

**TWENTY FIFTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT**

MEMORANDUM FOR Respondent

On Behalf Of:

Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
Mediterraneo
RESPONDENT

On Behalf Of:

Delicatesy Whole Foods
Sp 39 Marie-Antoine Carême Avenue
Oceanside
Equatoriana
CLAIMANT



DANIA AL-AMEERI • FAHED AL-OBAID • NOOR AL-FARHAN
SARA AL-HOUTI

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INDEX OF AUTHORITIES

STATUTES AND RULES

Abbreviation	Citation	Cited in
CISG	United Nations Convention on the International Sale of Goods	Para. 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 91, 92, 93
IBA	IBA Guidelines on Conflicts of Interest in International Arbitration	Para. 21, 22, 30, 31
RULES	UNCITRAL Arbitration Rules	Para. 2, 3, 10, 11, 12, 14, 15, 17, 20, 32
UNCITRAL	UNCITRAL Model Law on International Commercial Arbitration	Para. 13,19,28
 COMMENTARY		
KLASS	SCOTUS, Arbitration and Contra Proferentem, Greg Klass, Principle of Contra Proferentem, https://blogs.harvard.edu/nplblog/2015/10/07/scotus-arbitration-and-contra-proferentem-greg-klass/	Para. 8
ADMISSION	Evidence International Arbitration Criteria Admission http://arbitration-blog.eu/evidence-international-arbitration-criteria-admission/	Para. 18
CAPLAN	The UNCITRAL Arbitration Rules commentary by David D. Caron and Lee M. Caplan	Para. 20, 32
MAY	How to Challenge an Arbitrators Independence and Impartiality –	Para. 23

Slaughter and May (May2008)

PITKOWITZ	Supreme Court defines limits for challenge of arbitrator – Nikolaus Pitkowitz (12 September 2013)	Para. 24
HONNOLD	Commentary on Article 35(1) CISG by John O. Honnold https://cisgw3.law.pace.edu/cisg/biblio/ho35.html .	Para. 37,41
LUCIEN	The Interpretive Turn in International Sales Law by Larry A. Dimatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer and Marisa Pagnattaro https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.com.kw/&httpsredir=1&article=1577&context=njilb	Para. 43
SCHLECHTRIEM	Comment on Article 18(1) CISG by Professor Peter Schlechtriem https://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html#a29	Para. 62
LOOKOFSKY	Comment on Article 18(1) CISG by Joseph Lookofsky http://www.cisg.law.pace.edu/cisg/biblio/loo18.html	Para. 65
DIGEST	Commentary on Article 23 CISG by UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf	Para. 72
PROFESSOR	Commentary on Article 25 by Professor Schlechtriem https://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-25.html	Para. 76

CHENGWEI	CISG Art. 50, Comment on Article 50 CISG from Perspectives from the CISG, UNIDROIT Principle, PECL and Case Law by Chengwei Liu LL.M http://www.cisg.law.pace.edu/cisg/biblio/chengwei2.html	Para. 87,88
ZIEGEL	Comment on Article 50 CISG from Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods by Professor Jacob S. Ziegel, University of Toronto, July 1981 https://cisgw3.law.pace.edu/cisg/text/ziegel84.html	Para. 89,90
JOSEPH	1980 United Nations Convention on Contracts for the International Sale of Goods by Joseph Lookofsky http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html	Para. 93
 CASES		
 FRANCE		
HUGHES	Hughes v. Societe Technocostact http://cisgw3.law.pace.edu/cases/980127f1.html	Para. 67
 The Republic of China		
SHANGHAI	Shanghai Anlily International Trading Co., Ltd. v. J&P Golden Wings Corp. http://cisgw3.law.pace.edu/cases/081225c1.html	Para. 92

USA

ALPHA	Alpha Prime Development Corporation v. Holland Loader Company, LLC; and Steven Michael Svatek http://cisgw3.law.pace.edu/cases/100706u1.html	Para. 45
ANTENNA	CSS Antenna, Inc., v. Amphenol-Tuchel Electronics, GMBH http://cisgw3.law.pace.edu/cases/110208u1.html	Para. 59,60
CENTRIYS	Golden Valley Grape Juice and Wine, LLC v. Centriys Corporation/ Centriys Corporation v. Separator Technology Solutions Pty Ltd. http://cisgw3.law.pace.edu/cases/100121u1.html	Para. 56
DELCHI	Delchi Carrier Spa v. Rotorex Corp., 71 F.3d 1024, 1995 U.S. App. LEXIS 34226 (2d Cir. N.Y. Dec. 6, 1995) https://www.casebriefs.com/blog/law/commercial-law/commercial-law-keyed-to-lopucki/performance/delchi-carrier-spa-v-rotorex-corp	Para. 46, 78
IMBURIA	Direct v. Imburia 577 U.S. ____ (2015) .	Para. 8
LANCASTER	Kahn Lucas Lancaster, Inc. v. Lark International Ltd. http://cisgw3.law.pace.edu/cases/970806u1.html	Para. 69
LAYNE	American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) https://supreme.justia.com/cases/federal/us/241/257/case.html	Para. 52

ARBITRATION AWARDS

- AMOCO** Iran-US Claims Tribunal, Amoco Int'l Finance Corp. v. Iran, 15 IRAN-U.S. C.T.R. Case No. 55 https://www.trans-lex.org/231900/_/iran-us-claims-tribunal-amoco-int-l-finance-corp-v-iran-15-iran-us-ctr-at-189-et-seq/ Para. 17
- GRID** National Grid plc v. The Argentine Republic, UNCITRAL <https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf> Para. 10

TABLE OF ABBREVIATIONS

Art.	Article
Arb.	Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claimant
USA	United States of America
No.	Number.
Para.	Paragraph
P.	Page
Resp	Respondent

