FIFTEENTH ANNUAL

VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

Comestibles Finos Ltd v. Delicatesy Foods Whole Sp

On behalf of	**Against**
Comestibles Finos Ltd	Delicatesy Whole Foods S
75 Martha Stewart	39Marie-Antoine Carême
Drive	Avenue
Capital City	Oceanside
Mediterraneo	Equatoriana
RESPONDENT	**CLAIMANT**

Abdul Saboor Halamey **Tamim Asoulmal** **Laila Mirzaei** **Huma Saadat**

Kardan University-Afghanistan

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Switzerland

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, 2010 ONSC 4023 (CanLII) Telesat Canada v. Boeing Satellite Sys. Int'l, Inc., [2010] ONSC 4023 (Ontario Super. Ct.)

(Removing arbitrator where she would be required to decide collateral estoppel effects of award made by partner in her law firm in related arbitration).

Swiss

ECUADOR

AUSTRIA

TABLE OF ABBREVIATIONS

Clm.	Claim(ant)
Resp.	Respondent
GCC	General Conditions of Contract
Art.	Article
Ex.	Exhibit
PCA	Permanent Court of Arbitration
USD.	United States Dollars
Auth.	Author
NOC	Notice of Challenge
R.	Record
DAL	Danubian Arbitration Law
No(s).	Number(s)
Repub.	Republic
Arb.	Arbitration
Ltd	Limited
Int	International
Vs	Versus (Against)

p.	Page
e.g.	For Example
ICC	International Chamber of Commerce
ICSID	International Center for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
Mr.	Mister
Ms.	Mistress
ML	UNCITRAL Model Law
NY	New York Convention
Para.	Paragraph
PO 1	Procedural Order No.1
PO 2	Procedural Order No.2
&	And
i.e	Pronoun (for example)
GH	Handelsgericht (Commercial Court
OLG	Oberlandesgericht (Provincial Court of Appeal)
Para	Paragraph

§	Section Sign
CSR	Corporate Social
UCC	Uniform Commercial Code
IBA	International Bar Association

STATEMENTS OF FACTS

1. Comestibles Finos Ltd ("RESPONDENT") is the leading gourmet supermarket chain in Mediterraneo. Sustainable products produced in ethical manner, are of great importance to RESPONDENT and it always abides by fair-trade standard and Global Compact principles. Delicatesy Whole Foods Sp ("CLAIMANT") is manufacturer of bakery products. Both sides entered into a contract agreement for ultimate sustainable production.

2. RESPONDENT is a Global Compact member since 2002 and intends to become a Global Compact Lead company by 2018. RESPONDENT will be a lead company for the fact that products from further afield comply with the fair-trade standard or at a minimum do not violate the Global Compact principles. Therefore, it retains honor particularly through implementation of Global Compact Principles.

3. To expand its sustainable supplier base, RESPONDENT attended Cucina food fair in March 2014 and thereby met with many partners and also CLAIMANT. At the food fair, RESPONDENT discussed its eco-friendly needs with several companies specialised in baking products.

4. Spontaneously, at the food fair, CLAIMANT delivered its presentation of its newest cake, that the cake used "sustainable sourced cocoa" and also had displayed maps showing from where it was sourcing its ingredients. RESPONDENT was interested as it will deal with a business entity that seriously cares about sustainable production.

5. RESPONDENT clearly asserted while opening tender that successful offers will be accepted provided that are in compliance with tender documents. REPONDENT stated in clear wording that its General Conditions will govern the contract and also business will be conducted through its Code of Conduct.

6. All six offerors including CLAIMANT submitted the requested Letter of Acknowledgement and CLAIMANT submitted it on 17 March 2014. CLAIMANT's submission definitely denotes that offer is prepared in accordance with tender documents.

7. There were only two specific changes in CLAIMANT's offer as to the shape of cake and payment mode. Nevertheless, RESPONDENT considered two reasons for accepting; the chocolate cake offered was from CLAIMANT's premium product line farmed in highly ethical

and environmental standards. Second, RESPONDENT had been impressed with the CLAIMANT's commitment to ethical production.

8. CLAIMANT accepted and showed assent to General Conditions and Standard terms of RESPONDENT through its Letter of Acknowledgment and its Sales Offer. Therefore RESPONDENT awarded the contract to CLAIMANT as of 7 April, 2014.

9. RESPONDENT's Code of Conduct for Suppliers requires CLAIMANT not only to comply itself with the values but also to ensure compliance of its own suppliers with such principles. CLAIMANT guaranteed that the ingredients will be farmed in compliance with sustainable farming methods. CLAIMANT has stated in its Supplier Code of Conduct even covering sub-contractors to meet the guarantee given to RESPONDENT that the chocolate cake does not contain cocoa farmed in violation of the principles of sustainable farming.

10. For three years since 1 May 2014, RESPONDENT had the impression that it got what it contracted for and paid for a first-class chocolate cakes made out of ingredients from sustainable farming, but RESPONDENT came to know that the beans delivered was not from legally farmed fields after an article published on 23 January, 2017 in Michelgault magazine, the leading business newspaper in Equatoriana.

11. There were inefficiency and inaccuracy in certification process with regard to sustainable farming. It was a clear deforestation problem and unethical production for which RESPONDENT had zero tolerance.

12. 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.

13. In its 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.

14. The detrimental influence of bad press had been a major issue in the discussion of Mr. Tsai CLAIMANT's head of production and Ms. Ming RESPONDENT's head of purchasing at the Cucina Food Fair in 2014. Ms. Ming had actually justified the strict confidentiality policy of RESPONDENT by the wish to avoid any bad press.

15. On 30 May 2017, both parties had a meeting in which it has become clear that no settlement can be reached by mediation and thereby they intended to go for settlement through arbitration. Furthermore, due to CLAIMANT's completely unreasonable insistence of being paid for the non-conforming cake and its refusal to pay off damages to RESPONDENT, any amicable settlement was made impossible.

16. Under Dispute resolution clause, parties agreed to settle any dispute in accordance with UNICITRAL Arbitration rules without the involvement of any arbitral institution.

17. In line with Art. 11 of UNCITRAL rules, RESPONDENT nominates Ms. Hertha Reitbauer as its arbitrator in this case and CLAIMANT appointed Mr. Rodrigo Prasad as its arbitrator.

18. CLAIMANT's appointed arbitrator Mr. Rodrigo Prasad carries serious doubts due to his financial connection with CLAIMANT's funding source that his impartiality is clearly under effect. According to ad hoc arbitration procedure, RESPONDENT understands the authority of the Arbitral Tribunal and also is challenging Mr. Prasad for being partial as per Art. 13. UNCITRAL arbitration rules set forth for challenge procedure.

19. Mr. Prasad did not deliberately disclose all circumstances that carry justifiable doubts to his impartiality and independence and under IBA guidelines which evidences best practices in this regard. In deciding the challenge, the Arbitral Tribunal should take into account General Standard 7 (a) of the IBA-Guidelines on Conflict of Interest in International Arbitration.

20. Furthermore, one of Mr. Prasad's partners is acting for a client in an arbitration which is funded by Findfunds 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".

21. CLAIMANT delivered non-conforming goods pursuant to Article 35 CISG and terms of contract agreed by both parties and therefore CLAIMANT's act entitled RESPONDENT to withhold the payments and ask for damages cost.

22. CLAIMANT's delivered cakes were made from cocoa which was not farmed in accordance with sustainable farming and also as required under the contract and CISG. Thus, it entitles RESPONDENT may not only reduce the price for the 600,000 cakes delivered and not yet paid but also claim damages for these 600,000 cakes as well as all previous deliveries.

SUMMARY OF ARGUMENTS

ISSUE I: THE ARBITRAL TRIBUNAL SHOULD EXERCISE ITS EXTENSIVE POWER TO DECIDE UPON CHALLENGE OF MR. PRASAD, WITHOUT MR.PRASAD'S INPUT

The Arbitral Tribunal is authorized to proceed with the challenge of any arbitrator pursuant to standard procedure in ad hoc arbitration. Based on Art. 8 of CISG, the parties' intent was very clear from the beginning that they will not refer to any institution. Therefore CLAIMANT does not have any justification for the intervention of the PCA based on ad hoc procedure rules. The Arbitral Tribunal should not only decide on the challenge of Mr. Prasad, but should also proceed without Mr. Prasad's input. Parties have agreed on the exclusion of Art. 13(4) of UNCITRAL rules.

