Twenty–Fifth Annual Willem C. Vis International Commercial Arbitration Moot

Memorandum for Respondent

Qatar University College of Law

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

Counsel:

Amna Saif M S AlNaimi ◆ Aisha Ali Alhammadi ◆ Maryam Ahmed AlMaraghi
Maryam Yaqoub Al Jefairi ◆ Reihana Khoja ◆ Reem Hany Al Raeesi
Nada Salman A Eid ◆ Sara Ibrahim M A Al-Obaidli
Hanan Abdulwahed Abdulrahman ◆ Hiba Sekoura Oussedik

Doha, Qatar

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STATEMENT OF FACTS

CLAIMANT	Delicatesy Whole Foods Sp (hereafter "CLAIMANT") is a medium–sized manufacturer of high–end bakery products. CLAIMANT is registered in Equatoriana. CLAIMANT is a social enterprise, but places greater importance on the quality of the final product than it does on sustainable production. CLAIMANT is a member of the Global Compact.
RESPONDENT	Comestibles Finos Ltd (hereafter "RESPONDENT"), is the leading gourmet supermarket chain in Mediterraneo. RESPONDENT has a strong preference for sourcing its products locally, from organic farms, and requires all of its suppliers to use sustainable farming methods.
March 2014	RESPONDENT approached CLAIMANT at Cucina, the annual Danubian food fair. CLAIMANT and RESPONDENT discussed the possibility of entering into a business arrangement based on the high quality of CLAIMANT's products and the parties' shared business values.
10 March 2014	RESPONDENT sent an Invitation to Tender to CLAIMANT, along with the supporting Tender Documents.
27 March 2014	CLAIMANT submitted its tender offer to RESPONDENT, noting that the tender offer differed from the requirements of RESPONDENT's Tender Documents on two terms: product specifications and payment terms.
7 Apr. 2014	RESPONDENT informed CLAIMANT that its tender offer had been accepted, including the two modified terms (product specifications and payment terms).
1 May 2014	CLAIMANT made its first delivery.

May 2014–Jan. 2017 The parties performed under the contract.

23 Jan. 2017 Michelgault, the leading business paper in Equitoriana, published an article on the report of a UNEP special rapporteur investigating deforestation in Ruritania, as well as widespread fraud and corruption in the various agencies tasked with protecting the remaining rainforest.

27 Jan. 2017 RESPONDENT sent an email to CLAIMANT seeking confirmation that CLAIMANT's suppliers all complied with the Global Compact Principles. RESPONDENT stated that until the issue was resolved, no further payments would be made nor deliveries accepted.

27 Jan. 2017 CLAIMANT replied the same day, stating that it was confident its Ruritanian cocoa supplier would not be party to any fraudulent scheme, but that it would immediately investigate and report back to RESPONDENT. CLAIMANT also informed RESPONDENT that it did not believe this concern justified RESPONDENT's decision to no longer perform under the contract.

10 Feb. 2017 CLAIMANT informed RESPONDENT that its cocoa supplier, Ruritania Peoples Cocoa GmbH, had in fact been involved in the scandal. CLAIMANT stated that it would be willing to take back the most recent shipment. CLAIMANT also informed RESPONDENT it had already secured a new supplier for sustainably–sourced cocoa beans.

12 Feb. 2017 RESPONDENT rejected CLAIMANT's offer, and terminated the contract. RESPONDENT refused to submit its last payment owed, stating it would withhold the payment as an offset against any damages incurred due to CLAIMANT's breach.

INTRODUCTION

1. CLAIMANT and RESPONDENT have enjoyed a long and profitable business relationship. CLAIMANT's failure to adequately monitor and discover the fraudulent behavior of one of its suppliers has brought this once fruitful relationship to an end.

2. CLAIMANT had an obligation to discover the fraud perpetuated by Ruritania Peoples Cocoa GmbH, and to guarantee the cocoa beans it used in its chocolate cakes were sustainably–farmed. CLAIMANT failed to do so, which constitutes a breach of the parties' agreement.

3. In terms of the procedural issues, the parties had previously decided on ad hoc arbitration, and had agreed to exclude the involvement of any arbitral institution. This was grounded in RESPONDENT's compelling need for confidentiality. As such, the parties agreed to exclude provisions of the UNCITRAL Rules that required the involvement of outside parties, which includes UNCITRAL Rules Art. 13.4.

4. Therefore, this Tribunal is the only body that has the power to decide on the challenge to Mr. Prasad. However, Mr. Prasad should not be allowed to participate in the decision–making process for two reasons. First, including him would allow him to act as a judge in his own cause. Second, his involvement has the potential to affect the decision–making process of the remaining members of the Tribunal. In both cases, the integrity of the removal process would be undermined **(Issue 1)**.

5. Additionally, this Tribunal should decide that justifiable doubts exist as to Mr. Prasad's impartiality and independence under UNCITRAL Rules Art. 12. Additionally, this Tribunal has the power to consider the IBA Guidelines on Conflict of Interest in the present dispute, and it should do so because it has high persuasive value.

6. Ultimately, Mr. Prasad should be removed from the arbitral tribunal for four reasons. First, Mr. Prasad's past connections with the main shareholder of Funding 12 Ltd (CLAIMANT's third–party funder) create justifiable doubts as to Mr. Prasad's impartiality and independence. Funding 12

Ltd actively participates in the decision–making processes of its subsidiaries. Second, Mr. Prasad's law firm's current relationship with the main shareholder of CLAIMANT's third–party funder creates similar justifiable doubts.

7. Third, Mr. Prasad did not satisfy his obligation to timely disclose the Vindobona Journal article. Such disclosure was important, because the statements he made in the article demonstrate a high likelihood of bias against RESPONDENT on the core issues under consideration in the present arbitration. Knowledge of the article in his initial disclosure would have certainly caused RESPONDENT to reject his appointment.

8. Taken separately, these situations each raise justifiable doubts as to his impartiality and independence. Taken together, they raise strong doubts that require his removal from the Tribunal **(Issue 2)**.

9. In terms of the substantive issues, RESPONDENT's standard conditions govern the contract under CISG Art. 18 because RESPONDENT's letter constituted an invitation to receive an offer that conformed to the Tender Documents, which included RESPONDENT's General Conditions and Supplier Code of Conduct.

10. RESPONDENT's acceptance of CLAIMANT's offer included only the changed product description and payment terms. It did not include an acceptance of CLAIMANT's General Conditions and Supplier Code of Conduct.

11. Under both CISG Art. 8 and UNIDROIT Art. 4, CLAIMANT was aware or could not have been unaware that RESPONDENT had always intended the Agreement to be governed by its General Conditions and Supplier Code of Conduct. Those terms were crucial to RESPONDENT's goal of becoming a Global Compact LEAD Company. A reasonable person in similar circumstances would have reached the same conclusion. Finally, the parties' negotiations, practices, usages, and subsequent conduct demonstrate CLAIMANT was aware of RESPONDENT's intent, of the value it placed on sustainable production, and of its goal to become a Global Compact LEAD Company **(Issue 3)**.

12. Since RESPONDENT's General Conditions and Supplier Code of Conduct are (and should be) applicable, CLAIMANT failed to deliver conforming goods under CISG Art. 35. Under CISG Art. 8 and UNIDROIT Art. 4, RESPONDENT reasonably agreed to the use of a "guarantee" standard, and would have never reasonably agreed to a "best efforts" standard of performance by CLAIMANT or its suppliers.

13. CLAIMANT failed to satisfy its obligations under CISG Art. 35 because it did not deliver goods that conformed to RESPONDENT's General Conditions and Supplier Code of Conduct. Under CISG Art. 35, conformity of goods relates to the fitness of goods for a particular purpose, which in this case *especially* includes the non–physical characteristics of production agreed to by the parties.