STATEMENT OF FACTS

1. **RESPONDENT** (Comestibles Finos Ltd) a gourmet supermarket chain in Mediterraneo. **CLAIMANT** (Delicatessy Whole Foods Sp) a manufacturer of fine bakery products registered in Equatoriana.
2. On 10 March 2014 First meeting between Claimant (Delicatessy Whole Foods Sp) and Resp. (Comestibles Finos Ltd). Also Cl. received invitation to tender and the Tender Documents from Resp..
3. 17 March 2014 Resp.'s acknowledgment of invitation to tender package.
4. 27 March 2014 Cl. sent their offer including the changes suggested by them followed by Resp. invitation to tender
5. 7 April 2014 Resp. accepted Cl.'s offer awarded the contract to Cl.
1 May 2014 Cl. made its first delivery. The Delivery of Chocolate cake by Cl. was in the period of the 1 May 2014-27 January 2017.
6. 19 January 2017 Equatorian state news channel showed a documentary which drew attention to the irregularities in the Ruritanian certification practice with regard to sustainable farming which had been criticized in a report of a special rapporteur investigating on behalf of UNEP problems of deforestation in Ruritania.
7. 23 January 2017 the special rapporteur had indicated that probably many certificates certifying sustainable production methods were forged or obtained by bribery.
8. 23 January 2017 Resp. was worried and started its own investigation after the publication of the leading business newspaper in Equatoriana (Michelgault) concerning the disclosure of the fraud carried out by Ruritanian.
9. 27 January 2017 Resp. refrained from taking any further delivery or making any further payment until the issue is solved – the Cl. said that they will investigate further and asked for immediate payment for the cakes delivered. Resp. sought clarification whether the delivered chocolate cake contained cocoa obtained from Ruritania. Immediately the Cl. replied the Resp.'s confirming that they will take further investigation.
10. 10 February 2017 Cl. discovered the fact that their supplier (Ruritania Peoples Cocoa mbH), was involved in the scandal. They also alleged that they were complied with the contractual obligations. Cl. also was willing to take back the cakes delivered and not yet

- sold and to discuss with RESP. a financial contribution to possible losses. Cl. Confirmed Resp.'s allegation 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.
11. 12 February 2017 Resp. rejected the Cl. offer above. They claimed that cocoa produced not in compliance with the accepted sustainability standards. They also insisted that they were entitled to repudiate the contract on the fact that the Cl. made a fundamental breach. Resp. insisted that they were entitled to terminate the contract according to Clauses 4 (3) of the General Conditions of Contract. They are in the process of evaluating the damages which resulted from such breach of contract.
 12. Notice of Arb.. 26 June 2017 Declaration of Impartiality and Independence and Availability by Cl.'s arbitrator.
 13. 29 August 2017 Resp. concerned about the third party funder for the Cl. On 1 September 2017 The Arbitral Tribunal has made the following decision:
“Ordering Cl. to disclose to the Resp. if its claim is financed by a third party funder.”
 - 14- 14 September 2017 Notice of challenge of arbitrator was submitted by Resp. On 21 September 2017 Rodrigo Prasad claiming that his connection to Findfunds LP cannot lead to justifiable doubts as to his impartiality and independence.

SUMMARY OF ARGUMENT

Part One: The challenge of Mr. Prasad should be decided in accordance with the parties' agreement.

UNCITRAL Arb Rules governs the challenge procedure of Mr. Prasad. The parties agreed that UNCITRAL Arb. Rules shall govern the Arb. rules. The tribunal was constituted in accordance to the parties' agreement. Thus, the appointing authority has the jurisdiction to decide upon the challenge of Mr Prasad. Also, the Cl. Can not rely on the Contra Proferentem Principle in interpreting the Arb. Clause since the principle of Contra Proferentem applies where the situation concerns mass non negotiable consumers contracts.

Part Two: Mr Prasad is not entailed to participate in arbitral tribunal.

Mr. Prasad met the time limit according to the UNCITRAL Rules And his challenge is based on an admissible evidence. The Resp raised sufficient and justifiable reasons to challenge Mr. Prasad and the exclusion of Mr. Prasad does not impact the tribunal's voting power. Mr. Prasad also failed to disclose any conflict of interest.

Part Three: Cl. did not perform his contractual obligations:

The Cl failed to deliver conforming good. The Resp also was unaware of the lack of conformity. The General Conditions Of Resp. shall govern the contract. Since the Cl did not deliver conforming goods according to the contract, the Cl. Breach constituted a fundamental breach to the contract and thus the Resp avoidance of the contract is justified.

**PART ONE: THE CHALLENGE OF MR. PRASAD SHOULD BE DECIDED IN
ACCORDANCE WITH THE PARTIES' AGREEMENT**

**A. Art. 13(4) UNCITRAL Arb. Rules Governs The Challenge Procedure
Of Mr. Prasad**

1. The Parties agreed that UNCITRAL Art Rules shall govern the contract. The tribunal was constituted in accordance to the parties' agreement, prior to the RESP's knowledge of the risen matter. The RESP initiated challenge proceedings against the arbitrator appointed by the CL..(Problem P. 12)
2. The involvement of an appointing authority to look on the matter of the challenge of Mr. Prasad is mandatory. Art. 13(4) UNCITRAL Arb. Rules states that an appointing authority has to look upon the matter if there is no agreement reached between the two parties on the matter of the challenge. Art. 13(4) UNCITRAL Arb. Rules is applicable according to the dispute resolution clause found in the contract when stating: "Any dispute... shall be settled ... in accordance with the UNCITRAL Arb. Rules..."(RULES Art. 13(4))
3. The parties have agreed that any dispute shall be governed by the UNCITRAL Arb. Rules explicitly in the dispute resolution clause, making the parties agree on all Articles of the governing laws implicitly. Due to the consensual application of the governing laws on Arb., Art. 13(4) apply in giving an appointing authority the jurisdiction to rule on the matter of the challenge of the CL.'s arbitrator. (*Id.*)
4. The parties agreed to the non-involvement of any arbitral institution on the matters regarding "disputes, controversy or claim arising out of or relating to this contract..." The agreement upon the matter of the non-involvement of arbitral institution in the dispute resolution clause was regarding to matter arising for the contract itself and not regarding to matters that deal with procedures of appointing the arbitrators including the challenge of any arbitrator.(Problem P. 6)
5. Furthermore the CL.'s agreement to the UNCITRAL Arb. Rules contradict with his request of the non-involvement of arbitral institutions due to the fact that several article of the UNCITRAL Arb. Rules gives jurisdiction to an external institution to be involved with the Arb. in procedural matters.(Problem P. 6)