ISSUE II: MR. PRASAD SHOULD BE REMOVED FROM ARBITRAL PANEL DUE TO SERIOUS DOUBTS TOWARDS HIS IMPARLIATY AND INDEPENDENCE

Pursuant to UNCITRAL Arbitration rules, there are justifiable doubts towards Mr. Prasad's impartiality and independence; he should be removed of the Arbitral panel. The Arbitral Tribunal cannot legitimately proceed with the involvement of Mr. Prasad as there are serious doubts against him due to his financial relationship with CLAIMANT. Under IBA guidelines, Mr. Prasad should have disclosed any doubtful circumstances, but he deliberately ignored it. Therefore, he should not be part of Arbitral Tribunal; otherwise his decision will be influenced due to his affiliation with funding source. CLAIMANT's arbitrator should be removed from the arbitration proceedings

ISSUE III: RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT AND DELIVERED GOODS WERE NON-CONFORMING WITH THE CONTRACT

The law and principles chosen by parties provide firm basis that RESPONDENT's Standard Conditions and Code of Conduct govern the contract. The CISG and UNIDROIT Principles apply to the contract and affirm that public tender is not equal to the simple battle of forms. While interpreting provisions of the Art.35 of CISG, CLAIMANT delivered goods were not confirming, as well as, CLAIMANT failed to deliver conforming goods as required under the contract. The facts and circumstances of the case dictate that the contract should be interpreted that CLAIMANT guaranteed delivering conforming goods and therefore failed to do its contractual obligations.

ARGUMENTS

ISSUE I: THE ARBITRAL TRIBUNAL SHOULD EXERCISE ITS EXTENSIVE POWER TO DECIDE UPON CHALLENGE OF MR. PRASAD, WITHOUT MR.PRASAD'S INPUT

1. The Arbitral Tribunal should exercise its authority to decide on the challenge of Mr. Prasad. There is only one entrusted appointing authority that is Arbitral Tribunal that should proceed for purposes of arbitration dispute settlement. Both parties agreed upon the exclusion of Art.13 (4) of UNCITRAL Arbitration rules and therefore CLAIMANT is trying unsuccessfully to take the issue to the PCA for designation of appointing authority. Under dispute resolution clause, there is no place for the PCA to intervene when there is clear agreement of parties for ad hoc arbitration. The Arbitral Tribunal should decide on the challenge and it should perform without Mr. Prasad's input. The Arbitral Tribunal has the authority to decide on the challenge of Mr. Prasad **(A).** The Arbitral Tribunal should proceed with the challenge without involvement of Mr. Prasad **(B).**

A. The Arbitral Tribunal has the power to decide on the challenge of Mr. Prasad

2. As parties agreed upon ad hoc arbitration thus, the parties excluded the application of Article 13 (4) UNCITRAL Arbitration Rules for challenge procedure *[R.8, Clm.Ex.C1]*. As a consequence, as it is normal in ad hoc proceedings, the Arbitral Tribunal has the authority to decide on the challenge of any arbitrator. Therefore it should do without the participation of Mr. Prasad. If he were to decide on a challenge brought against him, he would be a judge in his own cause, something which should be avoided *[R.39, Resp. NOC]*.

3. Since Danubia, Mediterrano and Equatoriana are contracting states to New York convention all have enacted Model Law with Option 1 concerning the form of Arbitration Agreement *[R.55, Para.47, PO2]*. According to Art. 16(1) of UNCITRAL Model Law, the current Arbitral Tribunal is competent to decide on its own jurisdiction. Thereby it is under the jurisdiction of Arbitral Tribunal to decide on the challenge of Mr. Prasad *[Art.16 (1), UNCITRAL Model Law]*. This provision is mandatory and, accordingly, parties may not derogate from provisions and shall act out in compliance with provisions to resettle this dispute.

4. Further on that, the DAL is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter Model Law) According to Art. 16(1) DAL, an arbitral tribunal may rule "on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement," which reflects the well-established Principle of competence-competence *[Bärtsch/Petti, N3.05; Berger, N20.33; Born, Cases, P. 219; Born, Law, p. 52; Derains/Schwartz, p. 111–112; Girsberger/Voser, N409]*. Similar practice applies in this case, the Arbitral Tribunal has the authority to decide on the challenge without participation of Mr. Prasad.

5. In case Blue Bank Int'l & Trust (Barbados) Ltd vs. Bolivarian Repub of Venezuela, decision on the proposal to disqualify, a majority of the tribunal decided to remove arbitrator because he would be in a position to decide issues that would be relevant *[Blue Bank Int'l & Trust (Barbados) Ltd vs. Bolivarian Repub ICSID Case No. ARB/12/20 of 12]*. In the case at hand, the Arbitral Tribunal has got the power to remove Mr. Prasad as he is currently serving in the position of relevant issues, so Mr. Prasad should be removed from arbitral panel.

6. Based on above mentioned reasons, the Arbitral Tribunal should use its authority under its jurisdiction to proceed with the challenge of Mr. Prasad and without Mr. Prasad's input.

1. <u>The exclusion of UNCITRAL challenge procedure was clearly agreed by both parties</u>

7. RESPONDENT has clearly stipulated in General Conditions of Contract under dispute resolution clause that any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution and excluding the application, direct of by analogy, of the UNCITRAL Rules on Transparency *[R.12, GCC]*.

8. While CLAIMANT hopelessly bases its argument based on Art. 13(4) of UNCITRAL that appointing authority should be designated by the Secretary-General of the Permanent Court of Arbitration at The Hague (the "PCA") to decide on challenge of Mr. Prasad. This argument does not qualify position of CLAIMANT because that is already excluded in contract. Therefore no institutional authority even the Secretary-General of the Permanent Court of Arbitration should not intervene while parties agreed on ad hoc arbitration.

9. After RESPONDENT's bad experience in the past, RESPONDENT clearly stated its intent that it defers to resettle any dispute through ad hoc arbitration proceedings. The purpose was to keep utmost confidentiality during resettlement of any disputes arising in contract. As a consequence of that affair and the damage done to RESPONDENT's reputation, it has included in all its contracts a very strict confidentiality clause with a high penalty for breaches *[R.41, Resp.Ex.5]*. Therefore to keep the proceedings confidential, there is no need for the intervention of institution and the Arbitral Tribunal is the only authority to decide on the challenge of Mr. Prasad.

10. Furthermore, RESPONDENT switched its 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 *[R.41, Resp.Ex.5]*. Taking ad hoc arbitration into accounts, the Arbitral Tribunal is the only authority to decide on the challenge of Mr. Prasad.

11. Article 13 (4) denotes that the drafters of the UNCITRAL Arbitration Rules wanted to avoid that the challenged arbitrator decides in its own cause. That is the only reason why the task to decide on the challenge is relating to entrusted Arbitral Tribunal composed of parties' choice *[P.39, Resp. NOC]*.

12. The PCA can be authorized to designate an appointing authority when there is no agreement in advance, but in this contract, there is an already agreed clause upon exclusion of any institution in the General Conditions of contract. So, CLAIMANT has indicated its agreement on exclusion of institution while sent its offer in response to RESPONDENT's tender.

13. Unlike other arbitral rules, the UNCITRAL Rules do not provide for the automatic selection of an appointing authority. Instead, they state that in the absence of agreement between the parties, the Secretary-General of the Permanent Court of Arbitration will 'designate' a suitable appointing authority. When that circumstance arises, the role of the Secretary-General is to appoint an appropriate appointing authority, rather than to act as an appointing authority itself. Therefore, there is no need to refer the case to appointing authority designated by the PCA since there is clear agreement between parties.

14. As per Art.6 (1) of UNCITRAL Arbitration rules, the parties agreed that the same Arbitral Tribunal composed out of parties' choice should act out as appointing authority for the

purposes of deciding on the challenge of arbitrator *[Art. 6 (1), UNCITRAL Rules]*. Given that agreed term, the Arbitral Tribunal is authorized and should be acting on the challenge of Mr. Prasad.

15. Both parties in the dispute resolution clause merely agreed to exclude any arbitral institution for the arbitral proceedings that included fulfilling provisional and procedural functions however they have agreed to exclude any appointing authority for the challenge of arbitrator. The parties intended to keep arbitration proceedings confidential and they did intend to exclude the external authority to decide on the challenged arbitrator.

16. Pursuant to Art. 8(1) of CISG, while interpreting provisions of the contract the intention of the parties shall be considered. Confidentiality was the only concern for the parties to choose ad hoc arbitration and exclude arbitral institution *[Art. 8(1) CISG]*. Therefore CLAIMANT agreed to its exclusion to keep the arbitration proceedings confidential.

17. The parties agreed to exclude appointing authority discretion to decide on the challenge. Therefore the parties' intention shall prevail according to the contractual terms. Any reasonable person in the same circumstances would deem the exclusion of arbitral institution merely for authorizing Arbitral Tribunal included its fulfillment of provisions and procedural functions *[Art. 8(3) CISG]*.

18. Party's true intention should always prevail over its declared intention where the two differ. Thus a party who freely entered into an arbitration clause but challenges its form in order to avoid liability would fall foul of this principle. This principle of interpretation invites the tribunal to look behind the declared intention for what could have been the true intention at the time of entering the arbitration agreement. At the time of negotiation of the arbitration agreement, parties hope that there will not be disputes, would usually not be aware whether they would be claimant or respondent in the event of any dispute and could in good faith be presumed to want their disputes resolved efficiently and amicably. Once a dispute has arisen, however, parties tend to think of their own best interests, which could include looking for the most tactically advantageous dispute settlement process. It is the initial intent and not the latter, which should be determinative *[Jeffrey, Procedure and Evidence in International Arbitration, P.6]*. The intent of parties are highly preferred and considered as determinative in any dispute

resolution so in the current dispute, the Arbitral Tribunal should look behind declared intention at the time of entering to the contract.