14. As such, CLAIMANT was required to guarantee compliance of its suppliers to RESPONDENT's General Conditions and Supplier Code of Conduct. It did not do so. Furthermore, CLAIMANT failed to satisfy even its own best efforts standard, as the deception was discovered easily enough when CLAIMANT looked into it (at RESPONDENT's request). Finally, CLAIMANT is not excused from its failure to perform because the fraud was not an impediment beyond CLAIMANT's control under CISG Art. 79 **(Issue 4)**.

ARGUMENT

ISSUE 1: UNDER UNCITRAL RULES ART. 13.4, THIS TRIBUNAL HAS THE AUTHORITY TO DECIDE ON THE CHALLENGE TO MR. PRASAD; HOWEVER HE SHOULD NOT BE ENTITLED TO PARTICIPATE AS A MEMBER OF THE TRIBUNAL FOR THAT PURPOSE.

(A) Under both CISG Art. 8 and UNIDROIT Art. 4, the parties intended to exclude UNCITRAL Rules Art. 13.4 from the arbitration agreement.

(1) Under CISG Art. 8.1 and UNIDROIT Art. 4.1.1, CLAIMANT was aware or could not have been unaware that RESPONDENT intended to exclude UNCITRAL Rules Art. 13.4 in the arbitration agreement.

15. CISG Art. 8.1 provides that "[s]tatements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." Similarly, UNIDROIT Art. 4.1.1 states that "[a] contract shall be interpreted according to the common intention of the parties." To the extent the two instruments govern the same issues, the rules found in the UNIDROIT Principles are consistent with the provisions of the CISG. [*Bonell, p. 2, § 2(a)*]. As such, commentary on the former has strong persuasive value. [*Bonell, p. 2, § 2(a); Gabriel, p. 51*].

16. If a party knew or could not have been unaware of the other party's intent, that intent will prevail. [*Farnsworth, p. 99*]. All extrinsic evidence, facts, and circumstances of the case, including the negotiations, will be considered when determining the parties intentions during the course of contract interpretation. [*CISG–AC, Op. No. 3, p. 3, § 3.2*].

17. UNCITRAL Rules Art. 13.4 states that "[i]f, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days

from the date of the notice of challenge, *it shall seek a decision on the challenge by the appointing authority*." [emphasis added].

18. In this case, the arbitration clause states that "[a]ny 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 or by analogy, of the UNCITRAL Rules on Transparency." [*Ex. C 2, p. 12*] [emphasis added].

19. It is clear that RESPONDENT had always intended to exclude UNCITRAL Rules Art. 13.4. Throughout the negotiation process, RESPONDENT had been adamant about avoiding the involvement of any arbitral institution. Confidentiality was a central motivating factor for RESPONDENT, and the parties had discussed this. [*Ex. R 5, p. 41; Challenge, p. 39, § 8*]. As such, CLAIMANT was aware or could not have been unaware of RESPONDENT's intent. The fact that the arbitration clause states "without the involvement of any arbitral institution," supports the conclusion that the parties intended to exclude any UNCITRAL Rules that would require the involvement of an external authority.

20. RESPONDENT was clear that excluding the involvement of any arbitral institutional was a top priority. [*Ex. R 5, p. 41; Challenge, p. 39, § 8*]. It had experienced breaches of confidentiality and resulting damage to its reputation in the past. [*Ex. R 5, p. 41; Challenge, p. 39, § 8*]. RESPONDENT decided to switch to ad hoc arbitration as a result, which by its very nature excludes the involvement of outside authorities.

(2) Under CISG Art. 8.2 and UNIDROIT Art. 4.1.2, a reasonable person in similar circumstances would have concluded that RESPONDENT intended to exclude UNCITRAL Rules Art. 13.4 from the arbitration agreement.

21. CISG Art. 8.2 states "[i]f the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." Similarly,

UNIDROIT Art. 4.1.2 states "[i]f such an intention (common) cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."

22. If there are no indicators of the parties' true intentions, CISG Art. 8.2 instructs the tribunal to apply the same understanding a reasonable person with similar experience would attribute to the statements and conduct of the other party in equivalent circumstances. [*PECL/CISG Art. 8, § 3(f)*].

23. In this case, a reasonable person in similar circumstances would have come to the conclusion that RESPONDENT intended to exclude UNCITRAL Rules Art. 13.4. As discussed above, not only does the arbitration agreement explicitly state there would be no involvement from arbitral institutions, but the discussions and negotiations surrounding the arbitration agreement made clear that confidentiality was RESPONDENT's primary motivation for switching to ad hoc arbitration. [*Ex. R 5, p. 41; Challenge, p. 39, § 8*].

24. UNCITRAL Rules Art. 13.4 contravenes the reason RESPONDENT chose ad hoc arbitration, and violates the parties' arbitration clause. If a dispute ever arose, RESPONDENT wanted as few people as possible to be involved in the arbitration, in order to maintain a high level of confidentiality. [*Ex. R 5, p. 41; Challenge, p. 39, § 8*]. UNCITRAL Rules Art. 13.4 undermines the reason behind RESPONDENT's decision to resolve disputes by ad hoc arbitration in the first place.

25. This supports the conclusion that a reasonable person in similar circumstances would have intended the arbitration agreement to exclude UNCITRAL Rules Art. 13.4.

(3) Under CISG Art. 8.3 and UNIDROIT Art. 4.3, the parties' negotiations, practices, usages, and subsequent conduct demonstrate that RESPONDENT never intended to include UNCITRAL Rules Art. 13.4 from the arbitration agreement.

26. CISG Art. 8.3 states that "[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case

including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties." Similarly, UNIDROIT Art. 4.3 states that "[i]n applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including... preliminary negotiations between the parties..." As such, surrounding circumstances are relevant in determining the intent of the parties.

27. Privacy is an important aspect of international commercial arbitration. [*Caron/Caplan, p. 120*]. In many arbitration cases, the parties' discretion is enough to prevent sensitive information from being disclosed. [*Caron/Caplan, p. 120*]. However, one of the principle attractions of ad hoc arbitration is the ability to resolve commercial disputes even more discreetly, without exposure to an institution. [*Caron/Caplan, p. 120*].

28. In this case, all surrounding circumstances related to the arbitration agreement shows that RESPONDENT highly valued confidentiality in the resolution of all matters related to the dispute. In addition to the language of the arbitration agreement and the discussions between the parties, RESPONDENT had included a strict confidentiality clause with a high penalty for breaches in all of its contracts. [*Ex. R 5, p. 41; Challenge, p. 39, § 8*]. As such, there is ample evidence that both parties were aware that RESPONDENT wanted to avoid the involvement of any outside parties, and why it was important to do so.

29. Therefore, the circumstances surrounding the formation of the arbitration agreement support the conclusion that the parties had intended to exclude UNCITRAL Arbitration Rules Art. 13.4.

(B) This Tribunal is the only body that should decide the challenge to Mr. Prasad, but he is not entitled to participate as a member of the Tribunal for that purpose.

30. One of the most fundamental principles governing international commercial arbitration is that of party autonomy. [*Fagbemi, p. 224*]. An essential aspect of party autonomy is the ability to select arbitrators who will resolve their dispute, or alternatively, to indirectly choose a means by which this selection can be made. [*Born, p. 3*]. Challenges to arbitrators have the potential to greatly delay arbitral proceedings, resulting in additional costs. [*Caron/Caplan, p. 285*].