B. The Cl. Cannot Rely On The Contra Proferentem Principle In Interpreting The Arb. Clause

6. The CL. has agreed on the exclusion of the involvement of any arbitral institution due to its past experience with problems in appointing a presiding arbitrator, which was explicitly mentioned to the RESP however, the CL. did not indicate nor explicitly states that the non-involvement of arbitral institution is to be applied on procedural matters of the Arb..(Problem P. 6)
7. CL. was the party, which was insistent on the addition of a clause regarding the non-involvement of any arbitral institution. The RESP's intent in the application of the CL.'s clause is to have it apply on subjective matters of the case regarding the contract only. The non-involvement of any arbitral institutions was explicitly as stated in the contract to be governing issues regarding the contract and not regarding procedural matters including the challenge of an arbitrator.(Problem P. 6)
8. The Californian court of appeal ruled that the principle of Contra Proferentem applies where the situation concerns mass non negotiable consumers contracts.(KLASS, IMBURIA)
9. The Arb. clause is part of the tender offer that has been submitted by the Resp in the invitation to tender giving the Cl. the power to amend this clause yet the Cl. did not amend it(Problem p.16).
10. The applicability of Art. 13(4) is not a matter that has room for discussion; both parties have agreed to be governed by the UNCITRAL Arb. Rules within the dispute resolution clause found in the contract. Art. 13(4) mandates that in the event that "all parties do not agree to the challenge...it shall seek a decision on the challenge by the appointing authority" giving jurisdiction on the matter to be decided by an appointing authority.(RULES Art. 13 (4) , GRID)
11. In applying 13(4) of the UNCITRAL Arb. Rules, Art. 6(1) of the Rules states that: "unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arb." giving jurisdiction to the PCA also to look on the matter of the challenge of Mr. Prasad.(RULES Art. 6(1), 13(4))

12. The purpose of Art. 6 of the UNCITRAL Arb. Rules is to provide guidance as to what is to be done in the case that both parties have not reached an agreement over the issue of challenging an arbitrator. The importance of the inclusion of an appointing authority or a third person is to have neutrality and equality overseeing the issue between the parties in applying principles of independence and impartiality upon the ruling of issues between the two parties.(RULES Art. 6)
13. Regards must be given to the importance of the law of the seat. The parties have agreed that the seat of Arb. shall be in Vindobona, Danubia. In applying the Danubian Law which is the UNCITRAL Model Law, Art. 13(3) states that: “If a challenge under any procedure agreed upon by the parties...is not successful...the court or other authority specified in Art. 6 to decide on the challenge”. (UNCITRAL Art. 13(3))

PART TWO: MR PARASAD IS NOT ENTAILED TO PARTICIPATE IN ARBITRAL TRIBUNAL

A. Mr. Prasad Met The Time Limit Under 13(1) UNICITRAL Arb. Rules

14. The challenge of Mr. Prasad was conducted within a timely fashion in accordance with the governing laws on procedural matters on challenging an arbitrator. Under the governing laws being the UNCITRAL Arb. Rules, Art. 13(1) states: “A party that intends to challenge an arbitrator shall send notice...within 15 days after the circumstances mentioned in Art. 11 and 12 became known to that party”.(RULES Art. 11, 12, 13(1))
15. Under Art. 13(1), the RESP was given a 15-day time bar to file for a challenge against the CL.’s arbitrator. The circumstances that gave rise for the RESP to file for a challenge was brought forth on the 11 September 2017. (Page 36 of the Record). The date of filing for the challenge was on 14 September 2017 (Page 37 of the Record).(Rules Art. 13(1), Problem P. 36, 37)
16. From the date of the risen circumstance till the date of the filling for the challenge, the days are accumulated to be 3 days which falls within the 15-day time bar making the filling of the challenge of Mr. Prasad within the given time and admissible.(Problem P. 36, 37)
17. Furthermore, on the application of Art. 13(1) UNCITRAL Arb. Rules, In Amoco and Islamic Republic of Iran Case No. 55, “Iran alleged that Briner had a past relationship

with the Swiss subsidiary of Morgan Stanley”, with the challenge being successful “Judge Briner withdrew from Case No. 55...approximately three months after the challenge was formally made by the Iranians”. The challenge made by the RESP was done within the time bar but, in the event that the tribunal finds that it was out of time, the moral of the Case No. 55 shows that even with the overstepping of time bars consideration is to be made to the importance of arbitrator neutrality when handling a case. (RULES Art. 13(1), AMOCO)

B. Mr. Prasad Challenge Is Based On An Admissible Evidence

18. The evidence against Mr. Prasad to for his conflict of interest are admissible before the arbitral tribunal to decide upon his challenge since arbitrators in many Arbitrations considered all evidences admissible before their court.(ADMISSION)

C. The Resp Raised Sufficient And Justifiable Reasons To Challenge Mr. Prasad

19. The RESP’s claim is in accordance with grounds for challenge. The UNCITRAL Model Law would be applied in this case being the law of the seat and the one that possesses a precise description of grounds for challenge. Art. 12(2) of the Model Law give the criteria on grounds for challenge when stating: “An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence”. (UNCITRAL Art.12(2), Problem P. 12)

20. Art. 12 of the UNCITRAL Arb. Rules give the right to challenge an arbitrator in the event of justifiable doubts. Such as: “previous employment by the parent corporation by a party and financial relationship with a party through shareholdings”. (RULES Art 12, CAPLAN)

