FIFTEENTH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HERAT UNIVERSITY OF AFGHANISTAN

MEMORANDUM ON BEHALF OF RESPONDENT

On behalf of	Against
Comestible Finos Ltd.	Delicatesy Whole Foods Sp.
75 Martha Stewart Drive	14 Capital Boulevard
Medditeraneo	Equatoriana
RESPONDENT	CLAIMANT

Abdul Saboor Akbari, Aziz Ahmad Ahmadi, Mohammad Mabroor, Zabihullah Daee

Contents

Index of Abbreviations

Arb.	Arbitration
Art /articles	article/ articles
CL.	CLAIMANT
CCS	Code of Conduct for Supplier
CISG	Convention on International Sales of Goods
CEO	Chief Executive Officer
CLOUT	Case Law on UNCITRAL Texts
DDP	Delivered Duty Paid
Ex.	Exhibit
GCPs	Global Compact Principles
GCC	General Conditions of the Contract
HF	Horace Fasttrack
ICC	International Chamber of Commerce
IBA	International Bar Association
No.	Number
PO1	Procedure Order number 1
PO2	Procedure Order number 2
PCA	permanent court of arbitration
Para	Paragraph

P.	Page
Pr.	The Problem
RCPG	Ruritanina Cacao Peoples GmbH
SCC	Special Conditions of the Contract
SCR	Social Corporation Responsibility
T.D	Tender Documents
UNCITRAL	United Nations commission on international trade law
UNIDROIT	International Institute on the Unification of Private Law
USD	United States Dollar
UML	UNCITRAL Model Law
V /vs	versus

INDEX OF AUTHORITIES

International Treaties, Conventions and Rules

Books and Journals

Cases and Awards

Statements of Facts

1. Comistibles Finos Ltd, the RESPONDENT in the present case, is a gourmet supermarket chain in in Mediterraneo.
2. Delicatesy Whole Foods Sp the CLAIMANT, is a medium sized manufacturer in Equatoriana. Delicatesy is a member of Global Compact companies.
3. CLAIMANT and RESPONDENT met each other at the Cucina Food Fair, and they negotiated about making a contract. RESPONDENT liked the products and supply chain of CLAIMANT and presented its interest to have contractual relationship with CLAIMANT.
4. Then RESPONDENT sent to CLAIMANT an invitation to Tender for the delivery of chocolates cakes and the Tender Documents. CLAIMANT acknowledged receiving the Tender Documents and admitted to tender in accordance with the Tender Documents. Therefore CLAIMANT submitted its Tender on 27 March 2017.
5. CLAIMANT made its first delivery on 1 May 2014 in accordance with the contract. There were no problems concerning the deliveries in 2014, 2015 and 2016.
6. On 27 January 2017 RESPONDENT sent an email to CLAIMANT to confirm that all its suppliers strictly adhere to Global Compact Principles. And furthermore threatened that if your suppliers do not do so, we will not accept further deliveries. RESPONDENT's main reason for this email was the report of a special rapporteur investigating for UNEP the deforestation in Ruritania and the wide spread fraud and corruption in the various agencies set up to protect the remaining rain forest and its biodiversity.
7. CLAIMANT immediately replied and promised to investigate the issue further and expressed it has confidence that its suppliers would not be party to any fraudulent scheme.
8. CLAIMANT informed RESPONDENT about its discovery by email f 10 February 2017: and CLAIMANT was willing to take back the cakes delivered and not yet sold and to discuss a financial contribution of possible losses with RESPONDENT.
9. The dispute has to be decided by arbitration in accordance with the UNCITRAL Arbitration Rules by three Arbitrators.

10. CLAIMANT appointed Mr. Rodrigo Prasad to act as its arbitrator. While RESPONDENT states that he is not impartial and independence.

SUMMARY OF ARGUMENTS

ARBITRAL TRIBUNAL SHOULD DECIDE ON THE CHALLENGE WITHOUT THE INVOLVEMENT OF MR. PRASAD.

11. In the present case, the arbitral tribunal has the authority to decide on the challenge of Mr. Prasad. And since Mr. Prasad is not qualified to act as an arbitrator, and therefore should be challenged, cannot act as an arbitrator and the remaining two arbitrators should decide on the challenge of Mr. Prasad. This arbitration is ad hoc and by no means can CLAIMANT ask the PCA or any other institution, because RESPONDENT had cleared in the time of making the contract that this arbitration is without the involvement of any institution, therefore the only body to decide on the challenge is, the two remaining members of the present arbitration.

MR. PRASAD SHOULD BE REMOVED FROM THE ARBITRATION PROCESS.

12. In an arbitration process, an arbitrator must be impartial and independent; hence in this case Mr. Prasad according of UNCITRAL Arbitration Rules, UNCITRAL Model Law and IBA Guidelines on Conflict of Interest is not impartial and independent. Because he had direction relationship with Findfunds LP that funds this arbitration, he was appointed two times in the past as an arbitrator by the Law Firm of Mr. Fasttrack, advocate of the CALIMANT and he wrote a letter about conformity of goods and interpreted it in the favor of CLAIMANT in this dispute.

RESPONDENT'S GENERAL CONDITIONS AND ITS CODE OF CODUCT GOVERN THE CONTRACT

13. In the current case the General Conditions of RESPONDENT govern the contract, because, RESPONDENT was the offeror and (I) the Tender documents sent by RESPONDENT as an offer were accepted by CLAIMANT. And since CLAIMANT accepted and acknowledged the terms of the invitation to Tender documents sent by RESPONDENT, without providing changes that altered the Tender documents, (II) no counter offer happened. RESPONDENT never explicit acceptance CLAIMANT'S application of CLAIMANT'S Standard Conditions. Therefore RESPONDENT'S terms prevail.

RESPONDENT'S Tender Documents constitute an offer in the current case.

14. RESPONDENT sent the Tender Documents to CLAIMANT specifying the goods that were its interest. The Tender Documents which were sent by RESPONDENT to CLAIMANT (A) were efficient for being a bounding offer from RESPNDENT toward CLAIMANT, and moreover (B) Sales—offer of CLAIMANT by no means shall be applied in this case.

IN THE CURRENT CASE, NO COUNTER OFFER WAS SUBMITTED BY CLAIMANT

15. Counter offer according to the provisions of article 19 of CISG can be existed in the specific situations that in the present case those specific situations has not been met, since (A) the changes brought to the Tender Documents by CLAIMANT are not sufficient to alter the terms of the offer, and even if there a counter offer by CLAIMANT happened, (B) RESPONDENT did not imply or show its consent on accepting the application of CLAIMANT Standard Conditions.