31. In this case, the parties agreed to ad hoc arbitration. It is normal in ad hoc proceedings for the arbitral tribunal to decide procedural issues, including challenges to arbitrators. [*Schütze, p. 71*]. As to the procedure of challenging an arbitrator, the UNCITRAL Model Law guarantees the parties' freedom to agree on the procedure to be followed in case of a challenge. [*Holtzmann/Neuhaus, p. 411*]. However, when facing a challenge the nature of the allegations may prejudice the challenged arbitrator's perspective, which in turn may affect the remaining arbitrators. [*Daele, p. 171*].

32. As a result, this Tribunal does have the power to decide the present arbitrator challenge. However, this decision must be taken without the participation of Mr. Prasad. If he decides on the challenge brought against him, he would be a judge in his own cause. Moreover, Mr. Prasad's involvement also has the potential to affect the decision–making process of the other members of this Tribunal, and to prevent open and fair consideration of the merits of the challenge. In both cases, the integrity of the proceedings would be undermined, and ultimately could affect enforceability of any subsequent award under Art. 5 of the New York Convention.

33. This supports the conclusion that the Tribunal does have the power to decide on the challenge to Mr. Prasad. However, he should not be involved in the decision–making process.

CONCLUSION OF THE FIRST ISSUE

34. Under the arbitration agreement, the parties intended to exclude UNCITRAL Rules Art. 13.4. The parties agreed to exclude the involvement of any arbitral institution, and instead decided on ad hoc arbitration. As such, the parties agreed to exclude provisions of the UNCITRAL Rules that include the involvement of outside parties. Therefore, this Tribunal is the only body that has the power to decide on the challenge to Mr. Prasad. However, Mr. Prasad should not be allowed to participate in the decision–making process for two reasons. First, including him would allow him to act as a judge in his own cause. Second, his involvement has the potential to affect the remaining members of the Tribunal. In both cases, the integrity of the process would be

undermined, and could affect enforceability of any resulting award under the New York Convention.

ISSUE 2: UNDER UNCITRAL RULES ART. 12, THIS TRIBUNAL SHOULD DECIDE THAT JUSTIFIABLE DOUBTS EXIST AS TO MR. PRASAD'S IMPARTIALITY AND INDEPENDENCE, AND THAT HE SHOULD THEREFORE BE REMOVED FROM THE ARBITRAL TRIBUNAL.

(A) "Justifiable doubts" exist as to Mr. Prasad's impartiality and independence to arbitrate the present case.

(1) Mr. Prasad's past connections with the main shareholder of Funding 12 Ltd (CLAIMANT's third–party funder) create justifiable doubts as to Mr. Prasad's impartiality and independence.

35. To challenge an arbitrator's impartiality and independence, "[i]t is not necessary for a party challenging an arbitrator to demonstrate that the individual lacks independence or impartiality; it is instead sufficient to show that there is enough 'doubt' or 'suspicion' as to an arbitrator's impartiality to justify either not appointing or removing the arbitrator." [*Born, p. 1778*]. Hence, an arbitrator may be removed if there are sufficient justifiable doubts as to his impartiality and independence.

36. In deciding whether an arbitrator is independent, all relationships are relevant, not simply personal relationships. "[I]ndependence, however, is not limited to the arbitrator's personal relationships. It also includes the relationships of persons or entities that are closely connected to the arbitrator, such as close relatives of the arbitrator or the law firm where the arbitrator is working or to whom he/she is connected." [*Daele, p. 171*]. As such, independence is not only related to the arbitrator personally, but to the people surrounding the arbitrator and/or his professional relations as well.

37. In this case, Mr. Prasad has twice acted as an arbitrator in cases funded by Findfunds LP, the main shareholder of Funding 12 Ltd (CLAIMANT's third–party funder). [*Declaration Prasad, p. 36*]. In both cases, Mr. Prasad voted for the party that appointed him. [*P.O. No. 2, p. 51, § 15*].

38. Findfunds LP owns 60% of Funding 12 Ltd. [*P.O. No. 2, p. 50, § 2*]. However, Findfunds LP is not merely a passive shareholder. [*P.O. No. 2, p. 50, § 4*]. On the contrary, it is directly involved in decisions regarding its subsidiaries' cases. [*P.O. No. 2, p. 50, § 4*]. Before one of its subsidiaries funds a case, Findfunds LP itself does a thorough examination of the case. [*P.O. No. 2, p. 50, § 4*].

39. As part of its initial review, it discusses strategy options, and has the power to influence the appointment of the arbitrator. [*P.O. No. 2, p. 50, § 4*]. "Findfunds LP usually make a very thorough examination of the case at the beginning where also possible strategies are discussed." [*P.O. No. 2, p. 50, § 4*]. Although it purports to "exercise[] little influence in the appointment of the arbitrators," it has reserved the authority to do so. [*P.O. No. 2, p. 50, § 4*]. "The standard funding agreement used by Findfunds LP would allow, however, for a greater influence." [*P.O. No. 2, p. 50, § 4*].

40. This level of influence goes against the primary purpose behind creating a limited liability business structure. In order to insulate the parent company from liability, there should be no direct involvement in the decision–making process of its subsidiary. As such, decisions related to strategy and the appointment of arbitrators would normally (and properly) be left to the subsidiary's discretion alone.

41. The active participation of Findfunds LP in the cases funded by its subsidiaries creates the potential to exert undue influence in those cases. It also, linearly, creates a direct relationship between Mr. Prasad and CLAIMANT's third–party funder. As such, the fact that Findfunds LP has the power to influence cases funded by its subsidiaries provides justifiable doubts as to Mr. Prasad's independence in the present arbitration. [*P.O. No. 2, p. 50, § 4*].

42. There is also evidence that Mr. Prasad would be motivated to maintain a good relationship with Findfunds LP. As stated above, Mr. Prasad has a previous working relationship with Findfunds LP, the main shareholder of CLAIMANT's third–party funder. [*Declaration Prasad, p. 36*]. This relationship has been financially significant to Mr. Prasad. "The two arbitrations in which the party appointing 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." [*P.O. No. 2, p. 51, § 10*].

43. Mr. Prasad has profited greatly from his relationship with Findfunds LP in the past, and stands to do so in the future. This creates "justifiable doubts" that he will be influenced by his past and future relationship with Findfunds LP.

(2) Mr. Prasad's law firm's current relationship with the main shareholder of CLAIMANT's third–party funder also creates justifiable doubts as to Mr. Prasad's impartiality and independence.

44. Mr. Prasad's law firm has merged with Slowfood, a law firm based in Ruritania. [*Declaration Prasad, p. 36*]. One of the Slowfood partners is currently involved in an ongoing arbitration that is being funded by Findfunds LP. [*Declaration Prasad, p. 36*].

45. As stated above, 60% of CLAIMANT's third–party funder is owned by Findfunds LP. [*P.O. No. 2, p. 50, § 2*]. Both Mr. Prasad and his new partner from Slowfood have strong, established relationships with Findfunds LP. They have gained a substantial amount of revenue from past arbitrations involving the main shareholder of CLAIMANT's third–party funder. They stand to do so in the future.

46. As stated above, Findfunds LP is not a passive shareholder. It takes an improperly active role in the cases funded by its subsidiaries. As such, it is reasonable to assume that Findfunds LP will continue to do so in the future, which includes the possibility of influencing decisions related to the appointment of arbitrators. The amount of money Mr. Prasad and his new law partner have

made, are currently making, and stand to make from working with Findfunds LP is significant enough to raise justifiable doubts as to his independence. [*P.O. No. 2, p. 50, § 2*].

(3) Mr. Prasad's failure to timely disclose the Vindobona Journal article creates justifiable doubts as to Mr. Prasad's impartiality and independence.