21. In the IBA-Guidelines on Conflict of Interest under General Standard 2, in 2(d) it states that: “Justifiable doubts necessarily exist as to the arbitrators impartiality or independence...” what is found in the IBA-Guidelines is similar to what is found in the UNCITRAL Model Law in the sense of justifiable doubts as to the arbitrators impartiality and independence meaning that applying the IBA-Guidelines would be parallel to the UNCITRAL Model Law in outcome. The justifications mentioned above are reason enough to meet the criteria set in the IBA-Guidelines on grounds for challenging the CL.’s arbitrator.(IBA 2(d))

22. Moreover, the use of the IBA Guidelines by the RESP is merely as guidance as to how to resolve the existence of a third party's conflict of interest with an arbitrator that might give rise to issue with the arbitrators impartiality or impence. The applicability of the IBA Guidelines in our case would be beneficial to resolve engagements dealing with conflicts of interests as "they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence". (IBA Preamble)
23. "Justifiable doubts will exist if...There is an identity of interest between a party and the arbitrator...The arbitrator has a significant financial or interest in the matter at stake" the CL.'s arbitrator has a connection with the CL. due to the existence of a third party funder and a relation of precious judgment for the CL..(MAY)
24. Moreover, the fact that an arbitrator was a previous representative for the party appointed by, is enough grounds for challenge. The CL.'s arbitrator previously rules on tribunals for the CL. making it enough to be considered as a justifiable doubt to his independence and impartiality and is grounds enough to challenge.(PITKOWITZ)
25. The challenge met grounds derived for all governing laws and international guidelines and practices, was within the time bar making CL.'s claim of inadmissibility of the challenge and claim to dismiss the challenge not justifiable due to the criteria met by what is required to challenge an arbitrator with no flaw or error.

D. Exclusion Of Mr. Prasad Does Not Impact The Tribunal's Voting Power

26. According to Art. 10 of the UNICIRAL Model Law the exclusion of Mr. Prasad has no effect on diminishing the tribunals voting power. The inclusion of Mr. Prasad would have a negative effect on the voting on the case due to the fact that naturally and pursuant to international guidelines a judge or arbitrator cannot view or review his own case. In including Mr. Prasad while he is challenged it would give rise to justifiable doubts of impartiality and independence due to a sense of distrust from the judgment of Mr. Prasad towards the RESP.(UNICITRAL Art. 10)
27. Having a decision brought forth by the tribunal with an incomplete composition is to be considered unlawful due to the fact that the tribunal has to be composed of three arbitrators. The governing laws agreed upon mandate the inclusion of three arbitrators. More importantly the contract itself when the parties stated in (Page 6 of the Record

under Clause 20:Dispute Resolution (a)): “The No. of arbitrators shall be three”.(Problem P. 6)

28. Under Art. 10 of the UNCITRAL Model Law states (1): “The parties are free to determine the No. of arbitrators”, the parties have already agreed on the seating of three arbitrators. (UNCITRAL Art. 10 (1))
29. If the No. of arbitrators is not what is agreed upon or with the inclusion of the challenged arbitrators, the tribunal shall be deemed unlawful and an appointing authority or a competent court shall look on the matter of the seating of the arbitrators and the challenge of Mr. Prasad.

E. Mr. Prasad Failed To Disclose Any Conflict Of Interest Under Art. 11 Of The UNICITRAL Rules

30. Mr. Prasad was under the obligation by governing laws and international norms and customs to disclose of any reasons that may give rise to justifiable doubts as to his impartiality or/and independence, and any reasons that may result to conflicts of interest. General Principle (1) of the IBA Guidelines states that: “Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated”. (IBA (1))
31. Moreover, General Standard 3 of the IBA Guidelines states that: “The arbitrator’s duty to disclose under General Standard 3(a) rests on the principle that parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view”, under the IBA Guidelines Mr. Prasad was obligated and had the duty of informing the RESP of any facts or circumstances that may lead the RESP to believe that he shall not be subject to the principle of neutrality and equality in arbitrator. (IBA (3) (a))
32. Furthermore, pursuant to Art. 11 UNCITRAL Arb. Rules, Mr. Prasad should have disclosed of any circumstances that could give rise to justifiable doubts. “Disclosure at both pre-and post-appointment stages helps avoid selection of an arbitrator who may be successfully challenged later and thereby avoids interruption of the arbitral proceedings”. The dusty to disclose of any circumstances by the CL. or Mr. Prasad is one of importance to the ongoing process of continuation of the arbitral proceedings without any

interruption, to have the matter resolved in a timely manner and to keep business relations intact and in well health. (RULES Art. 11, CAPLAN)

PART THREE:CL. DID NOT PERFORM HIS CONTRACTUAL OBLIGATIONS

- A. The Failed To Deliver Conforming Good Pursuant To Art. 35 (1) (2) CISG**
33. To define the obligations of the CL., under Obligations of the Seller, Art. 30 of the CISG states that: “The seller must deliver the goods...as required by the contract”. The CL. did not fulfill his contractual obligations due to deliverance of goods non-conforming to the description in found in the contract. (CISG Art. 30)
34. Moreover a commentary on Art. 30 states that “the primary obligations which have to be fulfilled and the content of these obligations have to be evaluated primarily by examining the parties’ agreement and any applicable usages and practices established between the parties, Arts 6 and 9. Party autonomy prevails over the provisions of the CISG, even if the obligations are stipulated in model contracts or in General Terms and Conditions” such as the one in our case, the parties have agreed on specific certain terms of the CL.’s obligations towards the RESP and, the CL. had not performed his obligations as per the contract. (CISG Art. 30, 6, 9)
35. To further explain the conformity of goods, Art. 35 of the CISG set the standard requirements for goods to be conforming to the contract and the convention. Art. 35(1) states that: “The seller must deliver goods which are of the quantity, quality and description required by the contract”. The CL. delivered goods, which are not up to standard of being in conformity with the contract. (CISG Art 35(1))
36. The RESP explicitly stated that the goods be confirming with the RESPS code of conduct. The CL. did not conform with contract when he delivered goods that are relating to “corruption, extortion and bribery” (Problem P.14) in the manufacturing process which, is against the contract and the governing law being the CISG and Art. 35(1) specifically. (Problem P. 14,CISG Art. 35(1))
37. Art. 35(1) CISG “emphasized a point that could go without saying: the parties must comply with their contract. Uniform Commercial Code also emphasizes the importance of the contract” and provisions they are mandated by a party to perform. The importance of the contract is to show the obligations of the two parties. The CL. was obligated to sell

goods conforming with the RESP's Business Ethics which, he did not, making him non-compliant with the contract and governing laws. (CISG Art. 35(1), HONNOLD)