THE CHOCOLATE CAKES DELIVERED BY CLAIMANT ARE NOT IN CONFORMITY WITH THE CONTRACT

16. In a contract both parties have rights and duties which are set forth by the agreement of the parties or by provisions laws and regulations which were agreed to be applicable in the formed contract, in the current case CLAIMANT failed to perform its duties and obligations toward RESPONDENT, since the chocolate cakes were not completely in conformity with the requirements of the contract that CLAIMANT accepted and admitted to provide them, and CISG, as the applicable law in the current case; does not confirm the conformity of the chocolate cakes which were delivered by CLAIMANT. CLAIMANT committed to provide chocolate cakes in accordance with the requirements of the Tender documents, and assured RESPONDENT that its suppliers as well as itself, adhere to Global Compact Principle, and have an ethical business, therefore, CLAIMANT was under a duty of result to deliver the conforming goods and guaranteed that its suppliers all completely adhere to the Global Compact Principles. And even if CLAIMANT was under a duty of performing its best efforts, it failed to do so.

ARGUMENTS

PART 1: ARBITRAL TRIBUNAL SHOULD DECIDE ON THE CHALLENGE WITHOUT THE INVOLVEMENT OF MR. PRASAD.

Article 13(4) of UNCITRAL Arbitration Rules are not applicable.

17. The application of Article 13(4) of the UNCITRAL Arbitration Rules (the "Rules") is affected by the Arbitration Clause because: **(A)** the Parties intended to restrict the involvement of an arbitral institution in the composition of the arbitral tribunal and the determination of challenges to an appointed arbitrator; and **(B)** Article 13(4) of the Rules is inoperative and can't be taken into action.

The Parties intended to restrict the involvement of an arbitral institution in the composition of the arbitral tribunal and the determination of challenges to an appointed arbitrator.

18. The Parties agreed that any dispute, controversy, or claim arising out of their Agreement "shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of an arbitral institution and excluding the application . . . ." [R. 6]. The phrase "without the involvement of an arbitral institution" provides an express guidance for challenges to appointed arbitrators, if the clause is interpreted in accordance with CISG Article 8, the CLAIMANT informed and have known the intent of RESPONDENT. Parties who intend to deviate from the agreed procedure without express approval of the other party are well advised to ensure that the other party is properly informed of such a deviation [Nacimiento, Kröll and Bockstiegel, P. 719].
19. CLAIMANT stated, in the unlikely event that a dispute arises and cannot be solved amicably, we will be able to overcome even without institutional support. [Ex. C3, P. 15]. This statement of CLAIMANT shows that it had knew about the intent of RESPONDENT that was also for challenge proceedings not only for composition of arbitral tribunal. Art 13(4) of UNCITRAL Rules contains a mechanism for the decision of a challenge and to request from an arbitral institution or appointing authority to decide on the challenge, something which both parties agreed on their Arbitration agreement not to involve any arbitral institution. [Clause 20, P. 6]. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the

challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority. [Rules Art. 13(4)].

B. The Arbitration Clause restricts the involvement of arbitral institutions to determine arbitrator challenges and Article 13(4) of the Rules is inoperative and inapplicable.

20. Art 13(4) of the Rules contains a procedure for the challenge of arbitrators and decision by an appointing authority. Thus, the parties should have agreed on an appointing authority in their arbitration agreement, where they have agreed not to involve any arbitral institution in this arbitration. [Clause 20, P. 6]. So, according to their agreement, Art 13(4) is not applicable and the appointing authority cannot decide on the challenge. When a party intend to not involve any institution on their arbitration and the other party or parties agree on their arbitration agreement, the party or parties cannot then claim to involve any institution or any appointing authority. [Clark and Bosman, P. 250].
21. Article 6 of the Rules provides that either "party may at any time propose the name or names of one or more institutions . . . one of whom would serve as appointing authority." [Rules Art. 6(1)]. Article 6(1) clearly states the involvement of the institutions and decision on the challenge by an institution which is not acceptable for RESPONDENT and they clearly agreed to not involve any institution and to request from any institution to decide on the challenge, if any party requests from any institution stated in this article, that will be counted breach of arbitration clause. Generally, parties can nominate an arbitral institution or trade association as appointing authority, but, if there is any agreement between the parties for not involving any institution in their arbitration, nominating and requesting then from any institution would be a breach of their agreement. [Paulsson and Bosman, P. 314].
22. Selection of an individual appointing authority to rule on the challenge of Mr. Prasad would not be in accordance with the Parties' Agreement, and it would not be sensitive to RESPONDENT's concerns about confidentiality. The appointing authority would need the whole facts and hear both parties to rule on Mr. Prasad's challenge, and would need to receive more information regarding the substance of the dispute to decide on the challenge and it cannot be confident and can be cause the

confidentiality of the dispute. [Holtzmann, P. 88] RESPONDENT had explained to CLAIMANT that it wanted as few persons as possible to know about the arbitration and stated that, as a consequence of that affair and the damage done to our reputation, we have included in all our contracts a very strict confidentiality clause with a high penalty for breaches. Furthermore, we switched our arbitration clause from an institutional arbitration clause to an ad hoc clause providing for arbitration under the UNCITRAL Arbitration Rules and explicitly excluding the involvement of any arbitral institution. Mr. Tsai was very interested in the affair since CLAIMANT was in the process of reviewing its own contract models. I remember that discussion very well because he told me that they had moved some years before the other way from ad hoc arbitration to institutional arbitration. [P. 41, Para 5].

The Arbitral Tribunal is the main authority to decide on the challenge of Mr. Prasad, and the two remaining arbitrators must decide on the challenge.

23. The arbitral tribunal is the main authority to decide on Mr. Prasad challenge, the two remaining arbitrators must decide on the challenge, because: **(A)** The challenged arbitrator will judge in his own cause and **(B)** Involving Mr. Prasad at the decision will be against party autonomy to challenge.

The challenged arbitrator will judge on his own cause.