19. Furthermore, if the parties conclude a valid arbitration agreement, its positive effect is to confer exclusive jurisdiction to an arbitral tribunal for all disputes arising out of a determined legal relationship *[Born, p. 1005; Fouchard, N627; Frignani, p. 564]*. Hence, the exclusive jurisdiction should be given and any arbitral institution should be excluded as parties agreed.

20. After RESPONDENT's bad experience in the past, RESPONDENT clearly stated to CLAIMANT that it wants to make sure that they do not want to again be the subject of a negative press campaign *[R.41, Resp.EX.5]*. Referring to a past contract, one of RESPONDENT's suppliers or someone higher up in the production and supply chain has not complied with the principles of its Code of Conduct. So, RESPONDENT's intention was clear in the beginning to beware of participation of institution so as not to be subject to improper sales.

21. When ruling on its jurisdiction or absence thereof, a tribunal must decide whether there was a "meeting of the minds" between the parties to conclude an arbitration agreement, which is a question of substantive validity *[Berger, Applicable Law, p. 302; cf. Brekoulakis, p. 359; Born, Law, p. 69; Lew/Mistelis/Kröll, N7.34]*. The substantive validity of the arbitration clause is to be determined according to the law the parties chose to apply to the arbitration clause *[Berger/Kellerhals, N374–375; Born, p. 426]*. Accordingly, both parties before entering into the contract, they had a detailed discussion and meeting of minds for ad hoc arbitration.

22. Because the lex arbitri will generally enshrine party autonomy, the right to select particular rules is recognized. For example, Article 19(1) of the UNCITRAL Model Law indicates that the tribunal is bound by procedural choices made by the parties save where these conflict with any mandatory provisions of the Model Law. Thus if the parties select rules under that or similar mandate, to the extent of any conflict between the lex arbitri and the rules selected, the latter will prevail unless they purport to override a mandatory procedural norm. Page 29 Author Jeffrey Waincymer Procedure and Evidence in International Arbitration *[Jeffrey, Procedure and Evidence in International Arbitration, P.6]*. The autonomy of parties under ad hoc arbitration chosen the in the current case should prevail any other procedure and exclusion of Art. 13(4) of UNCITRAL rules should be considered.

23. In an ad hoc award in ICC Case No. 9548, discussed in Grigera Naón, Choice-of-Law Problems in International Commercial Arbitration, 289 Recueil des Cours 9, 41-42 (2001) (tribunal seated in Switzerland determines that it has competence-competence under Swiss law); Award in ICC Case No. 9184, discussed in Grigera Naón, Choice-of-Law Problems in International Commercial Arbitration, 289 Recueil des Cours 9, 42 (2001) (Swiss-seated arbitral tribunal reasons "the applicable arbitration law in the present matter is – as a mandatory rule – the Swiss Private International Law Statute" and therefore tribunal has competence-competence under Article 186) *[Econet Wireless Ltd v. First Bank of Nigeria]*. So, in case at hand the dispute should be resettled according to ("jurisdictional debate is to be resolved under the lex arbitri") that is qualifying the position of RESPONDENT.

24. Finally, the parties excluded the application of Art. 13(4) and therefore parties cannot refer the challenge to any institution and Arbitral Tribunal is fully empowered to proceed with any challenge in reference to arbitration as agreed by parties.

2. <u>The intent of parties clearly indicate that Arbitral Tribunal should act as an Appointing Authority in any dispute relating with the contract</u>

25. The agreement evidently contained the term ad hoc arbitration proceedings for any dispute arising between parties without the involvement of institution arbitration and both parties have accepted ad hoc arbitration proceedings *[R.8., Clm.Ex1]*. Therefore, the Arbitral Tribunal should act out as entrusted authority to decide on the challenge of Mr. Prasad.

26. Furthermore, both parties switched to 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. RESPONDENT noted that discussion very well because CLAIMANT told RESPONDENT that they had moved some years before from institutional arbitration to ad hoc arbitration *[R.41, Resp.Ex.5]*.

27. CLAIMANT has clearly asserted itself that in the unlikely event that a dispute arises and cannot be solved amicably, we are certain that we will be able to overcome any problems relating to the constitution of the arbitral tribunal without institutional support *[R.15, Clm.Ex.3]*.

28. Further on that the question whether a particular dispute resolution clause constitutes an "arbitration agreement" should also leave ample scope for effectuating the parties' intentions and wishes. If parties intended that the legal regime applicable to "arbitration agreements" will apply to their dispute resolution procedure, it is difficult to see why this should not ordinarily be accommodated, even if they have not, strictly speaking, agreed to "arbitrate." *[Born, International Commercial Arbitration, P.20]*. Both parties' intentions and wishes were discussed and agreed for initiating agreement and there was no intention for involvement institution in any phase with the contract.

29. Ad hoc is a phrase used to imply that something is for a particular situation or purpose. Therefore parties agreed for specific purpose and reason taking to ad hoc arbitration. In selecting ad hoc arbitration, parties forgo the procedural support and supervision typically provided by an arbitral institution. Instead, the parties will have to make their own decisions, either before or after a dispute arises, about the procedures that are to govern the resolution of their dispute. The responsibility for running any arbitration accordingly lies with the parties and, once it has been appointed, the arbitral tribunal *[Enock, Melia, Arbitration in England, P.1]*. The parties are free to make any decisions and agree for any arbitral proceedings. In the case at hand, they have chosen ad hoc arbitration, so arbitral tribunal should move forward without involvement of institution.

30. The 1996 Act provides flexibility for the parties to an ad hoc arbitration to agree the procedural steps that are to be taken. Any procedural steps agreed by the parties must comply with the tribunal's overriding duty to 'adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters to be determined'. Any agreement that falls short of those principles could be held to be void and therefore unenforceable. *[Enock, Melia, Arbitration in England, with Chapters on Scotland and Ireland, P.4]*. According to above commentary, the agreed steps should override in current arbitration and CLAIMANT performs opposite act that will delay the proceedings. Therefore, Arbitral Tribunal should immediately act out to the challenge of arbitrator.

31. In ad hoc arbitration, which is organized by the parties themselves, the parties alone choose the arbitrator or arbitrators for their particular dispute, directly or through a predetermined third party. This is in contrast with institutional arbitration, where the parties rely on an arbitral institution to determine the composition of the arbitral tribunal and organize the proceedings

[Goldman, International Commercial Arbitration, P.1]. So, the parties organized ad hoc for particular purposes and by no means, it should rely on an arbitral institution to designate an appointing authority for the challenged arbitrator.

32. Where a party challenges an arbitrator, the challenge is resolved by the other members of the arbitral tribunal, except where those members disagree or where there is only one arbitrator. In those cases, the decision is taken by the Chairman of the Administrative Council *[Arts. 57 and 58, 1965 Washington Convention]*. In the case at hand, the other members

33. Given that above mentioned reasons, parties never agreed or discussed that dispute should be taken to appointing authority, but rather they agreed that Arbitral Tribunal will resolved any arising issue in the arbitration proceedings.

B. The Arbitral Tribunal should proceed with the challenge without Mr. Prasad's input

34. In light of the clear agreement of the parties, that the dispute should be settled "without the involvement of any arbitral institution" the only body to decide the challenge is chosen Arbitral Tribunal. RESPONDENT had already requested the two other members of the Arbitral Tribunal to decide upon the challenge. RESPONDENT will definitively pursue the challenge, in case Mr. Prasad does not withdraw or CLAIMANT does not agree to the challenge *[R.39, NOC]*.

35. RESPONDENT has already declared to CLAIMANT that it wanted as few persons as possible to know about the arbitration and had no confidence that a dispute would be kept confidential by any institution *[R.41, Resp. Ex.5]*. As confidentiality was of a great significance to both parties, therefore no part of arbitration procedure should be taken to any institution.

36. The Arbitral Tribunal should decide on the challenge without Mr. Prasad's input. If he were to decide on a challenge brought against him, he would be a judge in his own cause, something which should be avoided *[R.39, NOC]*. Therefore, He cannot be part of arbitral panel while deciding upon the challenge.

37. Neither Party challenges the jurisdiction of this Arbitral Tribunal in principle but CLAIMANT contests the power of the Arbitral Tribunal to decide upon the challenge of Mr. Prasad *[R.48, PO1]*. Hence, the power of Arbitral Tribunal should not be pointed and should be left to arbitral autonomy and decide on causes that interrupt the proceedings.

38. In case Excelsior Film vs. UGC-PH annulling award on public policy grounds because arbitrator was also arbitrator in parallel arbitration and "conveyed to the latter erroneous information of such nature as to influence that tribunal's decision on jurisdiction *[Excelsior Film vs. UGC-PH, Case No. Rev. arb. 255, 255]*. In the current case, Mr. Prasad is partial and dependent therefore he will be influenced and his financial affiliation will impact his decision. On the other hand, if Arbitral Tribunal does not decide on Mr. Prasad challenge, it will undermine the authority of Arbitral Tribunal.