38. Art. 35(2) (a) states that for the goods to be conforming they have to be "fit for the purposes for which the goods of the same description would ordinarily be used". The RESP's purpose for the goods is to resell goods conforming with the RESP's code of ethics and description to supermarket chains. The Goods delivered to the RESP were not fit for the purposes for which the goods would ordinarily be used meaning, the CL. delivered goods, which are non-conforming with the contract, and governing laws. (CISG Art. 35(2)(a))
39. The CL. is obligated by Art. 35(2) (a) to sell goods conforming to the contract. "A seller who is informed by the buyer that the buyer wants to use the goods exclusively for a particular purpose can normally assume that the goods do not have to be fit for other purposes even if they belong to their ordinary purpose in the sense of Art. 35(2) (a)". (CISG Art. 35(2)(a))
40. Art. 35(2)(b) states that for the goods to be conforming they have to be: "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract". The RESP made it expressly known to the CL. the purposes of the goods, the CL. had an obligation to perform under the contract, delivering non-conforming goods is not in accordance with the contract meaning, the CL. has not performed his contract obligations under the contract itself and the governing laws. (CISG Art. 35(2)(b))
41. "The structure of paragraph (2)(b) may lead tribunals to conclude that the buyer makes a prima facie case by showing that the seller knew of the buyer's particular purpose at the time of the conclusion of the contract and that the goods were unfit for that purpose; the seller then has the burden to show that "the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment"". (CISG Art. 35(2)(b), HONNOLD)
42. The order that reached the RESP between 16 December 2016 and 27 January 2017 were non-compliant with what the RESP has contracted on. The goods were non-conforming with the contract and the CISG Art. 35 specifically due to them being non-compliant with Global Compact standards, the RESP's General Conditions, the Contract and having linked to bribery and extortion methods of production. (Problem P. 6 (16), CISG Art. 35)

43. To demonstrate the applicability of Art. 35 “The Austrian Supreme Court heard a dispute involving wall panels that were to be sold “ex factory” from a business in Germany to a buyer in Vienna. The panels that were shipped were non-conforming panels, in that they were not “formatted” as agreed in the contract. The appellate court held that the shipping of non-conforming panels constituted a delivery of non-conforming goods and a breach of contract.” (CISG Art. 35, LUCIEN)

**B. The Resp Was An Aware Of The Lack Of Conformity Under Art. 35 (3)
CISG**

44. The CL. cannot order applicability of 35(3) due to the fact that for the Art. to be applicable it states that “if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity”. (CISG Art. 35(3))
45. Moreover, in the case of Alpha Prime Development Corporation v. Holland Loader Company, LLC, and Steven Michael Svatek, before the Court on the Plaintiff’s Motion on the first claim for relief for delivery of non-conforming goods against seller. Buyer asserts that summary judgment on the first claim is proper based on sellers admitted failure to deliver a refurbished piece of coal mining equipment.(CISG Art. 35, ALPHA)
46. In the case of Delchi Carrier, S.p.A. v. Rotorex Corp., Judge Cholakakis held that “there is no question that Rotorex’s compressors did not conform to the terms of the contract between the parties and noted that “there are ample admission by Rotorex to that effect.” We agree. The agreement between Delchi and Rotorex was based upon a sample compressor supplied by Rotorex and upon written specifications regarding cooling capacity and power consumption. (CISG Art. 35, DELCHI)
47. The RESP. was unaware of the circumstances leading to the non-performance or non-compliance of the CL. because in regards to the matter of overseeing the production of the ingredients and the cake, the RESP. specifically stated that the CL. would oversee the matters of production of the ingredients and the cakes in the General Conditions P13(C) when stating to the CL.: “You shall provide a safe and healthy workplace for all your employees and shall conduct your business in an environmentally sustainable way. In particular, you will...” and then stated what the CL. is obligated to perform which, he had not. (Problem P. 13 (c))

C. The General Conditions Of Resp. Apply To The Contract

48. The RESP stated in the Tender Documents in the Invitation to Tender specifically under Art. 5 Page 11 of the Record when stating what the contract is made up of being “The Special Conditions of Contract” and “The General Conditions of Contract”. Making his statement of the applicability of the RESP’s General Conditions express and explicit. (Problem P. 11)
49. The CL. submitted its offer on 27 March 2014 (Page 16 of the Record Exhibit C3) and replied to the Invitation to Tender made by the RESP with accepting all conditions except changing the shape and size of the goods and the payment method. (Problem P. 16)
50. Furthermore the document of the Offer made by the CL. stated in the footnotes “The above offer is subject to the General Conditions of Sale and our Commitment to a Fairer and Better World”. The statement does not constitute a request to have the contract governed by the General Conditions of the CL. due to the fact that it being in the footnote of the document it is referring to the document itself and not the Contract. (Problem P. 16)
51. The footnote found in Record Page 16 stating that the CL.’s General Conditions apply is not applicable to the contract due to being a fine print and having only apply to the Tender and not Contract. Firstly, there was no mutual agreement since there was no opportunity to reject the provision. Secondly, the provision was too inconspicuously printed, considering the importance of the provision. Thirdly, the provision was not negotiating and is contrary to the RESP’s terms. (Problem P. 16)
52. Furthermore, courts usually nullify clauses, which are in fine prints and considered inconspicuous. In the case of Seibel v. Layne & Bowler, Inc. the court nullified an inconspicuous merger clause, which effectively excluded oral warranties since unfair surprise made it unconscionable. The CL.’s clause found in the footnote is inapplicable and has no legal weigh in application. (LAYNE, Problem P. 16)
53. If the CL. was requesting to have his General Conditions apply to the Contract he would explicitly request it as the RESP has done and not have it in the footnote of his offer, it would have been within the offer with the request of changing the size, shape and payment method. (Problem P. 9)