47. UNCITRAL Rules Art. 11 states that "[w]hen a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."

48. Moreover, "[a]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid *even the appearance of bias*." [*Born, p. 1767*] [emphasis added]. As such, it is not sufficient for an arbitral tribunal to be truly impartial and independent. The arbitral tribunal should maintain the appearance of impartiality and independence so as to not raise doubts about the proceedings. Loss of faith in the arbitration process affects not only the perception of the parties involved, but can also affect enforceability of the resulting award under Article 5 of the New York Convention.

49. Impartiality involves the subjective attitude of the arbitrator. "The concept of 'impartiality' is considered to be connected with actual or apparent bias of an arbitrator—either in favor of one of the parties, or in relation to the issues in dispute. Impartiality is thus a subjective and more abstract concept than independence, in that it involves primarily a state of mind." [*Redfern/Hunter, p. 255*]. Impartiality depends on the mindset of the arbitrator. It is intangible, but can be perceived in the actions of the arbitrator.

50. The fact that the Vindobona Journal article was published and publicly available does not relieve Mr. Prasad of his obligation to disclose it in his first letter of declaration. [*Ex. C 11, p. 23*]. "Even if the arbitrator does not believe himself to be biased in any way, he must disclose any information that, if known, is *likely* to cause a reasonable and neutral observer to have doubts about his or her independence or impartiality." [*Paulsson/Petrochilos, p. 81, § 7*] [emphasis in

original]. As a result, Mr. Prasad had an obligation to include his article and other related information during his initial disclosure. [*Ex. C 11, p. 23*].

51. Similarly, Mr. Prasad had the responsibility to disclose the viewpoints and potential biases included in the article he wrote. The article Mr. Prasad wrote is titled "The Notion of Conformity in Art. 35 in the Age of Corporate Social Responsibility Codes and 'Ethical Contracting.'" In it, Mr. Prasad shares strong views related to the main issue of this arbitration, which raise justifiable doubts as to his ability to remain impartial. [*Ex. R 4, p. 40*].

52. Mr. Prasad stated in his article that "[i]n particular, the conformity of goods does not depend on their compliance with the very broad and general statements in CSR Codes, such as that production has to be in line with Global Compact principles." [*Ex. R 4, p. 40*]. This statement directly relates to the issues under consideration in the present dispute. [*Ex. C 2, pp. 9–14*]. It further evidences that Mr. Prasad is opposed to considering non–physical characteristics for purposes of determining conformity under CISG Art. 35.

53. Mr. Prasad does concede (in passing) that non–physical characteristics may be relevant where the parties have clearly included them in the contract. However, this is not sufficient to overcome the justifiable doubts as to his impartiality. One of the issues under dispute in the present case is *whether or not* the parties did clearly include a non–physical characteristic as a material aspect of their contract. RESPONDENT argues yes. CLAIMANT (the party who appointed Mr. Prasad) argues no. The bias Mr. Prasad has evidenced in his article supports the conclusion that he would be predisposed to decide in favor of CLAIMANT on this issue, which raises justifiable doubts as to his ability to be impartial.

54. As such, Mr. Prasad is not impartial on the main issues related to this arbitration. The fact that he has published an article taking positions directly adverse to RESPONDENT's interests on these specific issues raises justifiable doubts as to his impartiality.

(B) This Tribunal should decide that the IBA Guidelines on Conflict of Interest apply to the present dispute, and that Mr. Prasad is in violation of them.

(1) The parties did not exclude the IBA Guidelines from consideration by the arbitral tribunal, and this Tribunal should consider them to be highly persuasive in the present dispute.

55. The IBA Guidelines provide helpful guidance on issues related to conflict of interest. They have become an international standard for commercial arbitrations. As such, they have strong persuasive value, and this Tribunal should use them to inform its decisions in the present arbitration.

56. The introduction to the IBA Guidelines explains that "[t]he growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues." [*IBA Guidelines, p. 1, § 1*]. The IBA Guidelines were developed in response to this evolution.

57. Even though the IBA Guidelines are not binding, they are commonly used by courts and arbitral tribunals. It is generally understood that the "IBA Guidelines have had significant practical consequences in international commercial and investment arbitration." [*Born, p. 1839*]. They provide practical instruction for deciding the impartiality and independence of an arbitrator, and provide concrete standards for resolving any doubts. [*IBA Guidelines, p. 1, § 1*; *Rawding/ Snodgrass, p. 10, § 24*].

58. In this case, if the parties had wished to prevent this Tribunal from considering the IBA Guidelines, they would have explicitly excluded them in the arbitration agreement. They did not do so. [*Notice, p. 6, § 13*]. However, the parties did explicitly exclude the UNICITRAL Rules on Transparency. This supports the conclusion that the parties were precise as to what documents they wished to exclude from consideration. As such, it is reasonable to conclude that neither party intended to exclude other sources of commentary, such as the IBA Guidelines. Therefore, this Tribunal has the power to consider the IBA Guidelines in this case.

(2) There are several violations under the IBA Guidelines, because both Mr. Prasad and his law firm have significant commercial relationships (past and present) with the main shareholder of CLAIMANT's third–party funder, and because Mr. Prasad had an obligation to disclose the Vindobona Journal article in his initial declaration.

59. Under the IBA Guidelines, an arbitrator is required to disclose any situation or circumstance that would give justifiable doubts to his or her impartiality or independence. They classify various disclosure topics into lists. Each list informs whether a topic could be used as grounds for removal of an arbitrator. These topics are divided into four categories: the Non–Waivable Red List; the Waivable Red List; the Orange List; and the Green List.

60. First, the "Non–Waivable Red List" includes situations where an arbitrator may not participate in the arbitration. [*IBA Guidelines, p. 17, § 2*]. Second, the "Waivable Red List" includes situations that parties of an arbitration must be made aware of, but that do not necessarily preclude participation in the arbitration. [*IBA Guidelines, p. 17, § 2*].

61. Third, the "Orange List" includes situations where parties could have doubts as to the arbitrator's impartiality and independence. The arbitrator should disclose these situations to remove any ambiguity or doubts in the parties' minds. [*IBA Guidelines, p. 18, § 3*]. Finally, the "Green List" includes situations where there is no lack of impartiality or independence. [*IBA Guidelines, p. 19, § 7*].

62. Issues on the Non–Waivable Red List require rejection or withdrawal. "Disclosure of such situations cannot cure the conflict and the arbitrator has to decline to accept or refuse to continue to act as an arbitrator." [*Mullerat, p. 2*]. Relevant to the present case, Subsection 1.3 of the Non–Waivable Red List covers situations where "[t]he arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case." [*IBA Guidelines, p. 20, § 1.3*].

63. The Waivable Red List covers issues that "should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator." [*IBA Guidelines, p. 17, § 2*]. Relevant to the present case,

Subsection 2.3.6 of the Waivable Red List includes situations where "[t]he arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties." [*IBA Guidelines, p. 21, § 2.3.6*].

64. The Orange List covers situations requiring disclosure that may lead to conflicts of interests. Three are relevant to the present dispute. First, where "[t]he arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties." [*IBA Guidelines, p. 22, § 3.1.3*]. Second, where "[t]he arbitrator holds shares, either directly or indirectly, that by reason of number of denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed." [*IBA Guidelines, p. 25, § 3.5.1*]. Third, where "[t]he arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise." [*IBA Guidelines, p. 25, § 3.5.2*].

65. In this case, Mr. Prasad disclosures violate topics covered by the Non–Waivable Red List, the Waivable Red List, and the Orange List. Taken singly, these situations raise justifiable doubts as to his impartiality and independence. Taken together, they raise strong doubts.