24. Challenged arbitrator should not participate in the decision and should withdraw as an arbitrator, even if the arbitrator will not withdraw as an arbitrator he/she should not participate till the arbitral tribunal's decision, if the arbitral tribunal finds that the challenge to the arbitrator is not acceptable, the arbitrator then can participate at the next step of the arbitral tribunal but cannot participate at the decision of the challenge brought against him/her. RESPONDENT has concerns if Mr. Prasad participates at the decision of the arbitral tribunal on the challenge he will be a judge on his own cause on the challenge brought against him and should be avoided ; the arbitral tribunal has to decide the challenge. That should be done without the participation of Mr. Prasad. If he was to decide on a challenge brought against him, he would be a judge on his own cause, something which should be avoided. [P. 39, Para 8]. To avoid that the challenged arbitrators decide on the challenge, the drafters of the UNCITRAL Arbitration Rules included and entrusted the decision on the challenge to

the appointing authority in article 13(4). If one of the members of the arbitral tribunal is challenged for some reasonable doubts, the arbitrator cannot be the part of the decision and the remaining arbitral tribunal should decide on the challenge. [Klausegger, Klein, Kremslehner, et al., P. 50].

Participation of Mr. Prasad in the Decision of The Arbitral Tribunal is Against the Party Autonomy for Challenge.

25. RESPONDENT challenged Mr. Prasad due to reasonable doubts, so Mr. Prasad cannot participate at the decision of the arbitral tribunal because, if the challenged arbitrator participates at decision of the challenge brought against him/her, he or she will decide on his benefit. Party autonomy is one of the fundamental principles of arbitration which the parties are free to agree on a procedure in their arbitration. Thus, in this arbitration the parties have agreed on UNCITRAL Arbitration Rules to be applicable and according to article 12(1) of UNCITRAL Arbitration Rules every party has the right to challenge an arbitrator. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. [UNCITRAL Arbitration Rules Art. 12(1)]. Hence, if Mr. Prasad participates at decision of the arbitral tribunal, he has acted against the party autonomy and RESPONDENT has the right to not accept the decision. The five working group's decision on UNCITRAL Model Law to remove the challenged arbitrator have been accepted by many states laws. The challenged arbitrator should be removed from the deliberations and decisions of the arbitral tribunal. [Paulsson and Bosman]. Participation of a challenged arbitrator should be avoided, because the challenged arbitrator will not decide against him/her but will try to decide in his benefit. [Born, P. 1439]. If the arbitral tribunal by the participation of Mr. Prasad decides on the challenge the party autonomy to challenge an arbitrator will be questioned and the challenge of the parties will be useless. Thus, to avoid the part autonomy being questioned the two remaining arbitrators should decide on the challenge and make an award. The challenged arbitrator by a party should not take part on the award made by an arbitral tribunal. [Born, P. 1445].

26. In conclusion, the arbitral tribunal will decide on the challenge without the participation of Mr. Prasad to avoid challenged arbitrator(s) being judge in his/her own cause and to defend from the party autonomy for challenge of the parties.

PART 2: THE TRIBUNAL SHOULD REMOVE MR. PRASAD BECAUSE HE IS NOT INDEPENDENT AND IMPARTIAL UNDER BOTH THE UNCITRAL "JUSTIFIABLE DOUBT" STANDARD AND THE IBA GUIDELINES.

I. Under circumstances raise justifiable doubts as to Mr. Prasad independence and impartiality under the UNCITRAL Rules so, he is not impartial and independent and he should be removed from this arbitration process.

27. **(A)** Legal view in a professional journal by Mr. Prasad on issues related to this case; **(B)** The two previous appointments of Mr. Prasad as arbitrator by Mr. Fasttrack's law firm, **(C)** The involvement of third-party funder Findfunds LP in the arbitration proceeding as it relates to both Mr. Prasad's previous appointment by parties funded by it.

A: Mr. Prasad's behavior entitles RESPONDENT to challenge him.

i. **Mr. Prasad did not disclose all relevant circumstances.** Article 12(1) of the Rules states that "any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts about the arbitrator's impartiality or independence." [Rules Art. 12(1)]. Article 12(2) of UNCITRAL Model Law also, stating that "an arbitrator may be challenged when circumstances exist that give rise to justifiable doubts as to his impartiality or independence." [Art. 12(2)].

28. Article 11 of UNCITRAL Arbitration Rules states that: When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties [Article 11 of UNCITRAL Arbitration Rules] Doubts are justifiable when circumstances exist that give rise to impartiality and independence of

and arbitrator. In this case appointment of Mr. Prasad by Horrace Fasttrack's Law Firm two times in the past, confection of Mr. Prasad with Findfunds LP existing circumstances directly give rise as to Mr. Prasad's impartiality and independence. [Born, p.1233].

29. And there are serious and justifiable doubts as to his impartiality and independence resulting from his connections with third party funder Findfunds LP and CLAIMANT's efforts to conceal such connections.

ii. Mr. Prasad's article constitute valid grounds for removal.

30. The previous expression of a legal view by Mr. Prasad published in an academic journal give rise to justifiable doubts about his impartiality to sustain a challenge to his appointment or warrant his removal as arbitrator. In his article, Mr. Prasad discussed the conformity of goods in a non-assuming and non-academic manner. However he did not address the specific legal issues of this dispute, but he interpreted it in favor of CLAIMANT in this case. [RESPONDENT's EXHIBIT R4, page 40] Expression of a legal opinion justifies a challenge when an arbitrator speaks directly to the legal issue under review. [See e.g oxford commentaries on international commercial law, commentary to U A R, 2013)

31. Mr. Prasad's opinion speak directly to the Parties and his article create justifiable doubts as to his impartiality sufficient to warrant challenge or removal.

The repeated appointments of Mr. Prasad create justifiable doubts sufficient to warrant removal.

32. The previous appointment of Mr. Prasad as arbitrator by Claimant's attorney create justifiable doubts sufficient to warrant removal. Tribunals in add hock arbitrations, where repeat appointments are particularly common, have consistently explained that repeat appointments of an arbitrator across related matters are sufficient to warrant a challenge. [See, e.g., Tidewater v. Venezuela; Universal Compression v. Venezuela].