54. The offer that is to be derived from the document sent by the CL. is acceptance to the RESP's Initiation to Tender with the changing of the size, shape and payment method of the goods. (Problem P. 10)
55. The CL.'s document on Page 16 of the Record is constituted as an offer and not a counter offer to the RESP's Invitation to Tender. In addition to the document being labeled as "Sales-Offer", Art. 14 of the CISG Under Formation of the contract it defines an offer as "A proposal of concluding a contract addressed to one or more specific persons constitutes an offer". (Problem P. 16, CISG Art. 14)
56. The CL.'s document on Page 16 of the Record is enough to be deemed an offer. In the case of Golden Valley Grape Juice and Wine, LLC v. Centriys Corporation/ Centriys Corporation v. Separator Technology Solutions Pty Ltd., STS' offer was contained on 29 February 2008 a sales quote to Thomas Junod, of Centriys. In an email dated 29 February 2008, STS sent, and Centriys received, sales quote for the sale of STS200 centrifuge to Centriys. The email was deemed as an offer under the CISG, this sales quote was sufficient to constitute an offer. A proposal is an offer if it is sufficiently definite to "indicate the goods and expressly or implicitly fix or make provision for determining the quantity and price". (CISG Art. 14, Problem P. 16, CENTRIYS)
57. On 7 April 2014 (Page 17 Exhibit C5 of the Record), the CL. sent the RESP a counter-offer with conditional acceptance on performance of RESP's counter-offer. Art. 19 of the CISG best defines a counter offer as being (1): "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer". The RESP's silence on the matter of the applicability of the CL.'s general conditions is a rejection making it a counter-offer. (CISG Art. 19(1), Problem P. 17)
58. Under Art. 19(1) CISG. The CL.'s documents that were sent on 7 April 2014 constitute a counter-offer. "Art. 19(1) states the basic principle that the terms of an acceptance must fully correspond to those of the offer in order to count as an acceptance of the offer and lead to the conclusion of the proposed contract...Art. 19(1) determines the relationship that must exist between the contents of the offer and that of the acceptance in order to lead to the conclusion of the contract...For Art. 19(1) to apply, the offeree must act with the intention to be bound when issuing the acceptance". (CISG Art. 19(1), Problem P. 17)

59. In regards to the application of Art. 19(1) CISG, in the case of CSS Antenna, Inc., Plaintiff v. Amphenol-Tuchel Electronics, GMBH, Defendant; the seller contends that the buyer then accepted its counteroffer, including the forum selection clause, by receiving its components and paying for the goods. The buyer argues that, although it accepted the seller's components, it did not accept the General Conditions for two reasons: (1) under the CISG, a party's express acceptance to a forum selection clause contained in a order confirmation form is necessary for it to become party of a contract, and (2) the language on the seller's purchase confirmation form was not sufficient to put the buyer on notice that the seller intended to incorporate the General Conditions into their contract. (CISG Art. 19, ANTENNA)
60. The buyer relies on two cases to support its argument that a forum selection clause contained in a seller's order confirmation form does not become part of a contract unless the buyer affirmatively assents to the proviso. (*Id.*)
61. RESP's silence on the counter-offer on the matter of the applicability of the CL.'s General Conditions does not constitute as acceptance. Art. 18 of the CISG states (1): "...Silence or inactivity does not in itself amount to acceptance". Due to the RESP's silence on the matter of the CL.'s General Conditions, it is implied or in accordance with Art. 18 explicit rejection to the CL.'s General Conditions and acceptance to have the RESP's General Conditions apply. (CISG Art. 18(1))
62. Professor Peter Schlechtriem states that: "The acceptance of an offer can be communicated verbally or by conduct indicating assent (Art. 18(1) sentence 1). Whether conduct should be interpreted as acceptance is determined by Art. 8. According to Art. 18(1) sentence 2, silence or inactivity as a reaction to the offer does not indicate acceptance. This rule, an extension of the idea behind ULF Art. 2 sentence 2, is intended to prevent the offeree from being taken by surprise (such as when a shipment of unordered goods is sent with an offer stating that by not returning the goods the offeree accepts the offer). (CISG Art. 18(1), SCHLECHTRIEM)
63. The wording "in itself" makes it clear, however, that silence in connecting with other circumstances can be considered as acceptance, particularly on the basis of Art. 8(3). In addition, silence can, as an exception to the rule, have the effect of acceptance on the basis of usages which are legally relevant under Art. 9". (*id.*)

64. The CL.'s performance to the RESP's counter-offer and terms institutes acceptance of the RESP's standards and General Conditions. Art. 18(1) states that: "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance..." (CISG Art. 18(1))
65. "According to the rule in 18(1), an acceptance may consist of a statement or of other conduct, e.g., shipping goods which the buyer has offered to buy. Whatever the form, for a statement or conduct to constitute an acceptance it must provide some indication of the offeree assent. On the other hand, since the CISG does not impose upon the offeree a general duty to reply, silence or inactivity does not – in itself – amount to acceptance. Therefore, the offeror cannot bind the offeree in advance merely by stating that silence will be treated as an indication of the offeree assent. Then again, if the offeree initiates a transaction by soliciting an offer, he – the offeree – may bind himself in advance by indicating that an offer received will be deemed accepted absent contrary indication by the offeree within a specific period". (CISG Art. 18(1), LOOKOFSKY)
66. Subject to Art. 18(1) of the CISG, The CL. made its first delivery on 1 May 2014 onwards (Page 5 (#6) of the Record). The CL. Performance of delivery on 1 May 2014 constitutes as acceptance to RESP's counter-offer and constitutes as acceptance to the General Conditions of the RESP. (CISG Art. 18(1), Problem P. 5)
67. Furthermore, In the case of Hughes v. Societe Technocostact, An English buyer, the defendant, approached a French seller, the plaintiff, with a view to purchasing hooks and sockets for fitting to electrical connectors. Several facsimiles were exchanged between the parties. The buyer filled out a purchase order, stating he quantities, references and unit price per socket. The seller submitted an acknowledgement of receipt of the order, setting out the seam terms as the purchase order. The buyer subsequently ordered an additional quantity of hooks from the seller. (CISG Art. 18, HUGHES)
68. Art. 18(3) of the CISG states that: "...the acceptance is effective at the moment the act is performed". The CL. acted in conformity with what is required by the contract, the counter-offer of the RESP and the General Conditions of the RESP making his act of performance of delivery of the goods amount to acceptance of the RESP's General Conditions. (CISG Art. 18(3))