66. Both Mr. Prasad's past relationships and his new law partner's present relationship with the main shareholder of CLAIMANT's third–party funder fall under Subsection 1.3 of the Non–Waivable Red List at worst, and Subsection 2.3.6 of the Waivable Red List at best. [*IBA Guidelines, p. 20, § 1.3; IBA Guidelines, p. 21, § 2.3.6*].

67. As established above, Mr. Prasad has gained a significant amount of revenue from his past relationship with Findfunds LP, and stands to gain more through a continuing relationship with his law firm. Due to the decision–making influence the parent company has, Mr. Prasad has a vested interest in remaining a desirable candidate for all of Findfunds LP's subsidiaries. [*P.O. No. 2, p. 50, § 4*].

68. Gaining future profits and maintaining a favorable relationship with Findfunds LP creates the likelihood that Mr. Prasad's ability to make impartial and independent decisions in the present

arbitration will be unduly influenced. [*P.O. No. 2, p. 50, § 2*]. Although Mr. Prasad has disclosed such information now, the disclosure does not take away the fact that they affect his impartiality and independence. Moreover, if they had been included in his initial disclosure, RESPONDENT would never have approved his appointment.

69. Additionally, Mr. Prasad's article falls under Subsection 3.5.2 of the Orange list. As stated above, Mr. Prasad gives strong opinions on the subject matter of this arbitration. Moreover, Mr. Prasad stated in the article that, "outside these narrow cases where the parties actually trade not only in goods but also in emotion (ethically conscious buyer), such a broad concept of conformity should be rejected." [*Ex. R 4, p. 40*]. Not only that, but he also stated that "such statements are by far too general and unspecific to result in an enforceable contractual obligation." [*Ex. R 4, p. 40*].

70. As such, Mr. Prasad has demonstrated potential lack of independence and impartiality related to topics at the very core of the present dispute.

CONCLUSION OF THE SECOND ISSUE

71. This Tribunal should decide that justifiable doubts exist as to Mr. Prasad's impartiality and independence under UNCITRAL Rules Art. 12, and that he should therefore be removed from the arbitral tribunal. Mr. Prasad's past connections with the main shareholder of Funding 12 Ltd (CLAIMANT's third–party funder) create justifiable doubts as to Mr. Prasad's impartiality and independence. Mr. Prasad's law firm's current relationship with the main shareholder of CLAIMANT's third–party funder also creates justifiable doubts as to Mr. Prasad's impartiality and independence.

72. Furthermore, Mr. Prasad did not satisfy his obligation to timely disclose the Vindobona Journal article, and the statements he made in the article demonstrate a likelihood of bias against RESPONDENT on the core issues under consideration in the present arbitration. Finally, The IBA Guidelines on Conflict of Interest do apply to the present dispute, and this Tribunal has the power to consider them. Mr. Prasad has multiple issues falling on the Non–Waivable Red List,

the Waivable Red List, and the Orange List. Taken separately, these situations each raise justifiable doubts as to his impartiality and independence. Taken together, they raise major doubts that support his removal from the Tribunal.

ISSUE 3: UNDER CISG ART. 18, RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT BECAUSE RESPONDENT'S LETTER CONSTITUTED AN INVITATION TO RECEIVE AN OFFER THAT CONFORMED TO THE TENDER DOCUMENTS.

(A) RESPONDENT's Invitation to Tender constituted an invitation to receive an offer that conformed to the Tender Documents, which included RESPONDENT's General Conditions and Supplier Code of Conduct.

73. The inclusion of standard terms under the CISG is evaluated according to the rules for the formation and interpretation of contracts under the CISG. [*CISG–AC, Op. No. 13, p. 5, § 1*]. Under CISG Art. 18.1, "[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance." Where there has been an acceptance with a proposal of different or additional terms, modern jurisdictions tend to acknowledge an acceptance, with the additional terms either being merged or omitted from the central agreement. [*CISG–AC, Op. No. 13, p. 6, § 4; Ferrari/Flechtner/Brand, p. 595, § 2; Schlechtriem/Schwenzer, p. 233, § 1*].

74. In this case, RESPONDENT invited an offer from CLAIMANT, with the expectation that the offer would conform to the terms of RESPONDENT's Tender Documents. RESPONDENT's Tender Documents specifically stated that RESPONDENT's General Conditions and Supplier Code of Conduct would govern any agreement arising out of the Tender Invitation. [*Ex. C 5, p. 16–17*].

75. CLAIMANT submitted an offer that deviated from the Tender Invitation on only two terms: product description and payment terms. [*Ex. C 4, p. 16*]. This is the offer that RESPONDENT accepted. CLAIMANT made no mention of substituting its own General Conditions and Supplier Code of Conduct, nor would RESPONDENT have accepted such an offer.

(B) Under CISG Art. 18.1, RESPONDENT's acceptance of CLAIMANT's offer included only the changed product description and payment terms, but it did not include an acceptance of CLAIMANT's General Conditions and Supplier Code of Conduct.

76. RESPONDENT's Invitation to Tender contained specific terms that RESPONDENT expected CLAIMANT to include in its offer. Among these terms were RESPONDENT's General Conditions and Supplier Code of Conduct. [*Ex. C 4, p. 16*].

77. In the letter accompanying its offer, CLAIMANT identified two deviations from the Tender Invitation, stating that "[a]fter a closer look at the Tender Documents and discussions with our production and finance department we have to make some minor amendments to the documents received by the invitation to submit a tender offer. These changes relate primarily to the goods and the mode of payment." [*Ex. C 3, p. 15*].

78. The changes identified by CLAIMANT were reflected in the "Sales–Offer" section of the offer document. The "Specific Terms and Conditions" section, which states that "[t]he following Specific Terms and Conditions, forming part of the offer, shall prevail over any other documents with respect to the sales contract, except the main part of the Sales–Offer" was filled in with the words "[n]ot applicable." The rest of the section was left blank.

79. At the very bottom of the page, after a significant amount of blank space, was a footer that included CLAIMANT's address and contact information, along with the words "[t]he above offer is subject to the General Conditions of Sale and our Commitment to a Fairer and Better World. Refer to our website www.Delicatesy WholeFoods.com in regard to our General Conditions and our commitments and expectations set out in our Codes of Conduct." [*Ex. C 4, p. 16*]. This statement was no more a part of the "Specific Terms and Conditions" section than CLAIMANT's address and phone number would have been.

80. RESPONDENT accepted CLAIMANT's offer without proposing a modification to the terms, stating that "your tender was successful notwithstanding the changes suggested by you." [*Ex. C 5, p. 17*]. As such, CLAIMANT's offer formed the agreement between the parties, which deviated from

the Tender Invitation only in the two changes related to product description and payment terms. [*Ex. C 4, p. 16*].

81. If CLAIMANT had seriously intended to substitute its General Conditions and Supplier Code of Conduct, it would have explicitly stated its intention in its cover letter. CLAIMANT could not have reasonably believed that such a major change would occur without any negotiation, or that RESPONDENT would have ever agreed to it. However, in the offer cover letter, it refers only to "minor amendments" arising out of discussions with its production and finance department. It then states that the changes "relate primarily to the goods and the mode of payment." [*Ex. C 4, p. 16*]. This makes sense, as these two issues are ones CLAIMANT's production and finance departments would be able to speak to. Production and finance are not departments likely to have proposed such a fundamental deviation from the Tender Documents.

82. Additionally, the words "not applicable" under the Specific Terms and Conditions section is significant. This section would have included any documents or terms CLAIMANT intended to "prevail over any other documents with respect to the sales contract." There was no content under this section, which supports the conclusion that the offer RESPONDENT accepted contained no alterations other than the product description and payment terms already identified.