39. It is elementary that a party may not be an arbitrator in its own case and it comes under Latin verbatim ("*nemo debet esse judex in propria causa*"). According to Mr. Born, "a well-recognized principle of 'natural justice' is that a man may not be a judge in his own cause." *[Born, International Commercial Arbitration, P. 86]*. In any case, Mr. Prasad should be removed from arbitral panel and also Mr. Prasad should recused himself without insistence due to conflict of interest.

40. In case Bennish v. N.C. Dance Theater, requiring trial court to substitute neutral arbitrator in place of tribunal designated in parties' contract, which provided for both trustee and staff member of defendant to serve as arbitrators *[422 S.E.2d 335, 337- 38 (N.C. App. 1992]*. Therefore Mr. Prasad, who has financial affiliation with CLAIMANT's funding source, cannot be a judge on its own cause. CLAIMANT has already appointed a substitute for replacing Mr. Prasad and that arbitrator can come in replacement of Mr. Prasad who has failed to make necessary disclosure at the right time. So, Mr. Prasad is disquieted because of conflict of interest

41. Both parties agree that to speed up proceedings in case the challenge of Mr. Prasad should be successful, CLAIMANT appoints already now Ms. Chian Ducasse as a potential replacement of Mr. Prasad. All submissions will be made available to her and she will be present at the oral hearing to be able to replace Mr. Prasad should the challenge be successful before this Arbitral Tribunal *[R.48, PO1]*. CLAIMANT already knows that Mr. Prasad will be disquieted duo to his financial connection and therefore he will be removed from panel.

42. If CLAIMANT knew that Mr. Prasad is impartial and independent, then he should not have appointed a replacement for him and even before the challenge was made by RESPONDENT.

43. Mr. Prasad did not disclose necessary information at the right time and he himself confesses after CLAIMANT's disclosure regarding third party funder that he has acted as arbitrator in two cases which were funded by subsidiaries of FindFunds LP *[R.36, Declaration Prasad]*.

44. The same provision also explains that "[failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate." See also Revised Uniform Arbitration Act, 12(1) (2000) ("Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding.")*[Born, International Commercial Arbitration, P.204]*. Mr. Prasad should have disclosed the necessary information to parties before his appointment as an arbitrator and he has failed to do so now.

45. In the light of above mentioned reasons, the Arbitral Tribunal has the full power to proceed with the challenge of Mr. Prasad and it should decide without his input and involvement in the arbitral panel.

CONCLUSION OF THE FIRST ISSUE

46. Under the contract, the Arbitral Tribunal has the authority to decide on the challenge of Mr. Prasad and Mr. Prasad should withdraw from his seat of arbitration due to his financial affiliation with third party funding. The decision should be taken without his input and involvement of Mr. Prasad. The PCA cannot intervene to designate appointing authority in ad hoc Arbitration. So, it is the Arbitral Tribunal that will decide upon the challenge of Mr. Prasad.

ISSUE II: MR. PRASAD SHOULD BE REMOVED FROM ARBITRAL PANEL DUE TO SERIOUS DOUBTS TOWARDS HIS IMPARLIATY AND INDEPENDENCE

47. The removal of Mr. Prasad will be the most necessary issue in the current arbitration proceedings as it will not dampen rendering a legitimate award in favor of any party. Mr. Prasad's exist in the panel definitely carries justifiable doubts to his impartiality and independence. The conflict of interest should be avoided in any case and particularly for the current proceedings. Mr. Prasad cannot prove being impartial and independent and will be

under undue influence for his financial relationship with funding source. There are serious doubts towards Mr. Prasad and he lacks impartiality and independence **(A).** Mr. Prasad will not be free of party's control and will favor one side without integrity **(B).** Mr. Prasad has antagonist mindset and will dampen the integrity and fairness of arbitration proceedings and will try to impose his opposite opinion **(C).**

A. There are serious justifiable doubts due to Mr. Prasad's connection with third party funder that proves his partiality and dependence

48. Mr. Prasad should be removed due to arising conflict of interest in the arbitration as Mr. Prasad has previously worked in the two arbitration and also he has currently in financial affiliation with Slowfood due to a recent merger with subsidiary of CLAIMANT's funding source. Mr. Prasad should be removed of arbitration process, otherwise the arbitration award will definitely fall under control of CLAIMANT and it will be in favor of CLAIMANT *[R.36 Declaration of Prasad]*.

49. On occasion, parties have been able to request the replacement of an arbitrator where a conflict of interest appears to arise due to the involvement of a third-party funder. Given the confidential nature of the vast majority of arbitral proceedings, however, public awareness of such instances are few and far between. In fact, much will turn on the definition of "parties to the proceedings," from whom the arbitrators have to be independent. It is generally accepted that this extends to companies that are part of the same group. Could it also be said to extend to entities that have a direct financial interest in the outcome of the dispute in that they will financially benefit from it(his is the criteria adopted by the IBA Guidelines in General Principle 6(b), id. Code de Procédure Civile, art. 1456.) *[Owczarek Stoyanov, BCDR International Arbitration Review, P.7]*. In the case at hand, Mr. Prasad has direct financial interest and therefore he would favor one party over another.

50. Although the arbitrator himself or herself may not represent, or have previously represented, one of the parties to the arbitration, partners, counsel, or other lawyers in his or her law firm may do, or have done so. A number of authorities conclude that these "law firm conflicts" are relevant to an arbitrator's independence and impartiality *[Born, International Commercial Arbitration, P.91]*. Since, Mr. Prasad's law firm currently merged with Slowfood which raise

conflicts and therefore, it is relevant to his independence and impartiality that clearly lacks in Mr. Prasad's position.

51. Mr. Fasttrack has not been directly involved in the two cases in which Mr. Prasad had been appointed as arbitrator but has given advise to the colleague running the case and had recommended Mr. Prasad as arbitrator in the second arbitration *[R.51, Para.9, PO2]*. Therefore, Mr. Prasad was recommended by Mr. Fasttrack and knew him from the past for his opinion about conformity of goods that clearly indicates the relation of Mr. Prasad and CLAIMANT *[R.38, NOC of Arbitrator]*. So, if he continues to be arbitrator in this case he will render the award to party that he has financial interest with.

52. Finally, doubts towards Mr. Prasad are justifiable in different circumstances and therefore he should be removed due to strict and close financial interest with the CLAIMANT's funding source.

1. <u>International Bar Association (IBA) guidelines are applicable, so it can disqualify Mr. Prasad from Arbitral Tribunal due to justifiable doubts</u>

53. Since there are no special rules/laws on transparency in arbitral proceedings in any of the three jurisdictions concerned, but parties and tribunals often refer to the IBA-Guidelines *[R.51, Para.18 PO2]*. So, IBA is as normal applicable in this arbitration proceedings because there is no rule or law other than it before Arbitral Tribunal.

54. The IBA's Guidelines address the appropriate scope of contacts between a party and potential co-arbitrators. They provide that a prospective arbitrator should, when approached, "make sufficient enquiries in order to inform himself whether there may be any justifiable doubts regarding his impartiality," as well as to ascertain whether he has the requisite competence and availability *[Born, International Commercial Arbitration, P.18]*. Therefore, application of IBA is considered by parties to check in the serious doubts towards appointed arbitrator.

55. IBA guidelines are of relevance to the selection of arbitrators because of their provisions regarding arbitrator independence and impartiality and their requirements regarding disclosure *[Born, International Commercial Arbitration, P.72]*. Mr. Prasad did not disclose at the right time and he did not perform required investigation before accepting appointment of CLAIMANT or may Mr. Prasad deliberately conceal his affiliation with third party funding until

RESPONDENT found out related information. Mr. Prasad knew that if he would disclose such information, he would be automatically removed from the arbitration due to his financial relationship with CLAIMANT's funding source.

56. Mr. Prasad himself was obliged to do required investigation before accepting the appointment as an arbitrator in the case. The IBA Guidelines provide that "[a]n arbitrator is under duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality to be questioned." Similarly, the ICC requires arbitrators, when accepting nomination, to confirm that they have made "due inquiry" into matters that might raise questions regarding their independence and impartiality *[Born, International Commercial Arbitration, P.98]*. As per above commentary, Mr. Prasad failed to do its obligation under IBA guidelines, so he should be disqualified for his failure if he demonstrate to be unaware of such circumstance.

57. Furthermore, the same provision also explains that "[failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate." See also Revised Uniform Arbitration Act, 12(1) (2000) ("Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding.")*[Born, International Commercial Arbitration, P.204]*. Even to take into account that Mr. Prasad did not have knowledge of third party funder, this automatically disqualifies him as this excuse cannot justifiable to his appointment.