69. In regards to Art. 18(3) CISG, in the case No. CISG/1997/34, the Arbitral Tribunal held that pursuant to Art. 18(3) CISG, loading the goods is considered to be acceptance. Furthermore, in the case of Kahn Lucas Lancaster, Inc. v. Lark International Ltd. The issue before the Court was whether parties had entered into an enforceable Arb. agreement. The district court found, however, that the defendant acted as seller. The court held that the purchase orders were offers that the defendant accepted by performing in accordance with the orders. (CISG Art. 18(3), LANCASTER)
70. Art. 23 of the CISG states that: “A contract is concluded at the moment when an acceptance of an offer becomes affective in accordance with the provisions of this convention”. The Convention referred to in the Art. being the CISG lays out as to what amounts to acceptance. Art. 18 of the CISG states that the CL.’s performance of delivery of the goods on 1 May constitutes acceptance. (CISG Art. 18, 23)
71. With the applicability of Art. 18 of the CISG, Art. 23 of the CISG therefore is applicable. The performance of the CL. in delivery constitutes as acceptance, with the performance of acceptance, applying Art. 23 of the CISG makes the CL.’s performance a conclusion of the contact therefore making the CL. accept the General Conditions of the RESP’s apply to the contract upon conclusion. (CISG Art. 18, 23)
72. “A contract is concluded when the communications between and actions of the parties, as provided in Art. 18 and as interpreted in accordance with Art. 8, establish that there has been an effective acceptance of an offer...Once a contract is concluded, subsequently communications may be construed as proposals to modify the contract. Several courts subject these proposals to the Convention’s rules on offer and acceptance” (CISG Art. 18, 23, DIGEST)

D. The Cl. Committed A Fundamental Breach To The Contract

73. Within the General Conditions found on page 12 of the Record, under Clause 4(3) states that: “Any breach of some relevance to 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”. (Problem P. 12)
74. In the Contract, the RESP is entitled to terminate the contract under any fundamental breach by the CL.. The RESP terminated the contract after the last delivery of 600,000

cakes between 16 December 2016 and 27 January 2017 due to the CL. committing a fundamental breach of the Contract. (Problem P.6)

75. To define the CL.'s breach, reference is due to the governing law being, the CISG. Art. 25 of the CISG states that: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract". (CISG Art. 25)
76. "Professor Schlechtriem has argued that detriment cause by a breach must be foreseeable at the time the contract was concluded in order to satisfy the requirements for a fundamental breach. He notes that Art. 25 defines fundamental breach in terms of the expectations created by the contract: thus, he asserts, determining whether a breach is fundamental is a matter of interpreting the parties contract; the foreseeability rule in Art. 25, he reasons, is "a 'substitute' for the need to reach clear agreement in the contract on the importance of those matters, i.e., it can make an appropriate interpretation of the contract possible." The implication of this approach is that "the importance attached by a promise to a particular obligation, which has been shown otherwise than by express agreement, must nevertheless be fixed by the time the contract is concluded"." (CISG Art. 25, PROFESSOR)
77. In accordance with Art. 25 of the CISG, the CL. deprived the RESP of "what he is entitled to expect under that contract". The RESP expected to have his goods in conformity with the contract and his General Conditions, when the RESP received goods not of the same quality and standards expected with the requirements by the contact, parallel to the CISG the CL. therefore constituted to have breached the contract fundamentally. (CISG Art. 25)
78. In the case of *Delchi Carrier, S.p.A. v. Rotorex Corp.* 1995, in regards to Art. 25, In granting summary judgment, the district court held that "there appears to be no question that Delchi did not substantially receive that which it was entitled to expect" and that "any reasonable person could foresee that shipping non-conforming goods to a buyer would result in the buyer not receiving that which he expected and was entitled to receive." Because the cooling power and energy consumption of an air conditioner compressor are important determinants of the product's value, the district court's

conclusion that Rotorex was liable for a fundamental breach of contract under the Convention was proper.(CISG Art. 25 DELCHI)

79. Moreover, Art. 36 of the CISG (2) states that: The seller is also liable for any lack of conformity...which is due to a breach of any of his obligations”. Applying the CISG, the CL. failure to fulfill and perform his obligations with delivering goods that are in conformity with the contract makes him liable for his action and is a cause of breach under the CISG. The CL.’s breach under the CISG and the Contract makes him liable and gives the RESP the right to terminate the Contract as agreed upon in the Contract and as stated in the CISG that the RESP has the right to consider the Contract void. (CISG Art. 36(2))
80. Art. 36 (2) states “The breach may occur before or after the passing of the risk. For subsequent breaches, however, it is necessary that the obligations and its breach are closely related to the contract”. (CISG Art. 36(2))
81. Art. 45 of the CISG gives out the Remedies for breach of contract by the Seller. The Art. 45(1) states: “If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in Art. 46 to 52...(2) the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies...(3) No period of grace may be granted to the seller by a court of arbitral tribunal when the buyer resorts to a remedy for breach of contract”. (CISG Art.45, 46-52)
82. Therefore, the RESP has the right to perform any of the remedies mentioned within the CISG furthermore, he is not deprived of any of his rights when he exercises his right to other remedies, moreover No period of grace may be granted to the CL. by a court of arbitral tribunal when the buyer resorts to a remedy for breach of contract.