83. RESPONDENT replied to CLAIMANT's offer by stating that "[t]he different payment terms and form of the cake are acceptable to us." [*Ex. C 5, p. 17*]. RESPONDENT did state that it had downloaded CLAIMANT's Codes of Conduct, and that they were a "decisive element" in its decision to accept CLAIMANT's offer. [*Ex. C 5, p. 17*]. However, this was not an acceptance to incorporate CLAIMANT's General Conditions and Supplier Code of Conduct into the agreement between the parties. Rather, RESPONDENT was pointing to the companies' "shared values," and applauding CLAIMANT's "convincing commitment to sustainable production." [*Ex. C 5, p. 17*]. The General Conditions and Supplier Code of Conduct were never mentioned or discussed in the offer whatsoever.

84. To conclude, the offer RESPONDENT accepted conformed to all terms in the Tender Invitation except two: product description and payment terms. RESPONDENT did not agree to substitute its

General Conditions and Supplier Code of Conduct with CLAIMANT's, nor would it ever have done so. Those documents are at the heart of RESPONDENT's agreements with all of its suppliers. RESPONDENT would never have agreed to such a change because they undermine RESPONDENT's ability to become a Global Compact LEAD Company, and go against its core business values. And even if RESPONDENT were ever to consider such a significant change, it would have certainly demanded a conversation and/or negotiation about it. Such a major change would never have been accepted simply based on the footer of an offer letter.

(C) Under both CISG Art. 8 and UNIDROIT Art. 4, the parties never intended CLAIMANT's General Conditions and Supplier Code of Conduct to govern the Agreement.

(1) Under CISG Art. 8.1 and UNIDROIT Art. 4.1.1, CLAIMANT was aware or could not have been unaware that RESPONDENT had always intended the Agreement to be governed by its General Conditions and Supplier Code of Conduct.

85. CISG Art. 8.1 states that "[f]or the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." Similarly, UNIDROIT Art. 4.1.1 states that "[a] contract shall be interpreted according to the common intention of the parties."

86. RESPONDENT's intent was always clear. Its General Conditions and Supplier Code of Conduct were central to the Agreement, and not a "minor amendment" that would have been altered with absolutely no discussion based on a boilerplate statement at the footer of a letter.

87. The language used in its Tender Invitation and Tender Documents lead to the same conclusion. In its Tender Invitation, RESPONDENT stated that "it is our intention to become a Global Compact LEAD Company by 2018 and *one of the decisive issues is a proper supply chain management*. Consequently, it is *very important for us that we can be sure that also your suppliers adhere to Comestibles Finos' Philosophy and our Code of Conduct for Suppliers*. After our bad experience in the past we want to make sure that we will not again be the subject of a negative press campaign because one of our suppliers or someone higher up in the production and supply chain

has not complied with the principles of our Code of Conduct." [*Ex. C 1, p. 8*] [emphasis added]. This supports the conclusion that RESPONDENT's General Conditions and Supplier Code of Conduct were essential terms that it intended to be incorporated into any final agreement between the parties.

88. CLAIMANT appeared to been aware of, and to share RESPONDENT's intent. In its Letter of Acknowledgment, CLAIMANT stated that "[w]e have read the Invitation to Tender and will tender in accordance with the specified requirements." [*Ex. R 1, p. 28*]. These specified requirements included RESPONDENT's General Conditions and Supplier Code of Conduct. [*Ex. C 2, p. 9*].

89. CLAIMANT's offer included some "minor amendments" related to product description and payment terms. [*Ex. C 3, p. 15; Ex. C 4, p. 16*]. RESPONDENT accepted these minor amendments. [*Ex. C 5, p. 17*]. However, CLAIMANT was aware or could not have been unaware that RESPONDENT would have considered changing the General Conditions and Supplier Code of Conduct governing the Agreement to be a *major amendment*, requiring discussion and/or negotiation. CLAIMANT was aware or could not have been unaware that RESPONDENT would in no way have considered such a proposal to be a "minor amendment," barely worthy of a passing comment.

(2) Under CISG Art. 8.2 and UNIDROIT Art. 4.1.2, a reasonable person in similar circumstances would not have concluded RESPONDENT intended the Agreement to be governed by CLAIMANT's General Conditions and Supplier Code of Conduct.

90. CISG Art. 8.2 states that "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." Similarly, UNIDROIT Art. 4.1.2 states that "if such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances." When the intention of the parties cannot be established, the judgement can be based on a reasonable person's understanding for the same circumstances of the case. [*PECL/CISG Art. 8, § 3(f)*].

91. As discussed above, RESPONDENT's General Conditions and Supplier Code of Conduct were central to its Tender Invitation, and crucial to achieving RESPONDENT's goal of becoming a Global Compact LEAD Company by 2018. [*Ex. C 1, p. 8*]. A reasonable person in similar circumstances would not have believed that boilerplate language at the bottom of a letter was sufficient to instead substitute CLAIMANT's General Conditions and Supplier Code of Conduct.

92. A reasonable person would have also come to the conclusion that CLAIMANT's offer incorporated RESPONDENT's General Conditions and Supplier Code of Conduct. The Special Terms and Conditions section of CLAIMANT's offer indicated that it was submitting no other changes to the terms contained in RESPONDENT's Tender Invitation, other than the product description and payment terms it had highlighted in its cover letter. [*Ex. C 4, p. 16*].

93. Finally, a reasonable person would have understood that RESPONDENT did not intend to incorporate CLAIMANT's General Conditions and Supplier Code of Conduct when it referenced them in its acceptance letter. Rather, RESPONDENT was pointing to the companies' "shared values" and applauding CLAIMANT's "convincing commitment to sustainable production." [*Ex. C 5, p. 17*]. RESPONDENT was simply expressing its belief that the two companies would have a successful business relationship.

(3) Under CISG Art. 8.3 and UNIDROIT Art. 4.3, the parties' negotiations, practices, usages, and subsequent conduct demonstrate CLAIMANT was aware that RESPONDENT had always intended the Agreement to be governed by its General Conditions and Supplier Code of Conduct.

94. CISG Art. 8.3 states that "[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties." Similarly, UNIDROIT Art. 4.3 states that "[i]n applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including...

preliminary negotiations between the parties...” As such, surrounding circumstances are relevant to determining the intent of the parties.

95. As stated above, the parties never negotiated or even discussed the possibility of substituting RESPONDENT’s General Conditions and Supplier Code of Conduct. Even if they had, RESPONDENT would never have agreed to such a change. RESPONDENT made clear that its General Conditions and Supplier Code of Conduct were a central part of the Tender Invitation, that they expressed RESPONDENT’s core business values, and that they were crucial to achieving RESPONDENT’s goal of becoming a Global Compact LEAD company by 2018. [*Ex. C 1, p. 8; Ex. C 2, p. 9*].

96. The only discussion or negotiation between the parties related to the two “minor amendments” that CLAIMANT had identified in the cover letter to its offer, pertained to the product description and payment terms. [*Ex. C 3, p. 15*]. RESPONDENT accepted those two changes. And while RESPONDENT did admire CLAIMANT’s commitment to sustainable production, it never indicated a willingness to abandon its own General Conditions and Supplier Code of Conduct in favor of CLAIMANT’s less stringent ones.