33. Case law and numerous challenges would recommend, at least, reasonable doubt. A particular case in question involves the appointment of an arbitrator that was challenged because she was appointed four times by the State and three by the same counsel, regardless of the fact that the issue discussed in the four cases was identical to an issue raised in previous arbitrations. The challenge was succeed since the Tribunal concluded that the multiple appointments did demonstrate a manifest lack on the arbitrator's part of the quality of independent and impartial judgment. The

arbitrator's natural sympathy for the arguments raised was obvious and it clearly put the other party on an unequal footing. As if this did not suffice, the awards were identical in all four cases. The four most recent ICA disqualification decisions (Universal Compression v. Venezuela, OPIC Kari mum v. Venezuela, Tidewater v. Venezuela and Urbaser v. Argentina) have unanimously accepted applications to disqualify arbitrators. This post addresses an issue raised in three of the most recent decisions—disqualification based on repeat appointments by the same party or counsel—and the apparent divergence of views in the *Tidewater* and *OPIC Kari mum* disqualification decisions as to whether repeat appointment is a neutral factor in a challenge to an arbitrator [Contemporary Asia Arbitration Journal, Vol. 4, No. 2, pp. 247-271, November 2015]

34. In *Tidewater*, the respondent challenged Venezuela's appointee, Professor Stern, who had been appointed by Venezuela to three other tribunals in the past six years. As is well known, the Orange List in the IBA Guidelines on Conflicts of Interest in International Arbitration addresses multiple appointments in two sections: one according (article 3.1.3 IBA) The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties. Two according to (article 3.3.7 IBA) The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm. The IBA-Guidelines consider repeat appointments by a party/law firm to be problematic. In the present case, Mr. Prasad had been appointed twice before by Mr. Fasttrack's law firm and two times by Findfunds LP. These appointments have to be added.

35. Furthermore, one of Mr. Prasad's partners is acting for a client in an arbitration which is funded by Find funds LP. The IBA-Guidelines in para. 2.3.6. consider that to be an issue which disqualifies an arbitrator unless both Parties after having become aware of the case "expressly state their willingness to have such a person act as an arbitrator" [The problem page 39 pa 11] Given the fact that the previous appointments of Mr. Prasad by Mr. Fasttrack were on entirely direct connection between them and previous appointments are sufficient to create justifiable doubts as to Mr. Prasad's impartiality and independence in this dispute.

The involvement of Findfunds LP in other proceedings involving Mr. Prasad and his partner Mr. Slowfood compromises Mr. Prasad's independence and impartiality.

36. Findfunds was involved in two previous disputes in which Mr. Prasad was appointed as arbitrator and is currently funding a case in which Mr. Prasad's partner, Mr. Slowfood, is participating as arbitrator.[The problem page 23 and PO2 pa 7] These circumstances give rise to justifiable doubts that warrant the removal of Mr. Prasad.
37. Thus, the arbitrator's awareness of the involvement of a third-party funder is important for arbitrators to assess possible conflicts of interest and to make necessary disclosures [Aren Goldsmith & Lorenzo Melchionda, Third-Party Funding in International Arbitration: Everything you ever wanted to know (but were afraid to ask), 1 (1) Int'l Bus. L.J. 53 (2012).]
38. The two issues regarding the involvement of third-party funders in international arbitration require immediate attention. First, there should be an obligation on the parties to disclose the presence of third-party funders to the arbitrator so that the arbitrator can disclose possible conflicts of interest between him/herself and the third-party funder. Second, all participants in international arbitration should collaborate to regulate this obligation of disclosure. . [See, e.g., Collins, supra note 24, at 275, 284.].
39. The third-party funding relationship is comparable to a controversial business relationship. In deciding challenges of arbitrators, courts and tribunals have routinely interpreted the justifiable doubts standard to require that business and financial relationships require a likelihood that a contact will influence the decisions of the challenged arbitrator. [See, e.g., Collins, supra note 24, at 132, 134.].
40. Mr. Prasad connections to Findfunds LP can lead to justifiable doubts as to his impartiality and independence. The IBA-Guidelines on Conflict of Interest, should they be applicable, include direct connections with third-party funders into those contacts which should be disclosed. In this case there are direct relationships of Mr Prasad with Findfunds. However, already doubts whether he falls under the disclosure obligation since in both cases the funding was provided by Findfunds LP directly.[PO2 pa6, 2 and 10]
41. In addition, the fact that circumstances should be disclosed means automatically that they justify a challenge. Findfunds LP is known in the industry to take lots of influence on the actual conduct of the arbitration, in particular the appointment of the arbitrator. In one of the two cases, they signed the funding agreement Mr Prasad was

as an arbitrator. Consequently, Mr. Prasad involvement in the other two cases would give rise to justifiable doubts.[page 43 of the problem pa 4 and PO2 pa 12]

42. In fact, there is direct connection of Mr. Prasad with Findfunds, but CLAIMANT did not disclose it to the respondent that it is cleared mention in Mr. Fasttrack notation in the case as follow: Verify with Findfunds whether there exist any contacts between Mr. Prasad and Findfunds. If contacts exist we should definitely do our best to keep the funding secret and not disclose it to the Respondent, to avoid potential challenges of Mr. Prasad. Prasad, whom I know from two previous arbitrations, is the perfect arbitrator for our case given his view expressed in an article on the irrelevance of CSR on the question of the conformity of goods."[page 38 the problem]

43. Certainly, it is not certain how the creation of an obligation to disclose the presence of a third-party funder will influence the future of third-party funding, for various reasons, including: the third-party funding industry in international arbitration is still new; it is highly heterogeneous and funders differ significantly from each other; and the terms of the funding agreements also differ in each different case.

44. Mr. Prasad did not disclose his relationship and all relevant information concerning his connections to Findfunds LP as soon as he became aware of their involvement. Each omission by Claimant or Mr. Fasttrack has bearing on Mr. Prasad's independence and impartiality, and therefore create a valid basis for his removal.

II.THE IBA GUIDELINES APPLY TO THE PARTIES' DISPUTE AND COMMAND MR. PRASAD'S REMOVAL.

45. Mr. Prasad should be removed under the standard set forth in the IBA Guidelines because **(A)** the IBA Guidelines apply to the parties and, **(B)** the circumstances raised by Respondent justify removal.

The IBA Guidelines apply to the Parties dispute.

46. Respondent alleges an additional disclosure obligation arising from the IBA-Guidelines on Conflict of Interest "the IBA Guidelines are ethically applicable in international arbitration on parties." [Croft et al., pp. 135–36]. The IBA Guidelines are applicable to the present arbitration. Moreover, although referenced by arbitral institutions and courts. [See Adrian Mutu v. Chelsea Football Club Limited]. Furthermore, the IBA Guidelines establish an additional disclosure duty for the

Parties themselves. [IBAG, Gen. Stan. 7]. Given these materially different standards applied by the Rules/DAL and the IBA Guidelines, the Tribunal should find that application of the IBA Guidelines would be inappropriate here.

The IBA Guidelines circumstances raised by Respondent justify the removal of Mr. Prasad.