E. The Resp Avoidance Of The Contract Is Justified under Art. 49(1) CISG

83. In exercising the rights given by the CISG and Art. 45, Art. 49 states: (1) The buyer may declare the contract avoided: (a) If the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract”. The RESP declared contract void due to the CL.’s breach when he delivered goods non-conforming with what is mandated in the contract and the governing laws giving him the right to consider the contract void due to the CL.’s breach and under the CISG. (CISG Art. 45, 49(1)(a))

84. “It is submitted that one can discern from those sources a consistent approach to the criteria that may be used when deciding on the whether the seller’s breach was fundamental in the sense of Arts 25 and 49(1)(a). On that basis there would essentially be four criteria which can be taken into account when deciding on the fundamental character of the non-performance, i.e. the contractual agreement, the seriousness of the breach, the seller’s right to cure and (arguably) the reasonable use test.” (CISG Art. 49(1)(a))
85. In regards to Art. 49(1)(a) and the four criteria set; firstly, the CL. breached the contract fundamentally. Secondly, the breach was of a serious and fundamental nature due to non-conforming goods. Thirdly, the seller’s right to cure was no performed due to the serious nature of the breach. Fourthly, it is only reasonable to find that the RESP deems the contract void due to the extent of the seriousness of the fundamental breach brought forth by CL.. (CISG Art. 49(1)(a))
86. Art. 50 gives an action that may give the RESP the right to consider the contract void when stating: “IF the goods do not conform with the contract”. For the CL.’s goods to be in conformity with the contract they have to be upon the standards of the RESP’s General Conditions stated in the contract. With the goods being non-conforming to the contract, the RESP has the right under the CISG to consider the contract void. (CISG Art. 50)
87. “Art. 50 of the CISG provides the buyer with the unilateral right to reduce the price of the purchased goods if they do not conform to the contract, to the amount that buyer would have been paid had the buyer known of the non-conformity, unless the seller cures the non-conformity. Price reduction under CISG Art. 50 is said to be advantageous because it is a self-help remedy. It was drafted from the perspective of the buyer. It is the buyer that has the option and the power to reduce the price paid (or to be paid) to the seller. (CISG Art. 50, CHENGWEI)
88. While civilian legal system require expert advice or the court to determine the difference in value between the contract price and the actual value, the CISG gives this power of determination solely to the buyer. On this basis, price reduction can be seen as a self-help remedy that can be implemented by the buyer without any requirement to have the determination upheld by a court, expert or other tribunal.” (CISG Art. 50, Id.)
89. Furthermore, “Art. 50 confer on the buyer a right to reduce the price of non-conforming goods in lieu of claiming damages (assuming there is a right to damages). Art. 50 was

amended at Vienna by substituting, in line 3, the value of the goods at the time at delivery for their imputed value at the time of the conclusion of the contract as the basis for determining the reduction in price. (ZIEGEL)

90. The provincial Acts contain no comparable provision and art. 50 must not be confused with the right to set-off recognized in OSGA 51 and its other provincial counterparts. Art. 50 is based on the notion that it is unjust to require the buyer to pay the full price for non-conforming goods, and the right to claim a price reduction must be carefully distinguished from the right to claim damages”. (Id.)
91. Art. 51(2) of the CISG states: The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract”. The Art. gives the RESP the right to declare the contract avoided due to the CL.’s failure to deliver the goods in conformity with the contract. In the application of Art. 51 and the CISG, the contract is terminated and void after the CL. committed a fundamental breach of the contract when dealing with fraudulent suppliers who are against the RESP’s General Conditions Policy. (CISG Art. 51(2))
92. Pursuant to Art. 51(2) CISG, in case of Shanghai Anlily International Trading Co., Ltd. v. J&P Golden Wings Corp., the buyer discovered that the goods delivered were severely defective, and were not fit for the standard agreed upon in the Contract making the seller’s conduct constitute a fundamental breach of the Contract. The buyer filed this case with the Court and requested the Court to Terminate the Contract concluded by the parties. In conclusion, according to Art. 51(2) and 81(2) of the CISG, the Court ruled to grant the buyer his request and terminated the contract between the parties. (CISG Art. 51(2), 81(2), SHANGHAI)
93. “As regards avoidance, paragraph (1) of Art. 51, represents an amplification of Art. 49(1): the general rule for part-performance is avoidance in part. Against this background, paragraph (2) of Art. 51 re-states the obvious: ‘The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the [entire] contract.’” (CISG Art. 51(2), JOSEPH)

94. The CL. should of known or ought have known of the crimes and breaches committed by his supplier. The CL. was the one obligated to oversee the matters of supply and if they were in conformity with the requirements of the RESP or not. The CL. was negligent in dealing with the SUPPLIERS conducts, this is proven through the fact that the CL. found out about the suppliers breach after investigation meaning that the CL. did not have routine checkups and did not investigate and oversee the supplier until the RESP ordered him to do so. The RESP therefore should not bare the negligence that was brought forth by the CL. and his non-conformity and breach of his contractual obligations of non-performance.

PRAYER FOR RELIEF

In light of the foregoing submissions, counsel respectfully submits that the Tribunal should order that:

1. The Appointing Authority has the jurisdiction to decide upon the challenge of Mr. Prasad.
2. Mr. Prasad should be excluded from of the arbitral tribunal.
- 3-The Resp. General Conditions should govern the contract.
- 4-The Cl. delivered non-conforming goods to the Resp..

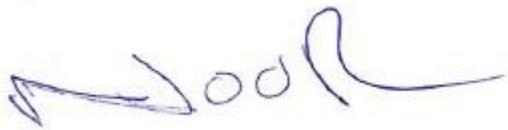
DANIA AL-AMEERI

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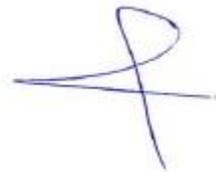
FAHED AL-OBAID

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NOOR AL-FARHAN

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SARA AL-HOUTI

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