58. Similarly, International Bar Association (IBA) Guidelines provide that "no one is allowed to be his or her own judge (i.e., there cannot be identity between an arbitrator and a party)," categorizing this as a non-waivable conflict. Even where parties have expressly agreed to arrangements where one party, or its representative, is to resolve the parties' future disputes, courts have almost always refused to give effect to such agreements *[Born, International Commercial Arbitration, P. 86]*. If Mr. Prasad insists to continue as CLAIMANT's arbitrator, there will be no identity between arbitrator and a party since there are financially interrelated.

59. The IBA Guidelines on Party Representation in International Arbitration are almost identical. Likewise, the IBA Rules of Ethics also permit the prospective arbitrator to "respond to enquiries from those approaching him, provided that such enquiries are designed to determine his or her suitability and availability for the appointment as arbitrator and provided that the merits of the case are not discussed."*[Born, International Commercial Arbitration, P.18]*. This qualifies the position of RESPONDENT to seek any enquiries before proceeding to arbitration and the arbitrator is obliged to provide a clear statement to enquiries.

60. Specifically, the Guidelines' Non-Waivable Red List consists of four items, which are absolute prohibitions against affected individuals serving as arbitrator in any circumstances. All four items are said, by the Guidelines' drafters, to involve cases of a party being judge of its own cause – specifically, cases of an identity between a party and an arbitrator (including where an arbitrator is the "legal representative" of a party), an arbitrator being a manager or director of a party, an arbitrator having a "significant financial interest" in a party or the outcome of the case, and (less clearly) an arbitrator regularly advising a party (or its affiliate) and deriving "significant financial income therefrom." In the current case, Mr. Prasad has significant financial interest with the funding source of CLAIMANT and will derail the arbitration. FindFund LP has a subsidiary which is Slowfood and it has recently merged with Mr. Prasad's Law firm, so a victory of Mr. Prasad will benefit both FindFund LP funding CLAIMAANT and also Mr. Prasad will receive 30-40 percent of its share as well.

61. A red list describes situation in which an arbitrator should not accept appointment or withdraw if already appointed. Mr. Prasad is placed under this list because he has connections to the concerned funding entities and does bear justifiable doubts *[P.17, Part.2, IBA]*.

62. Another clear presumptive basis for finding a lack of independence or impartiality is an arbitrator's prior involvement in the parties' dispute, either as a corporate officer or other decision-maker, lawyer, witness, or expert. Thus, the IBA Guidelines on Conflicts of Interest, provide that an "arbitrator [who] has previous involvement in the case" is subject to a waivable, Red List conflict *[Born, International Commercial Arbitration, P.86]*. In the current arbitral proceedings, Mr. Prasad cannot fit in any context since he is clearly lacking independence and impartiality.

63. The IBA's Guidelines address the appropriate scope of contacts between a party and potential co-arbitrators. They provide that a prospective arbitrator should, when approached, "make sufficient enquiries in order to inform himself whether there may be any justifiable doubts regarding his impartiality," as well as to ascertain whether he has the requisite competence and availability *[Born, International Commercial Arbitration, P.18]*. According to Mr. Born, CLAIMANT's appointed arbitrator should have ascertained that he has requisite competence and whether it meets circumstances required for being impartial. So, Mr. Prasad failed to inform himself and disquieted for lacking impartiality.

64. In case Telekom Malaysia Berhad vs. Repub. of Ghana in which lawyers from his firm represented a party, if he remained an arbitrator in this case *[Telekom Malaysia Berhad vs. Republic of Ghana, Case No. 23 ASA Bull. 186]*. In this case, Mr. Prasad comes from a firm in which CLAIMANT's funding party is financially affiliated and hence he will be a lawyer of their own firm, so he should not remain as an arbitrator in this Arbitral Tribunal.

65. In the light of above mentioned reasons, Mr. Prasad's independence and impartiality carries justifiable doubts under IBA and also Mr. Prasad does not meet the requirements under IBA to act as an arbitrator in this arbitration due to his business relationship with third party funding.

B. Mr. Prasad will favor CLAIMANT due to his involvement in two previous arbitration that will raise conflict of interest

66. Mr. Prasad's background clearly indicates that he rendered the award to any party that has appointed him despite taking trueness and fairness in the arbitration cases. Mr. Prasad voted in the previous 4 arbitrations where he was nominated either by law firm of Mr. Fasttrack or by a party financed by a subsidiary of Findfunds LP *[R.51, Para.15, PO2]*.

67. Mr. Prasad was already recommended as arbitrator for arbitration of cases and also Mr. Fasttrack given advise to the colleague running the case *[R.51, Para.9, PO2]*.

68. If an arbitrator is repeatedly appointed by the same party or lawyer, this gives rise to doubts concerning his or her independence and impartiality. The IBA Guidelines adopt a relatively extreme view of this issue, providing that multiple appointments of an arbitrator by the same party or the same legal counsel in the past three years are an Orange List circumstance,

requiring disclosure and providing possible grounds for challenge *[Born, International Commercial Arbitration, P.88]*. Hence, Mr. Prasad's repeated appointment is ground for challenge and reflects partiality and dependence.

69. All of these aspects of the Orange List imply, both textually and structurally, that Orange List items may be the basis for disqualification of an arbitrator.

70. CLAIMANT has already known Mr. Prasad and looking for verification whether there exist any contacts between Mr. Prasad and Findfunds. The contacts existed and CLAIMANT definitely did its best to keep the funding secret and not disclose it to RESPONDENT, to avoid potential challenges of Mr. Prasad *[R.38, NOC of Prasad]*. This is CLAIMANT's fault to conceal something that will cause wonder to arbitral process and is not a fair and good faith toward dispute resettlement. It clearly indicates that it wants to delay the arbitral process.

71. First, CLAIMANT and its appointed arbitrator both concealed a general truth regarding connection with third party funder which dampens the impartiality and independence of Mr. Prasad.

72. Second, knowingly Mr. Prasad accepted the appointment acting as arbitrator of CLAIMANT in the arbitration proceedings. As professional arbitrator, he knew that disclosure will remove him from seat of tribunal and did not disclose it till the last minute.

73. It was RESPONDENT that retrieved related information about involvement of third party funding which undermines the position of Mr. Prasad as partial arbitrator. The data was found during the virus check of the word file sent by CLAIMANT from and RESPONDENT immediately informed the law firm about third party funding. *[R.38, NOC], [R.51, Para.11, PO2]*.

74. The timing of any disclosure must also be taken into consideration, as it may have an effect on the ability of the tribunal to deal with any potential conflicts that may arise. It would seem logical to require disclosure prior to the confirmation of an arbitral tribunal, so that any potential conflicts may be resolved at that point in time. However, parties may enter into funding arrangements at any time in the life of a claim. On the one hand, it can be argued that disclosure should be required as soon as such arrangements are entered into; on the other hand, it could be argued that disclosure at a late stage in the claim risks uprooting the tribunal

and significantly delaying determination, especially if it necessitates a change in the composition of the tribunal. A further risk arises as the engagement of third-party funding could be open to abuse as a delay and disruption tactic by the funded party.(Scherer, supranote 100.)

75. In case Telesat Canada v. Boeing Satellite Sys removing arbitrator where she would be required to decide collateral estoppel effects of award made by partner in her law firm in related arbitration *[Telesat Canada v. Boeing Satellite Sys, Case No. ONSC 4023]*. In the current case, Mr. Prasad is one of partners in recently merged law firm and is related arbitration to the funding source *[R.36 Declaration of Prasad]*.

76. One of the clearest bases for finding a lack of independence and impartiality, effectively involving an arbitrator acting as a judge in his or her own cause, is the arbitrator's material financial interest in the outcome of the arbitration. This includes cases where the arbitrator would profit financially from his or her own decision or had an ownership interest in a party to the arbitration. In contrast, in cases involving an arbitrator's ownership of a de minimis number of shares of one of the parties, at least where the shares are publicly-traded and insignificant to the arbitrator's financial position, courts have refused to uphold the challenge *[Born, International Commercial Arbitration, P.86]*. There is verification as to Mr. Prasad that he has financial interest in the outcome of the arbitration. He will definitely receive benefits of partnering indirectly with funding source.

77. Looking at the previous arbitrations, all four cases unanimous awards were rendered, which were all in favor of the parties which had appointed Mr. Prasad *[R.51, Para.15, PO2]*. This time, he will again favor the party over another who appointed Mr. Prasad and therefore he should be removed for fair arbitration award.

78. Mr. Prasad has been acting as arbitrator in 21 arbitrations over the last three years. The two arbitrations in which the party appointed Mr. Prasad had been funded by a subsidiary of Findfunds LP have been within the 5 biggest of these arbitrations, making up for 20% of the arbitrator fees generated during the last three years. The two cases in which he had been appointed by the law firm of Mr. Fasttrack were only of minor value. Mr. Prasad derives between 30% - 40% of his earnings from his work as an arbitrator *[R.51, Para.10, PO2]*.

Therefore, Mr. Prasad has financial relationship with Findfunds LP and will work for retaining its interest in any arbitration proceedings.

79. Given the above reasons, Mr. Prasad should be removed from arbitral proceedings; otherwise, he will not observe integrity and fairness in the arbitral process.