47. Repeat appointments of the arbitrator by the same third-party funder give rise to arbitrator conflict of interest. This scenario is similar to that which is envisaged in situations 3.1.3 and 3.1.4 under the Orange List of the IBA Guidelines on Conflict of Interest where 'the arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties' or if the 'the arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator. It makes a valid point in saying that the funder becomes an affiliate as a result of his/her correspondence with one of the parties in order to provide financing for the arbitration, and even though situations under the Orange List automatically result in disqualification of the arbitrator, it is a situation that needs to be disclosed.

48. Furthermore, in case of repeat appointments, the question of whether the funder was involved in the appointment of the arbitrator should also be taken into consideration. For instance, if the same arbitrator has been appointed twice by a party, and if in a third arbitration proceeding within three years, the third-party funder joins after the appointment of the arbitrator, will it make a difference that the same third-party funder finances all of these three arbitration proceedings? Direct appointment of the same arbitrator by the third-party funder in multiple instances is what matters most.[Contemporary Asia Arbitration Journal, Vol. 4, No. 2, pp. 247-271, November 2011, 25 Pages Posted: 30 Nov 2011 Last revised: 15 Jan 2012]

49. The Tribunal should decide to apply the IBA Guidelines here, it should find that the circumstances in this case call for Mr. Prasad's removal. The IBA Guidelines separate personal and professional conduct into three color-based categories: The orange list explicitly expressed the circumstances that give rise to disqualifying of arbitrator which those circumstances clearly exist in this case, in accordance with (article 3.1.1 of IBA) The arbitrator has within the past three years served as counsel for one of the

parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship. And according to (article 3.1.2 of IBA)

50. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter. According to (Article 3.1.3 IBA) the arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties. And also article 3.1.4 of IBA says the arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.
51. There circumstances which raise largely issues under the IBA Guidelines that it did under the "justifiable doubts" standard: **(i)** Mr. Prasad's two prior appointments by Mr. Fasttrack's law firm; and **(ii)** that Mr. Prasad's new law firm has been involved in two previous arbitrations with Findfunds LP. None of these circumstances ground for Mr. Prasad's removal from the tribunal under the IBA Guidelines.[Contemporary Asia Arbitration Journal, Vol. 4, No. 2, pp. 250-281, November 2011 25 Pages Posted: 30 Nov 2011 Last revised: 15 Jan 2012.

    i. Mr. Prasad's previous appointments by Mr. Fasttrack's law firm fall under

The IBA Guidelines Red List justify removal.

52. Mr. Prasad's previous appointments by Mr. Fasttrack create a conflict of interest under the IBA guidelines. In Mr. Prasad's Declaration of Impartiality and Independence and Availability, however, Mr. Prasad disclosed to Respondent that he had been appointed as arbitrator by Mr. Fasttrack's law firm twice over the past two years, and that both cases were now completed, but it has lots of impact on impendence of his and these appointments cause his removable under the IBA Guide lines Red List as I mentioned in it.[Kluwer Arbitration Blog, *available at* http://kluwerarbitrationblog.com/blog/2011/06/23/disqualification-based-on-multiple-appointments—divergence-in-recent-ICA-decisions/ (last visited Nov. 23, 2011).]
53. 2.1. Relationship of the arbitrator to the dispute. And 2.1.1 the arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties. And according to article 2.1.2 the arbitrator has previous

involvement in the case. Article 2.2. states Arbitrator's direct or indirect interest in the dispute. 2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held. 2.2.2 A close family member4 of the arbitrator has a significant financial interest in the outcome of the dispute. 2.2.3 The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute. . [IBAG, Part II, 1].[*See generally* Joseph C. Safar, *Repeat Arbitrator Appointment and Issue of Conflicts in Bermuda Form Arbitrations*, 15 K&L GATES ARB. WORLD (2011).]

i. Mr. Prasad's law firm's connection to the third-party funder Findfunds LP is grounds for removing Mr. Prasad under the IBA Guidelines.

54. The issues related to the third-party funding are grounds for Mr. Prasad's removal. This type of situation again falls under the Orange List standard 3,2 because third-party funders may be considered the equivalent of the party since they have a "direct economic interest" in the outcome. [IBAG, Explanation to Gen. Stan. 6(b)].

55. 3.2.1 The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator. According to 3.2.2 A law firm that shares revenues or fees with the arbitrator's law firm renders services to one of the parties or an affiliate of one of the parties before the arbitral tribunal.

56. 3.2.3 The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute. Relationships to third-party funding entities may rise to doubts regarding arbitrator impartiality, but the arbitrator has a duty to disclose. [IBAG, Part II, 2]. Here, in one of these cases, Mr. Prasad had been appointed before the third-party funding was secured Thus, his appointment had to have been related to the Findfunds funding. Additionally, Findfunds generally influence the appointment of the arbitrators in the cases it chooses to fund. [PO2, R. 4].

PART 3: RESPONDENT'S GENERAL CONDITIONS AND ITS CODE OF CODUCT GOVERN THE CONTRACT

57. In the current case General Conditions of RESPONDENT govern the contract, because in the present case, RESPONDENT was the offeror and (I) the Tender documents sent by RESPONDENT as an offer were accepted by CLAIMANT. And since CLAIMANT accepted the tender documents and acknowledged to tender in accordance with the requirements of the Tender documents sent by RESPONDENT, without brining changes that alter the Tender documents, (II) no counter offer happened. And moreover since the reaction to the Tender documents of RESPONDENT was an explicit acceptance by CLAIMANT but the statement of CLAIMANT regarding the application of its Standard Conditions was never accepted by RESPONDENT, the terms used by RESPONDENT prevail.

RESPONDENT's Tender Documents constitute an offer in the current case

58. RESPONDENT sent the Tender Documents to CLAIMANT, and in that Tender RESPONDENT specified the goods that wanted. These Tender Documents (A) were sufficient for being a bounding offer from RESPNDENT toward CLAIMANT, and moreover (B) Sales—offer of CLAIMANT by no means shall be applied in this case.

Respondent's Tender Documents were sufficient for being an offer.

59. RESPONDENT's Tender documents were qualified to be a binding offer for the following reasons. RESPONDENT sent its Tender Documents which contained special conditions of the contract and general conditions of the contract. And in the Tender Documents RESPONDENT cleared the specifications of the goods that were the interest of RESPONDENT, and According to article 14 of CISG (1), 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.