CONCLUSION OF THE THIRD ISSUE

97. Under CISG Art. 18, RESPONDENT’s standard conditions govern the contract because RESPONDENT’s letter constituted an invitation to receive an offer that conformed to the Tender Documents, which included RESPONDENT’s General Conditions and Supplier Code of Conduct. RESPONDENT’s acceptance of CLAIMANT’s offer included only the changed product description and payment terms. It did not include an acceptance of CLAIMANT’s General Conditions and Supplier Code of Conduct.

98. Under both CISG Art. 8 and UNIDROIT Art. 4, CLAIMANT was aware or could not have been unaware that RESPONDENT had always intended the Agreement to be governed by its General Conditions and Supplier Code of Conduct. Additionally a reasonable person in similar circumstances would have reached the same conclusion. Finally, the parties’ negotiations and

subsequent conduct demonstrate CLAIMANT was aware that RESPONDENT had always intended the Agreement to be governed by its General Conditions and Supplier Code of Conduct.

ISSUE 4: SINCE RESPONDENT'S GENERAL CONDITIONS AND SUPPLIER CODE OF CONDUCT ARE (AND SHOULD BE) APPLICABLE, CLAIMANT FAILED TO DELIVER CONFORMING GOODS UNDER CISG ART. 35.

(A) Under CISG Art. 8, RESPONDENT reasonably agreed to the use of a "guarantee" standard, and would have never reasonably agreed to a "best efforts" standard of performance by CLAIMANT or its suppliers.

99. Under CISG Art. 8.1, CLAIMANT was aware or could not have been unaware that RESPONDENT intended to use a guarantee standard in the parties' agreement, and not a best efforts standard. Under CISG Art 8.2, a reasonable person in similar circumstances would have reached the same conclusion. And under CISG Art 8.3, the parties' negotiations, practices, usages, and subsequent conduct demonstrate that RESPONDENT had an absolute expectation that all of CLAIMANT's suppliers would use sustainable methods of production.

100. There are several levels of commercial obligation in business agreements. [*Rocks, p. 1*]. The highest and most onerous on the performer is the "guarantee." [*Chorley, p. 332*]. A guarantee creates an absolute duty on the performing party. [*Chorley, p. 332*]. It is based on results, regardless of efforts. [*Rocks, p. 2*].

101. In its Tender Invitation, RESPONDENT stated that "it is our intention to become a Global Compact LEAD Company by 2018 and one of the decisive issues is a proper supply chain management. Consequently, it is *very important for us that we can be sure that also your suppliers adhere to Comestibles Finos' Philosophy and our Code of Conduct for Suppliers*. After our bad experience in the past we want to make sure that we will not again be the subject of a negative press campaign *because one of our suppliers or someone higher up in the production and supply chain has not complied with the principles of our Code of Conduct*." [*Ex. C 1, p. 8*] [emphasis added].

This supports the conclusion that RESPONDENT's expected CLAIMANT to guarantee compliance by its suppliers, and not simply use its best efforts to do so.

102. Both RESPONDENT's Special Conditions of Contract and General Conditions of Contract use the language of guarantee, including phrases such as "'*zero tolerance*' policy when it comes to unethical business behavior" and "you *must comply with* all applicable laws and regulations, the requirements set out in Comestibles Finos' Code of Conduct for Suppliers and your contractual obligations to us." [*Ex. C 2, p. 11, 12, Preamble*] [emphasis added].

103. Similarly, RESPONDENT's Supplier Code of Conduct uses the language of guarantee, stating that the supplier "*must under all circumstances* procure goods and services in a responsible manner…[and] *make sure that they comply* with the standards agreed upon *to avoid that goods or services delivered are in breach* of Comestibles Finos' General Business Philosophy." [*Ex. C 2, p. 14, § E*] [emphasis added]. It uses language such as "to *guarantee* such adherence, the measures and conduct expected from suppliers are set out in this Code of Conduct for Suppliers." [*Ex. C 2, p. 14, Preamble*] [emphasis added]. The Supplier Code of Conduct also uses language of obligation throughout, such as "shall" and "must." [*Ex. C 2, p. 14*]. This is all the language of doing, not the language of trying.

104. In the cover letter to its offer, CLAIMANT evidenced its understanding of RESPONDENT's expectations, stating that "we will do everything possible to *guarantee* that the ingredients sourced from outside suppliers comply with our joint commitment to Global Compact Principles." [*Ex. C 3, p. 15*] [emphasis added]. RESPONDENT acknowledged CLAIMANT's ability to guarantee sustainably–sourced supplies in its acceptance letter, stating "your Codes show that Delicatesy Whole Foods and Comestibles Finos share the same values and are both *committed to ensure that the goods produced and sold fulfill the highest standard of sustainability*." [*Ex. C 5, p. 17*] [emphasis added].

105. As such, CLAIMANT was aware or could not have been unaware that RESPONDENT intended to use a guarantee standard in the parties' agreement, and not a best efforts standard. Based on the language of RESPONDENT's General Conditions and Supplier Code of Conduct, a reasonable

person in similar circumstances would have reached the same conclusion. And the parties' negotiations and subsequent conduct demonstrate RESPONDENT had an absolute expectation that CLAIMANT would guarantee all of its suppliers were using sustainable methods of production.

(B) CLAIMANT failed to satisfy its obligations under CISG Art. 35 because it did not deliver goods that conformed to RESPONDENT's General Code of Conduct.

(1) Under CISG Art. 35, conformity of goods relates to the fitness of goods for a particular purpose, which in this case *especially* includes the non–physical characteristics of production agreed to by the parties.

106. CISG Art. 35.1 states that "[t]he seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. CISG Art. 35.2 states that "[e]xcept where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."

107. Under CISG Art. 35.1, conforming products must meet the description, quality, and quantity outlined in the agreement. Additionally, CISG Art. 35.2 requires conforming products to be fit for the commercial purposes goods of the same description would ordinarily be used.

108. CISG Art. 35 covers both physical and non–physical characteristics of goods. "Both tangible and intangible variables are part of the perception of the economic value of a product." [*Dysted, p. 12, § 26*]. This includes ethical and emotional characteristics. [*Ramberg, p. 82*]. The wording of

CISG Art. 35 "does not exclude that ethical defects may form part of the contract.'' [*Dysted, p. 34, § 91*].

109. On the contrary, in certain circumstances non–physical characteristics of goods are essential to determine conformity. "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." [*Schwenzer/Leisinger, p. 267, § 80*]. As such, goods are unfit for normal use (and therefore non–conforming) "when the lack of proper characteristics or the defects, though not affecting the material use of the goods, lessen conspicuously their value affecting their trade use." [*Poikela, p. 38, § 152*].

110. In this case, RESPONDENT clearly indicated that sustainable production was a crucial aspect of the parties' agreement, and that it was instrumental to RESPONDENT's goal of becoming a Global Compact LEAD Company. [*Ex. C 1, p. 8*]. It also included language of guarantee throughout the Tender Documents, demonstrating that it required all suppliers to adhere to sustainable methods of production throughout the supply chain.

111. Conformity under the parties' agreement requires more than that the cakes must be chocolate, or that they must be delicious. Those issues are not in dispute. In order to satisfy RESPONDENT's needs and goals under the Agreement, the method of production was just as important. And the cakes CLAIMANT supplied to RESPONDENT were not what they were promised to be.

112. CLAIMANT does not dispute that it failed to use sustainably–produced cocoa beans in the cakes delivered to RESPONDENT. And while it may have reasons for that being the case, those reasons are irrelevant under both the parties' agreement and under CISG Art. 35.

(2) Under CISG Art. 35, CLAIMANT was required to guarantee compliance of its suppliers to RESPONDENT's General Conditions and Supplier Code of Conduct.