C. Mr. Prasad has antagonist mindset regarding modern trend in conformity concept that impairs his independence

80. In his article in the Vindobona Journal of International Commercial Arbitration and Sales Law Mr. Prasad positions himself very clearly against the modern trend in the understanding of the conformity concept in Art. 35 CISG, which goes beyond the mere physical characteristics of the goods and includes the production process as well as the legal entities involved *[R.38, Resp.Ex.4]*.

81. Given his view expressed in an article on the irrelevance of CSR on the question of the conformity of goods, clearly opposing the modern trends and crosses beyond the actual understanding on conformity of goods. Therefore, CLAIMANT has chosen Mr. Prasad for his opposite view towards RESPONDENT's claims. So, he is already having an opposite mindset regarding the issue.

82. Mr. Prasad in his article clearly opposed any production line in compliance with Global Compact principles saying, *"In particular, the conformity of goods does not depend on their compliance with the very broad and general statements in CSRCodes, such as that production has to be in line with Global Compact principles*" *[R.40, Resp.Ex.4]*. Therefore, he clearly opposes the ethical sustainable production set in accordance with principles of Global Compact and will never be important for him.

83. In his publication, he has expressed his view that, in principle, the conformity of goods under the CISG is solely dependent on the physical nature of the goods themselves and not their production process or even other seller related component *[R.44, Refusal to Withdraw]*. So, having such a mindset will definitely influence his decision on the case which clear will be in favor of CLAIMANT.

84. Mr. Prasad clearly supports through his idea that ethical behavior does not fit in the conformity of goods.

85. In case Adrian Mutu vs. Chelsea Football Club Ltd "The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties *[Adrian Mutu vs. Chelsea Football Club Ltd, Case No. 520, 529et seq]*. Looking at current case, Mr. Prasad has been working as arbitrator and maintains financial affiliation with funding source within the past four years and therefore Mr. Prasad should be removed from proceeding in arbitration.

86. In case Société Raoul Duval vs. Société Merkuria Sucden the knowledge of this situation by the other party would evoke at the least a reasonable doubt as to the independence of mind of this arbitrator *[Société Raoul Duval v. Société Merkuria Sucden, Case No.Rev. arb. 410, 411]*. In the current case, Mr. Prasad's mind is already influenced through his publication and will be in control of mind.

87. Mr. Prasad has a critical mindset regarding the conformity of goods, as well as, CLAIMANT knows Mr. Prasad from two previous arbitrations, therefore in its view, he is the perfect arbitrator for its case given his view expressed in an article on the irrelevance of CSR on the question of the conformity of goods *[R.38, NOC of Prasad]*. Mr. Prasad will evidently try to impose his mindset on others and will base and divert the case from its actual standing point.

88. Further on that, it is argued that an arbitrator's public statements of his or her opinion concerning matters raised in the arbitration will be grounds for removal. In almost every instance, statements of legal philosophy, interpretation, or approaches to particular issues are not considered even relevant to the arbitrator's independence or impartiality. That view is correct. Every lawyer has – whether expressed or unexpressed – views about legal issues that may be relevant in arbitral proceedings; indeed, it is desirable that the tribunal include individuals who are experienced in the matters in dispute, which necessarily involves the prior formulation of thoughts and positions. On the other hand, a public expression of views about the particular dispute, as distinguished from views about legal issues, involved in the arbitration is often held grounds to remove an arbitrator. The same result may follow from an arbitrator's expression of negative views about a particular party to the proceedings before him or her. The similar circumstances fits the nature of this arbitration as Mr. Prasad has negative views about RESPONDENT and will try to impose his view point on the issue.

89. In case Oberlandesgericht vs. Hamburg and Hilmar Raeschke-Kessler, the Oberlandesgericht Hamburg (Higher Regional Court) allowed a party to challenge an arbitrator for having provided an impartial expert opinion to the opposing party prior to his appointment as arbitrator. The court held that the expert opinion went beyond a mere academic statement and had clearly been written to support the respondent's position. In this case, Mr. Prasad has clearly written a statement that will benefit the position of CLAIMANT and will take the case to divergence. In the case at hand, Mr. Prasad has expressed his opinion and clearly opposite of RESPONDENT's claims.

90. Given that above mentioned reasons, Mr. Prasad has an opposite view over the conformity and will definitely be under undue influence of third party. Since he will not be fully independent and therefore should be removed in this arbitration clause.

CONCLUSION OF THE SECOND ISSUE

91. As per above reasons, CLAIMANT's appointed arbitrator carries unjustifiable doubts due to arbitrator's financial relationship and under IBA guidelines, Mr. Prasad falls under the red list to be withdrawn from his office. There is a direct connection between Mr. Prasad and Findfund LP, therefore Mr.Prasad is partial and dependent.

ISSUE III: RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT AND DELIVERED GOODS WERE NON-CONFORMING WITH THE CONTRACT

92. The General Conditions and standard terms of RESPONDENT is the governing conditions put forth for this contract. Meanwhile, the Arbitral Tribunal should consider RESPONDENT's conditions applicability for the contract. There were two minor changes made by CLAIMANT as to the shape and payment mode that should not equate to the public tender incorporated during tender process and therefore RESPONDENT's General Conditions is governing the contract. Under CISG and UNIDROIT principles, CLAIMANT has not fulfilled its contractual obligations towards RESPONDENT. CLAIMANT has delivered non-conforming goods opposite of what CLAIMANT guaranteed. It is a big fraud in business standard and CLAIMANT cannot justify and bring hopeless reasons for being obliged to best efforts. Hence, CLAIMANT failed to deliver conforming goods according to ethically sustainable production. RESPONDENT's standard conditions govern the contract

(A). CLAIMANT accepted all terms and conditions **(B).** CLAIMANT failed to deliver conforming goods to RESPONDENT as it guaranteed **(C).**

A. The standard conditions of RESPONDENT govern the contract as accepted by CLAIMANT

93. At the time of opening tender, RESPONDENT invited CLAIMANT to the tender process and it was clearly written to all and contained Special Conditions of Contract and General Conditions of Contract to be carefully read and reviewed by the contracting party. So, the General Conditions of RESPONDENT were included and is subject to govern the contract *[R.9, Clm.Ex.2]*.

94. Furthermore, CLAIMANT has made its offer in response to the tender documents and stated that after a closer look, CLAIMANT made some minor amendments primarily related to goods and mode of payment. The sentence does not necessarily mean that CLAIMANT did not accept the General Conditions of Contract put forth by RESPONDENT *[R.15, Clm.Ex.3]*.

95. There were only two specific changes in CLAIMANT's offer as to the shape of cake and payment mode. Nevertheless, RESPONDENT considered two reasons for accepting; the chocolate cake offered was from CLAIMANT's premium product line farmed in highly ethical and environmental standards. Second, RESPONDENT had been impressed with the CLAIMANT's commitment to ethical production *[R.15, Clm.Ex.3]*.

96. If the CLAIMANT intended to bring changes and not accepting the General Conditions of RESPONDENT, it would have definitely pointed out with clear wording that it will bring changes in General Conditions of Contract as like mentioned regarding goods and mode of payment *[R.15, Clm.Ex3]*.

97. Confirmation of Order as Writing in Confirmation If, however, the seller's initial quotation can be qualified as a binding offer, the contract is concluded by the buyer's order, which constitutes an acceptance of the seller's offer. In this case, the seller's subsequent confirmation of order does not bring about the contractual agreement between the parties. However, it may have the effect of varying the contents of the parties' contractual agreement if it falls under a relevant category such as Kaufmännisches Bestätigungsschreiben in German and Swiss commercial law, Orderbevestiging in Dutch law, lettre de confirmation in French law, written confirmations

pursuant to § 2-207 of the American UCC, or similar concepts of writings in confirmation of other legal systems which apply to the contract *[Berger, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration, P.3]*. As per above commentary, RESPONDENT's initial action opening the public tender is qualified as binding offer and therefore CLAIMANT should abide by its contractual agreement through implementing General Conditions of RESPONDENT.

98. In case, CLAIMANTS wanted that its Specific terms and Conditions inserted under the Sales Offer, to govern the contract, they would never use the term "Not applicable" as CLAIMANT normally contract with its customers. Contrary to CLAIMANT's assertion that states its General Conditions govern the contact *[R.16, Clm.Ex.4]*. Therefore, CLAIMANT had not indicated any sentence that its General Conditions should govern the contract and on the other hand, RESPONDENT did not see anything and did not accept any standard terms of CLAIMANT.

99. Very often, 'Acknowledgement of Order' is used by parties intending to conclude a commercial contract. The legal effect of such an order depends on the circumstances under which the contract is negotiated *[Berger Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration, P. 3]*. According to the above commentary, CLAIMANT has sent the acknowledgement letter to RESPONDENT and thereby concludes the contract. So, the legal effect of this indicates that RESPONDENT General Conditions govern the contract.

100. In the light of above facts, RESPONDENT's General Conditions should govern the contract as it was accepted by CLAIMANT before initiating the contract.