60. A proposal is sufficiently definite if it indicates the goods and fixes or determines the quantity and the price (CISG article 14). This article indicates when a proposal made to a person clarifies the type of the goods, price and the quantity of the goods, that proposal is considered as an offer. For supporting the RESPONDENT there is a similar case that a court put weight on a proposal that clarified the goods, price and the quantity of the goods, by the buyer party toward the seller, to be a complete offer, (CLOUT case No. 215 Bezirksgericht, 3 July 1997) according to Joseph Lookofsky

which states in the case of modifying an offer, that, if a statement made by a party clarifies the goods, the quantity, the price and the payment, that statement is an offer. In the present case according to (CLAIMANT EX2 P. 10 and 11) RESPONDENT made clear the quantity, type of goods, price and the payment terms and conditions. Therefore the Tender Documents of RESPONDENT is completely qualified to be an offer.

61. The intention of RESPONDENT from sending the Tender Documents was making a binding offer in the light of the article 14 of CISG. According to (article 8 para 1 of the CISG), the intention of a party can be interpreted by statement made, or the conduct of that party. RESPONDENT in the Tender Document clearly mentioned that the CLAIMANT or any other party which accepts the tender documents, should make acknowledgement in a limited time period (C2, page 10 para 1) and furthermore, cleared that all the suppliers shall respect and adhere to the philosophy of RESPONDENT, if not does so, there would be a zero tolerance policy against such a supplier (C2 p. 11, special conditions of the contract first para). This explicitly and implicitly indicate that the provisions of the Tender Documents were binding and could make a binding offer for CLAIMANT.

Claimant's "Sales – Offer" cannot be applied in the current case.

62. CLAIMANT's submission failed to be an effective offer, since (i) it did not meet the requirements of an offer under article 14 of CISG, and (ii) it was not followed by an acceptance from RESPONDENT.

    i. The requirements of article 14 of CISG are not met completely in CLAIMANT'S Sales- Offer

    Article 14 of CISG, provides some critical points that an offer should be based on, first the statement should be with the intention that binding makes the offer effective, second it should be sufficiently definite and clarifies the goods, price and the quantity of the goods. And according to UNIDROIT principles, (article 2.1.2) an offer to be sufficiently definite should be consist of, determination of quality of performance, determination of price, time of performance and the place of performance. When a statement cannot meet the provisions set forth in the article 14 of CISG, that statement cannot be considered as

an offer.(John Honnold, commentary on CISG p.234,para6) (case) in the present case the sales offer of CLAIANT failed to have to meet all the mentioned requirements. According to CLAIMANT sales offer e-mail, the sales offer is not applicable (CLAIMANT EX C4 P. 16). Therefore CLAIMANT'S sales offer cannot be applied in the present case.

ii. CLAIMANT'S offer was not followed by RESPONDENT'S acceptance.

RESPONDENT never accepted the terms of CLAIMANT in the case of application of its own terms. When the indication of assent does not reach to the offeree, it is not effective and also silence cannot be considered as an acceptance (CISG art 18 para2). In the current case, there is no evidence that RESPONDENT accepted the application of CLAIMANT'S standard conditions. And according to article 23 of CISG when the offer be followed by an acceptance, that time that offer becomes effective (CISG art 23). But the offer of CLAIMANT with the inclusion of its standard conditions was never accepted by RESPONDENT. Therefore for the mentioned reasons, CLAIMANT'S offer with the inclusion of its Standard Conditions cannot be applied in the present case.

IN THE CURRENT CASE, NO COUNTER OFFER HAS BEEN EXISTED

63. Counter offer according to the provisions of article 19 of CISG can be existed in the specific situations that in the present case those specific situations has not been met, since (A) the changes brought to the Tender Documents by CLAIMENT are not sufficient to alter the terms of the offer, and even if there a counter offer by CLAIMANT happened, (B) RESPONDENT did not imply or show its consent on accepting the application of CLAIMANT Standard Conditions.

A. Minor changes in CLAIMANT's tender were not sufficient to cause the existing of a counter offer.

64. Changing the time of payment of the price by CLAIMANT and the size of the cake which was a minor change cannot be a ground for altering the terms of the offer, since

according to "article 19 (2), CISG" which states, a reply to an offer which purports to be an acceptance but contains additional or different terms but does not materially alter the terms of the offer, constitutes an acceptance. According to Franko Ferari, Wikki Rogers and Hiro Sono (in the UNCITRAL Digest of Case Law on CISG P. 103 para 5) that state when the acceptance contains changes that not cause to change the offer terms, is considered an acceptance, unless the offeror objects without undue delay. Moreover a court state that if modifications are irrelevant to the addressee have also been immaterial and cannot alter the terms of the offer. (CLOUT case No. 189 [Oberster Gerichtshof, Austria 20 March 1997].

65. In the present case the changes that CLAIMANT brought to the Tender Documents provisions cannot alter the terms of the offer. The changes of the cakes' shape and payment of the price by a 30-day delay cannot change the acceptance of CLAIMANT to a counter offer. And moreover the changes brought by CLAIMANT that were accepted by RESPONDENT were only the two above changes, irrespective of the reason of accepting them. (C5 p. 15 para 2). The aforementioned changes firstly cannot alter the terms of the offer (Tender Documents) and secondly does not effect on the application of CLAIMANT Standard Conditions.

B. RESPONDENT by no means accepted the application of CLAIMANT's Standard Condition.

66. There is no indication of assent regarding to the application of the Standard Conditions of CLAIMANT by REPONDENT, since RESPONDENT did not explicitly or implicitly accept the application of CLAIMANT Standard Conditions, and no consequences would be borne by RESPONDNET by its silence. According to article 18 [1] silence or inactivity cannot be considered as an acceptance "art 18(1), CISG". According to Peter Schlechtriem, no acceptance can be made until the offeree expresses it assent and the offeror receive that indication of assent. There is a similar case that the Denmark court stated if there have not been any prior dealings, and the acceptance of the offeree could not be proven by other evidences, silence by no means can be considered as an acceptance. (CLOUT case No. 309 [DENMARK Østre Landsret Denmark, 23 April 1998]).
67. In the present case RESPONDENT is completely silent about the inclusion of the Standard terms of the CLAIMANT, and the indication of assent of RESPONDENT was only about the minor changes in the slight different of cake size and the payment

time. (CLAIMANT EX3 p. 15). Therefore the claim on the application of CLAIMANT Standard Conditions is not admissible and cannot be effective and the RESPONDENT's General Conditions are the agreed governing conditions of the contract.

III. IF BOTH PARTIES' GENERAL CONDITIONS WERE INCORPORATED, RESPONDENT'S TERMS PREVAIL.

CLAIMANT accepted to tender in accordance with the Tender documents sent by RESPONDENT.

68. *According* to article 23 of the CISG, the contract is concluded at the moment that the acceptance to an offer becomes effective, and according to article 18 of CISG when the indication of assent reaches to the offeree, the acceptance becomes effective.
69. In the present case according to (RESPONDENT EX R1 P.28) CLAIMANT itself acknowledged that it received the Tender Documents of the RESPONDENT, and even moreover CLAIMANT admitted that it has received the other relevant documents sent with the tender documents. Since RESPONDENT's tender was qualified enough to be an offer, and CLAIMANT received them and accepted them.
70. The contract was concluded at the moment that CLAIMANT dispatched its letter of acknowledgement and the acceptance became effective and made the parties bound to the contract 1257. Therefore the General Conditions of Sale and Code of Conduct of RESPONDENT govern the contract.

PART 4: THE CHOCOLATE CAKES DELIVERED BY CLAIMANT ARE NOT IN CONFORMITY WITH THE CONTRACT AND CISG

THE CAKES DELIVERED BY CLAIMANT ARE NOT IN CONFORMITY WITH THE CONTRACT.

71. In a contract both parties have rights and duties which are set forth by the agreement of the parties or by provisions laws and regulations which were agreed to be applicable in the formed contract, in the current case CLAIMANT failed to perform its duties and obligations toward RESPONDENT, since (A) the chocolate cakes were not completely in conformity with the requirements of the contract that CLAIMANT

accepted and admitted to provide them, and (B) CISG, as the applicable law in the current case; does not confirm the conformity of the chocolate cakes which were delivered by CLAIMANT.

The chocolate cakes are not in conformity with the requirements of the contract.

72. Article 23 of CISG indicates that a contract is concluded at the moment that an acceptance to an offer becomes effective (Article 23 of CISG). After concluding the contract by an offer and acceptance, the agreed terms in the offer are binding to the parties (Fault and breach of the contract, by Bary Nicholos P 54, para 3). And according to the *Pacta Sunt Servanda,* and binding character of the contracts (UNIDROIT art. 1.3 and art 2.1.2) provide that parties are bound to the contract after a complete offer and acceptance process.
73. RESPONDENT made clear in its Tender Documents that it only accepts the goods which are ethically and sustainably provided. And it only would accept the goods which are of the highest standards of ethical, and would make contract only with the suppliers that accept to provide goods in accordance with its philosophy which is a strict adherence the Global Compact Principles, (T. D, Ex C2 p. 11, SCC).
74. And moreover RESPONDENT made it clear from the first in the negotiations (Pr, P 4. Para 3), in the invitation to tender time, (CL. Ex C1, P. 8) and in its Tender documents (SCC, p. 11 para 1; GCC, p. 12, para 1); that RESPONDENT only accepts the chocolate cakes from CLAIMANT when they are completely provided in accordance with the ethical and sustainable manner. CLAIMANT clearly and explicitly accepted the terms of RESPONDENT, in its letter of acknowledgement (RE, Ex R1 P. 28 para 3) and CLAIMANT accepted the Tender documents with all provisions except in two points which were primarily only about the size of the cake and time of making the payment, and never objected or deviated from accepting the provisions of the Tender documents (CL. Ex C3 P. 15).
75. Therefore CLAIMANT was bound to deliver the chocolate cakes completely in accordance with the ethical standards mentioned in RESPONDENT Code of Conduct, but clearly failed to do so. CLAIMANT delivered the chocolate cakes which contained cocoas farmed in an unsustainable manner. (CL. Ex 6 P. 18) CLAIMANT itself admits this issue (CL. Ex9 P.21). Adherence to Global compact principles is set forth in RESPONDENT's Code of Conduct for suppliers (CL EX C2, p. 14 para D and E).

76. Since one of the most important terms of the RESPONDENT, the ethically and sustainably production, was violated by CLAIMANT, therefore CLAIMANT failed to deliver the conforming goods to RESPONDENT. Moreover RESPNODENT completely made clear to CLAIMANT that breaching any of the provisions of the RESPONDENT's Code of conduct or its philosophy, constitutes a breach of the contract, (T.D GCC, P 12 clause 4, line 2) therefore it clarifies that the non-compliance of cocoas used in the chocolate cakes, made the chocolate cakes not to be in conformity with the requirements of the contract.

The chocolate cakes failed to be considered as conforming goods according to article 35 of CISG.

77. Article 35 (1) of CISG provides that goods are in conformity with the contract if they be in the same quality, quantity and description which is required by the contract. (CISG, art 35, para 1). And the new render of conformity of the goods require the conformity of the goods in physical and non-physical conforming of goods. (Gary Born, cases and materials).
78. A district court in the U.S stated that the conformity of the goods also can be in the process of production, since some thoughts and beliefs care about the inherent existing of a particular process, (U.S district court, Southern District Court of NY, 23 August 2006, [Tee Vee Toons, Inc. v Gerhard Schubert Gmbh], available at: http://cisgw3.law.pace.edu/cases/060823ul.html). In the present case RESPONDENT in determination of the chocolate cakes that wanted from CLAIMANT, beside other characteristics, emphasized on the ethically and sustainably production of them, not only to the CLAIMANT as its supplier, but moreover to the sub-contractors, the suppliers of the CLAIMANT.
79. RESPONDENT asked CLAIMANT firmly to adhere itself to the Global Compact Principles and ensure that its suppliers do so as well.(Res. Supplier Code of Conduct, R3 P. 31) and reiterated that it only accepts the goods produced in the ethical and sustainable way. (CL Ex 2, T.D, P. CCS).
80. But as it is clear, CLAIMANT failed to fulfill its duty and obligation under the contract by using the unsustainably farmed cacaos and committed unethical business. Since RESPONDENT's Code of Conduct sections D and E, oblige its suppliers to make sure that their suppliers also completely adhere to Global Compact principles

and conduct their business in the ethical manner, (CL Ex2 T. D, P.14 para 2 and 3); CLAIMANT by delivering cakes with the unsustainably farmed cocoas, failed to comply with the requirements of the contract. And also failed to perform its duty in delivering conforming goods in accordance with the provisions of the article 35 of CISG.