B. CLAIMANT did not deliver conforming goods as the goods were not produced in ethical and environmentally sustainable required by the agreed contract

1. The delivered goods were not in conformity under Art. 35 of CISG.

101. Based on Art. 35 of CISG the goods must be delivered that are of the quantity, quality and description required by the contract *[Art.35, CISG]*. This qualifies the claims made by RESPONDENT that delivered goods are not in conformity with contractual terms and do not fit the quality required

102. In the light of Art. 35 of CISG, non-conformity may appear in various forms. It may be that the goods are not delivered in time, that they are not in conformity with contractual terms, that they are not fit for the ordinary purpose or any particular purpose made known to the seller *[Müller-*

Chen /Pair, International Arbitration and International Law, P.1]. As RESPONDENT clearly stated that 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. Therefore RESPONDENT already clarified the intention to CLAIMANT that it will only accept sustainable production because of a particular purpose.

103. Article 35 CISG sets the relevant standard for the question of non-conformity of goods. First and foremost the contractual terms are decisive in this respect. If the delivered goods do not conform to these requirements quantitatively, qualitatively or in description, there is a breach of contract *[Article 35(1) CISG].* Hence, CLAIMANT failed to deliver goods in accordance with contractual terms agreed by both parties.

104. The term "quality" in CISG Art. 35(1) does not exclude emotional quality. I Schwenzer & B Leisinger, Ethical Values and International Sales Contracts, supra, at 267, state: "Quality must be understood as not just the goods' physical condition, but also as all the factual and legal circumstances concerning the relationship of the goods to their surroundings…The agreed origin of the goods, which necessarily comprises issues of ethical standards, also forms part of the quality characteristics." Schwenzer states that a discrepancy in quality includes 'all factual and legal circumstances concerning the relationship of the goods to their surroundings *[Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG), supra at. 572 et seq with a reference to Mullis in Huber & Mullis, The CISG – A new textbook for students and practitioners, at 132 (2007)].* As per above commentary, the nature of goods does not only relate to physical condition, but also factual and legal circumstances in which CLAIMANT explicitly failed and ignored the necessary issue of ethical standard and the agreed origin of the goods.

105. Finally, CLAIMANT did not deliver goods in a quality as required with the contract and CLAIMANT failed to meet all the requirements of contractual terms.

a. Based on terms of contract, CLAIMANT guaranteed to deliver conforming goods

106. CLAIMANT has clearly asserted in the Letter regarding Sales Offer that you can be assured that we will guarantee that the ingredients sourced from outside suppliers comply with our joint commitment to Global Compact Principles *[R.15, Clm.Ex.3].* Interpreted in light of the surrounding circumstances, that means nothing else but that the CLAIMANT guaranteed that

also the ingredients supplied by its suppliers will be farmed in compliance with sustainable farming methods.

107. Article 35(2)(b) CISG refers to specific uses, which a seller has been made aware of or should have been aware of. When the goods are intended for a buyer's own use, the goods must be fit for such use, whether it is as machinery for processing, globes for marketing purposes, compressors for use in air-conditioners or component in computers. Similarly, where the goods are intended for resale, they must be fit for resale. An exception to a buyer's entitlement to receive a product fit for its intended use is said to exist when a seller has no expertise. In such cases a buyer cannot reasonably rely on a seller's delivery of goods fit for a particular purpose. A particular purpose can be very specific. One court found that a seller violated Article 35(2) (b) when he delivered skin care products that did not maintain specified levels of a vitamin throughout their shelf life. "The special purpose (…) was known by the [seller] with sufficient clarity and that "the buyer counted on the seller's expertise in terms of how the seller reaches the required vitamin A content and how the required preservation is carried out." The exact form this knowledge must take is in dispute. Schwenzer suggests, if e.g. a buyer makes a seller aware of the country of use, this seller becomes liable for the goods' usability there: When for example a buyer makes a seller aware that goods will be subjected to certain climatic conditions, will be used in a context where certain ethical principles are of high importance or will be used in a country where specific public law regulations apply, a seller must conform to those standards. Otherwise the goods would not be fit for use intended by a buyer. Circumstantial evidence of awareness may also suffice, such as third party information or awareness of the habitual place of business of a buyer. Such awareness must exist at the time of conclusion of the contract *[Müller-Chen / Pair, International Arbitration and International Law, P.3]*. As per above commentary, CLAIMANT was well aware of RESPONDENT's purpose and therefore made it clear the use of cakes for its greater reputation. CLAIMANT as professional producer was liable to comply with contractual terms and should have delivered conforming goods.

108. In case on point a seller delivered tantalum powder with oxygen content exceeding 1,300 ug/g, instead of the provided for oxygen content. The powder would have been useable if it had been mixed with the buyer's product differently, resulting in a much larger quantity of the desired material. The buyer was entitled to avoid, even though the powder would have been useable. The buyer would have, using a different mixture, had too much of the product. It could not have used such quantities, so that avoidance was permitted *[OLG Innsbruck, 1 February 2005, 1130 (Austria)]*.

In case at hand, CLAIMANT is already aware of RESPONDENT's intention regarding the required chocolate cakes to fully meet the usage purposes, but CLAIMANT ignored and did not deliver goods as asked for usage purposes.

109. CISG Art. 35(2)(a) states that the goods shall be "fit for purpose". The notions of merchantability and "fit for purpose" concern not only the goods' practical and physical use, but also include emotional characteristics. CISG's rule on non-conformity is basically dependent on the buyer's reasonable expectations. Can the purchaser have reasonable expectations in relation to emotions and feelings? According to ULIS Art. 33(2) immaterial discrepancies are irrelevant. Schwenzer refers to the goods 'characteristics' which clearly includes feelings and emotions, see Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG), supra, at 571 et seq.) Schwenzer states that the agreed origin of the goods forms part of quality characteristics (at 573 with reference to BGH 3 April 1996 CISG online 135. BGHZ 132, 290 cobalt sulphate). She continues to state that the same applies to observing certain manufacturing standards, in particular Goods Manufacturing Practices (to be found in EU directives) or fundamental ethical principles (at 573). A case from the Oberlandsgericht Munchen in 2002 concerned the sale of organically produced barley. The barley was non-conforming when the seller was unable to provide a certificate proving the organic origins of the product, irrespective of whether the barley actually was organically produced or not. The buyer, however, lost its right to remedies due to late notice *[http://www.unilex.info/case.cfm?id=922]*. As per above commentary and practice, the goods delivered by CLAIMANT do not meet the characteristics set by RESPONDENT and the agreed origin of goods was not in accordance with the agreement, parties discussed before entering into the contract.

110. In the light of above mentioned reasons, CLAIMANT delivered non-conforming goods opposite of it liability. CLAIMANT was obliged and liable to deliver conforming goods to RESPONDENT.

b. <u>RESPONDENT's code of conduct even obliges supply chain of CLAIMANT to comply with Global Compact Principles</u>

111. CLAIMANT has written in its code of conduct for its suppliers that all its suppliers must adhere sustainable production and therefore RESPONDENT thought that it will have all its suppliers to provide an eco-friendly production of beans, not causing environmental problems

[R.8, Clm.Ex.1]. RESPONDENT has clearly stated that it was impressed by strict adherence of CLAIMANT to Global Compact principles and also for an ethical and sustainable production. These were all reasons RESPONDENT contracted with CLAIMANT but CLAIMANT not only acted against, but ignored them all.

112. Whereas Comestibles Finos Ltd is a gourmet supermarket chain operating in Mediterraneo and a Global Compact member committed to high standards of integrity and sustainability, whereas Comestibles Finos has a 'zero tolerance' policy when it comes to unethical business behavior, such as bribery and corruption, whereas Comestibles Finos expects all of its suppliers to adhere to similar standards and to conduct their business ethically, the Parties, as defined in Article 1, agree on the following Special Conditions of Contract *[R.11, Clm.Ex.2]*. Any reasonable person can understand above clear wording of the party and should not act out oppositely, but CLAIMANT had clear divergence with terms of contract that is totally not accepted by RESPONDENT.

113. Under clause 4 of General Conditions, RESPONDENT has also mentioned that noncompliance with any of the contractual documents constitutes a breach of contract. Any breach of some relevance of Comestibles Finos' General Business Philosophy or its Code of Conduct for Suppliers shall be considered to constitute a fundamental breach entitling Comestibles Finos to terminate the contract with immediate effect and claim damages *[R.12, General Conditions]*. RESPONDENT has the right to point out the breaches and terminated lawfully, while CLAIMANT should admit it and pay off the damages inflicted to RESPONDENT.

114. Furthermore, in Black's Law Dictionary, 'breach of contract' is defined as failure, without legal excuse, to perform any promise which forms the whole or part of a contract. See also supra n. 291. See Treitel, Remedies for Breach of Contract (1988), para. 31 (p. 36) and infra p. 65 ff., 86 ff. See infra p. 86 at n. 432; see also Zweigert/Kötz, 514 with regard to a previous draft of 276 BGB *[Zweigert/Kötz, P.514]*. RESPONDENT's General Condition required CLAIMANT to deliver conforming goods and fulfill its contractual obligations, but CLAIMANT failed to do so and therefore committed the breach of contract.