81. Article 35 (2, b) of CISG, provides that, the goods are conforming goods if they are fit for the particular purpose expressly or implicitly made known to the seller at the time of the conclusion of the contract (Article 35 (2, b) of CISG). According to Franko Ferrari and Wikki Rogers, when a party clears at the time of conclusion of a contract, a particular purpose to be met by the other party, that particular purpose prevails to be met (the Journal of Law and Commerce P146 Para 11 year 2012). The Frankfort provincial court held the seller liable where its goods could not meet the particular purpose that was made known to it by the buyer. (Landgericht Munchen, Germany, 27 February 2002, En Translation at, http://cisgw3.law.pace.edu/cases/020227gl.html).
82. In the present case, RESPONDENT cleared that it is going to be the Global Compact LEAD Company by 2018 and the reason that RESPONDENT made entered into a contract with the present CLAIMANT was that it was a member of Global Compact and committed to sustainable products, (CL. Ex1 p.8 para 1,2). RESPONDENT made clear that it had been suffered by a negative press, and its intention by making commercial relationship with Comestible Finos is not to be subject to a negative press again. (Re. Ex R5 P. 41 para 1, 2, 3) as was witnessed by Annabelle Ming.
83. Therefore RESPONDENT'S particular purpose from this contract was developing its supply chain and being far from bad press and moreover being the Global Compact LEAD Company by 2018. (CL Ex C1 p.8 para 3). But this purpose cannot be met since CLAIMANT's chocolate cakes contain cocoas which were farmed illegally. Since the particular purpose of RESPONDENT could not be met by the deliveries of CLAIMANT, therefore these chocolate cakes are not in conformity with the contract in the light of the CISG article 35 (1,b)

CLAIMANT FAILED TO PERFORM ITS OBLIGATIONS TOWARD RESPONDENT.

84. CLAIMANT committed to provide chocolate cakes in accordance with the requirements of the Tender documents, and assured RESPONDENT that its suppliers

as well as itself, adhere to Global Compact Principle, and have an ethical business, therefore, (A) CLAIMANT was under a duty of result to deliver the conforming goods and guaranteed that its suppliers all completely adhere to the Global Compact Principles. And (B) even if CLAIMANT was under a duty of performing its best efforts, it failed to do so.

CLAIMANT is under a duty of achieving a specific result.

85. RESPONDENT's General Conditions of contract and its Code of Conduct as the governing codes of the contract, make CLAIMANT under a duty of result, in the case of ensuring that its suppliers including RPCG, strictly adhere to Global Compact Principles. In International Commercial Law, there are some ways to examine and determine if a party is under a duty of achieving the result or merely performing its best efforts. UNIDROIT principles (article 5.1.6) set forth four ways to determine wither a party is under an obligation of performing it best efforts or achieving a specific result, as follow:

    i. The way of expressing the obligation in the contract.

86. In RESPONDENT's Code of Conduct it is clearly mentioned that all suppliers beside adhering to the C.F.L philosophy, and complying with the G.C.Ps, must ensure that its suppliers also comply with the principles of this Supplier Code of Conduct (Re Ex3, P.31 para5 line 3) and (Pr. P14, para D&E, Ex C2). The word must, expresses a strong obligation to be performed. This idea can be supported by another regulation set forth in the RESPONDENT's Special Conditions of the Contract and General Conditions of the contract that implies, RESPONDENT has a "zero tolerance" policy when it comes to unethical business. (Pr. P11 & P12). Therefore it is completely necessary that RESPONDENT's suppliers adhere to the Global Compact Principles and guarantee their sub-contractors to do so.

i. The contractual price and other terms of the contract.

87. RESPONDENT has paid for the chocolate cakes the upper end of the price paid for a premium product, (PO2, P54, Para 40). This is an enough price to make the seller bound to guarantee its goods, moreover this price was the upper end of the price paid for a premium product, therefore it is not difficult for CLAIMANT to guarantee that its goods be in conformity with the contract. Moreover the insurance and guaranteeing

of CLAIMANT on behalf of its supplier should not make him to hesitate since it is a member of Global Compact and it is the commitment of itself to adhere to the Global Compact Principles. (Pr. P4, para 1)

i. The degree of risk normally involved in achieving the expected result.

88. The degree of risk which is presented in the UNIDROIT Principles, in this article, requires a very high degree of risk, such as guaranteeing a satellite that orbits around the earth in a definite degree, (UNIDROIT, article 5.1.6 comment 5). But in the present it is completely different since CLAIMANT ordinary and easily can afford the risk, since it is more protectable and can easily use precautionary measures not to face with the risk.

i. The ability of other party to influence the performance of the obligation.

89. There, CLAIMANT cannot claim that the performing of the duty was directly under the influence of the RESPONDENT, since RESPONDENT does not have any relationship with the Ruritania, and in no case RESPONDENT had any influence on the relationship of the CLAIMANT with its suppliers. Therefore CLAIMANT had an obligation of achieving specific result, which in this case was to guarantee the compliance of its suppliers with the Global Compact Principles.

Even if CLAIMANT was under a duty to do its best efforts to ensure that its suppliers adhere to global compact principle, it failed to do so.

90. According to the UNIDRIOT Principles, (article 5.1.4) when a party is under a duty to do its best efforts, that party is bound to do its best efforts as would may be done by a reasonable person in the same kind and in the same circumstances. And according to CISG (article 8[3]) for understanding a reasonable person and the intention, we should take into consideration all relevant circumstances of the case, negotiations, any practices made between the parties, usages and any subsequent conduct of the parties.
91. But in the present case CLAIMANT did not perform enough needed actions to discover and audit about their suppliers, since it relied upon the news and reports

which were provided since two years. (CL. Ex8 p20 para1). The CLAIMANT only relied on the papers and certificates rendered to it, and never visited or monitored the farms which were being farmed illegally. (CL. Ex9 p21). And moreover the Egimus AG. entity that it established was not qualified and sufficient to investigate about the frauds of the suppliers. (PO2, P54. Para 33)

92. Considering the mentions issues, rules, relevant facts and factual cases, the arbitral tribunal should decide on the challenge of Mr. Prasad and Mr. Prasad should be removed from the arbitration process, since he is not impartial and independence. Furthermore, we respectfully ask the arbitral tribunal to explain that the RESPONDENT's General conditions of Contract and its Code of Conduct govern the contract, and also the chocolate cakes of CLAIMANT are not in conformity with our contract.

Statement of Relief sought:

In light of mentioned reasons, RESPONDENT requests the Arbitral Tribunal

1. To reject all claims for payment raised by CLAIMANT;
2. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

Respectfully Submitted,

Abdul Saboor Akbari

Aziz Ahmad Ahmadi

Mohammad Mabroor

Zabihullah Daee