115. In most modern international arbitration statutes, the primacy of the agreement of the parties is the fundamental principle underlying the whole of the arbitral proceedings, and especially the constitution of the arbitral tribunal. The same principle is also found in international conventions

[Goldman, International Commercial Arbitration, P.1]. Both parties had a clear agreement regarding sustainable production and goods delivery in accordance with ethically environmental production, but CLAIMANT neither observed the eco-friendly standards, but also used those sources in order to receive profits.

116. Finally, CLAIMANT's supply chain was obliged under RESPONDENT's General Conditions and its supply chain was obliged to do it as well.

1. <u>CLAIMANT was obliged to be bounded to sustainable production outside of the agreed contract.</u>

117. RESPONDENT is a Global Compact company committed to the principles expressed in the UN Sustainable Development Goals and described in further details in Comestibles Finos' General Business Philosophy. It is important that Comestibles Finos' Suppliers are aware of that Philosophy and adhere to it. To guarantee such adherence, the measures and conduct expected from suppliers are set out in this Code of Code of Conduct for Suppliers *[R.13, General Conditions]*.

118. Furthermore, the Purchaser Makes a General Communication Very often the question of inclusion of standard terms concerns the supplier's reference to terms whereby he limits his liability for damages and other remedies. It is, however, in the interest of the purchaser to include rules on ethical production methods in order to achieve emotional value and the question is therefore to what extent the purchaser's general statements regarding its ethical behavior make the supplier liable for using production methods non-conforming to the purchaser's ethical aspirations. I do not think that the purchaser's general CSR-policy could form a basis for a claim of non-conformity against a supplier even when the supplier is aware of the policy. It is also necessary that the supplier understands that the purchaser has an intention that this particular sale fits into his CSR-policy. In other words, it is necessary that the supplier understands that the purchaser has a particular purpose to resell the goods to customers who are willing to pay more for a particular feeling based partly on the production methods. The supplier must also understand that his production methods entail problems for the purchaser in making profits *[Ramberg, Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct, P.16]*. Before entering into the contract, RESPONDENT clarified to CLAIMANT that it strictly supports sustainable and ethical production and therefore included its General Conditions and standard terms to govern the contract.

119. RESPONDENT clearly stated under Preservation & Regeneration of Environmental Resource Bases Delicatesy wants to continuously reduce any negative impact its business has on the environment. As these impacts derive from multiple sources within its business processes, Delicatesy acknowledges that its environmental effort must be comprehensive and implemented at different stages of its activity *[R.30, Para.3, Resp.Ex.3]*. CLAIMANT's delivery of goods definitely had negative impact on environment and therefore RESPONDENT after knowing the fact behind illegal sourcing, immediately terminated the contract.

120. Finally, CLAIMANT was obliged to deliver goods of conformity in accordance with ethical and sustainable production, but it failed to do so.

a. A clear negotiation and communication was done before parties entering into contract.

121. CLAIMANT met the RESPONDENT at the yearly Danubian food fair, Cucina, in March 2014. The CLAIMANT was approached by RESPONDENT's Head of Purchasing, Annabelle Ming, at its stall. Ms. Ming and Kapoor Tsai, the CLAIMANT's Head of Production, discussed which products would be of interest for RESPONDENT and whether it would be feasible to supply those to the RESPONDENT. Ms. Ming invited Mr. Tsai to visit RESPONDENT's stall in return which he did. Mr. Tsai and Ms. Ming not only discussed product choices and delivery quantities but also had a general discussion about the cost versus the benefits of ethical and environmentally sustainable production and their respective experiences. Mr. Tsai expressed a clear interest to Ms. Ming in establishing a business arrangement *[R.4, Clm.Facts]*. Therefore, CLAMAINT submits it correctly that it was fully discussed what are the expectation behind this agreement and RESPONDENT was very straight forward in making its point regarding sustainable production.

122. In the light of above mentioned reasons, RESPONDENT had a clear negotiation with CLAIMANT and how the expectations are behind the contract, but none of them was observed by CLAIMANT.

b. Article 35 of CISG imposes an obligation for quality based products

123. Under clause 19 of General Conditions of Contract, this Agreement is governed by the UN Convention on the International Sale of Goods ("CISG"). For issues not dealt with by the CISG the UNIDROIT Principles are applicable *[R.12, General Conditions]*. Liability for the non-

conformity (quality) of goods sold. Influenced by Roman law, all civil law systems entitle the buyer to terminate the contract ('Wandlung') or to reduce the purchase price ('Minderung') in case of non-conformity of goods sold, regardless of whether the seller is at fault. As such, the seller is strictly liable. Similar rules sometimes apply to other specific types of contracts, e.g., work contracts or leases. However, the civil law systems diverge in respect of the question as to whether the buyer may also claim damages in the absence of fault by the seller *[Brunner, International Arbitration, P.4]*. CLAIMANT's act against its agreed obligations, clearly entitles RESPONDENT to terminate the contract. So, RESPONDENT has the right not to accept goods and reject it for unethical business.

124. Under the CISG, the UPICC and the PECL, the right to damages, like other remedies, *arises from the sole fact of non-performance*. It is not necessary for the aggrieved party to prove in addition that the non-performance was due to the fault of the non-performing party. The degree of difficulty in proving the non-performance will depend upon the content of the obligation. the determination of the content of the obligation at issue and the evaluation as to whether non-performance has occurred or not, may be made on the basis of the distinction between obligations of *best efforts* and obligations to *achieve a specific result*. Where a party's obligation is to produce a given result, its failure to do so entitles the aggrieved party to damages despite the exercise of all reasonable care and skill on its part, i.e., regardless of any fault, except where performance is excused. In case of an obligation of best efforts, the obligor will be liable only if it has not exercised the care and skill required under the circumstances, regardless of whether a desired (but not promised) result has occurred. General contract principles thus essentially follow the Anglo-American concept of strict liability for breach of contract. The obligor is liable for non-performance if it fails to perform any of its contractual obligations, unless it proves that there is a ground for exemption from liability due to an external event beyond its sphere of risk and control. Absence of fault may only exempt the non-performing party if the force majeure or hardship exemption applies *[Brunner, International Arbitration, P.2]*. CLAIMANT should have had its suppliers to provide legal beans for production and failing in its obligation does not mean that suppliers' chain was not included under both parties agreement. So, CLAIMANT cannot its own guilt on other party that failed to deliver legally farmed beans.

125. Finally, CLAIMANT delivered goods are not conforming under article 35 of CISG and also as it was required to be of quality agreed by both parties.

2. Based on Article 5.1.5 of UNIDROIT principles, CLAIMANT is obliged to deliver conforming cakes as a duty of result

126. It is undisputed between the Parties that Equatoriana, Mediterraneo, Ruritania and Danubia are Contracting States of the CISG. The general contract law of all four states is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. All states have adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments *[R.49, PO1]*.

127. Furthermore, the concept of non-performance adopted by the UNIDROIT Principles of International Commercial Contracts (UPICC) and Principles of European Contract Law (PECL) is based on the United Nations Convention on Contracts for the International Sale of Goods (CISG), and the one is essentially identical to the other. It may be characterized by five salient features: (1) the unitary concept of 'non-performance'. The word 'non-performance' is used as a general term covering any failure to perform, for whatever cause. The UPICC/PECL intentionally use the term 'non-performance' of a contract instead of the term 'breach of contract' (used by the CISG) so as to avoid any confusion with the terminology of common law *[Brunner, International Arbitration, P.2]*.

128. Furthermore, The parties may have express contractual provisions as to the emotional characteristics of the goods. It is quite common that the parties have referred to a Code of Conduct in their contract, included it in an annex and explicitly stated that the supplier shall adhere to the Code of Conduct. It is also rather common to find express contractual requirements of certification procedures. If the supplier has breached such explicitly contracted terms, the goods are non-conforming and the purchaser is entitled to remedies *[Ramberg, Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct, P.10]*.

129. Finally, CLAIMANT failed to deliver goods of conformity under UNIDROIT principles and did not meet all required set forth by these principles.

CONCLUSION OF THE THIRD ISSUE

130. Based on above mentioned reasons, RESPONDENT's General Conditions govern the contract and CLAIMANT failed to deliver conforming goods under RESPONDENT's General

Conditions. CLAIMANT failed to deliver goods based on agreed and chosen set of laws and therefore the delivered goods are non-conforming to RESPONDENT.

Request for Relief

Based on above facts and arguments, Counsel for RESPONDENT respectfully requests the Arbitral Tribunal to:

- Declare that the contractual relationship between RESPONDENT and CLAIMANT is governed by RESPONDENT's General Conditions of Sale.
- Reject all claims for payment raised by CLAIMANT.
- Order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

The RESPONDENT reserves the right amend this request for relief as necessary.

(signed)

Abdul Saboor Halamey

Tamim Asoulmal

Laila Mirzaei

Huma Saadat