113. Under CISG Art. 35, the seller is required to guarantee the goods conform to the terms of the contract. [*Butler, p. 11*]. Simply using best efforts is insufficient. "Indeed, the underlying reason pushing any buyer to conclude a sales contract is the will to receive a specific product in return for a given price." [*de Luca, p. 3*]. The seller is in breach of its obligation if the goods do not possess those qualities, even if the non–conformity is not immediately apparent. [*Butler, p. 12*]. Conformity under CISG Art. 35 is dependent on the buyer's reasonable expectations. [*Ramberg, p. 83*].

114. In this case, CLAIMANT was obligated to provide products containing ingredients that were produced using sustainable farming methods. The language included in RESPONDENT's General Conditions and Supplier Code of Conduct, as well as its stated goal of becoming a Global Compact LEAD Company, are evidence that the sustainable–sourcing of CLAIMANT's cocoa beans was a primary consideration, just as important as the look and taste of the final cakes. It was a need, not a want. It was a do, not a try. And since CLAIMANT failed to deliver cakes made from sustainably–farmed cocoa beans, it delivered non–conforming goods in violation of CISG Art. 35.

(C) Furthermore, CLAIMANT failed to satisfy even its own best efforts standard.

115. CLAIMANT argues that, under its own General Conditions and Supplier Code of Conduct, it was only required to use "best efforts" to provide sustainably–sourced cocoa beans. Although that is not true, it is significant to note that CLAIMANT failed to satisfy even its own standard.

116. In its initial audit of Ruritania Peoples Cocoa GmbH, CLAIMANT hired third–party Egimus AG to prepare a report on its Global Compact compliance. [*Ex. C 8, p. 20*]. Egimus AG did not assess issues related to fraud and corruption, because this was outside its areas of expertise. [*P.O. No. 2, p. 54, § 33*]. It also did not examine the suitability of the State Certificate System. [*P.O. No. 2, p. 54, § 33*].

117. However, the scope of Egimus AG's expertise did not excuse CLAIMANT from conducting additional investigations and/or hiring additional consultants in order to guarantee that its cocoa beans were produced according to the methods claimed by Ruritania Peoples Cocoa GmbH. And as was demonstrated, it was something that CLAIMANT could have easily discovered. After RESPONDENT learned of the UNEP Special Rapporteur's report and the article in Michelgault Business News, it immediately contacted CLAIMANT to verify that its cocoa bean supplier was not involved in the fraud. [*Ex. C 6, p. 18; Ex. C 7, p. 19*]. Within two weeks, CLAIMANT discovered that Ruritania Peoples Cocoa GmbH had, in fact, been involved. [*Ex. C 9, p. 21*].

118. As such, this was certainly information that could have been discovered if CLAIMANT had truly used its best efforts. In fact, a simple site visit would have uncovered the fraud. The UNEP Special Rapporteur discovered it, Michelgault Business News discovered it. And finally, with apparently no need for outside consultants, so did CLAIMANT.

(D) CLAIMANT is not excused from its failure to perform because the fraud was not an impediment beyond CLAIMANT's control under CISG Art. 79.

119. CISG Art. 79 provides that "[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

120. An "impediment beyond control" is a high standard. [*CISG–AC, Op. No. 7, § 8*]. It includes major catastrophic events, or "acts of God." [*Värv/Karu, p. 91–2*]. It does not include failure of performance by third–parties engaged by the seller. [*Garro, p. 1*]. It does not include lack of due diligence by the performing party. [*Garro, p. 1*]. On the contrary, except in extreme cases "the seller is the party who is in the best position to avoid or minimize non–compliance by someone whom he himself has engaged to perform all or part of the contract." [*Garro, p. 1*].

121. In this case, CLAIMANT is not excused from its failure to provide conforming goods under the

Agreement on the grounds that it had been deceived by Ruritania Peoples Cocoa GmbH. As discussed above, it was within CLAIMANT's power to have discovered the deception. And it was CLAIMANT's obligation to do so.

122. This was not an act of God; there was no natural disaster involved. Ruritania Peoples Cocoa GmbH was CLAIMANT's supplier. It delivered non–conforming cocoa beans. While it is unfortunate, CLAIMANT used those cocoa beans in the cakes it supplied to RESPONDENT. And as a result, those cakes became non–conforming goods.

CONCLUSION OF THE FOURTH ISSUE

123. Since RESPONDENT's General Conditions and Supplier Code of Conduct are (and should be) applicable, CLAIMANT failed to deliver conforming goods under CISG Art. 35. Under CISG Art. 8, RESPONDENT reasonably agreed to the use of a "guarantee" standard, and would have never reasonably agreed to a "best efforts" standard of performance by CLAIMANT's suppliers.

124. CLAIMANT failed to satisfy its obligations under CISG Art. 35 because it did not deliver goods that conformed to RESPONDENT's General Code of Conduct. Under CISG Art. 35, conformity of goods relates to the fitness of goods for a particular purpose, which in this case *especially* includes the non–physical characteristics of production agreed to by the parties. As such, CLAIMANT was required to guarantee compliance of its suppliers to RESPONDENT's General Conditions and Supplier Code of Conduct. Furthermore, CLAIMANT failed to satisfy even its own best efforts standard. The fraud was something that could have easily been discovered. And CLAIMANT ultimately did discover it, with minimal effort. Finally, CLAIMANT is not excused from its failure to perform because the fraud was not an impediment beyond CLAIMANT's control under CISG Art. 79.

REQUEST FOR RELIEF

In the light of the above submissions, Counsel for RESPONDENT respectfully requests this Arbitral Tribunal to find that:

1. The contractual relationship between CLAIMANT and RESPONDENT is governed by RESPONDENT's General Conditions of Sale and Supplier Code of Conduct;

2. CLAIMANT delivered non–conforming goods under both the Agreement and under CISG Art. 35;

3. RESPONDENT is not required to pay the outstanding purchase price in the amount of USD 1,200,000;

4. RESPONDENT is not required to pay damages in the amount of at least USD 2,500,000;

5. CLAIMANT is responsible for any damages incurred by RESPONDENT as a result of CLAIMANT's breach; and

6. CLAIMANT shall bear the cost of these arbitral proceedings.

CERTIFICATE

Doha, Qatar
18 January 2018

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

/s/ Amna Saif M S AlNaimi	/s/ Aisha Ali Alhammadi
Amna Saif M S AlNaimi	Aisha Ali Alhammadi
/s/ Maryam Ahmed AlMaraghi	/s/ Maryam Yaqoub Al Jefairi
Maryam Ahmed AlMaraghi	Maryam Yaqoub Al Jefairi
/s/ Reihana Khoja	/s/ Reem Hany Al Raeesi
Reihana Khoja	Reem Hany Al Raeesi
/s/ Nada Salman A Eid	/s/ Sara Ibrahim M A Al–Obaidli
Nada Salman A Eid	Sara Ibrahim M A Al–Obaidli
/s/ Hanan Abdulwahed Abdulrahman	/s/ Hiba Sekoura Oussedik
Hanan Abdulwahed Abdulrahman	Hiba Sekoura Oussedik

INDEX OF ABBREVIATIONS

§	Section; Paragraph
§§	Sections; Paragraphs
3P	Third Party
Answer	Answer to the Request for Arbitration
Apr.	April
Art./Arts.	Article/Articles
Aug.	August
C	Claimant
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG–AC	Advisory Council, Convention on Contracts for the International Sale of Goods
Comm.	Commercial
Dec.	December
ed.	Edition
et seq.	and the following
EUR	Euro
Ex.	Exhibit
Feb.	February
GmbH	Gesellschaft mit beschränkter Haftung
IBA	International Bar Association
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
Jan.	January
Jul.	July
Jun.	June
Ltd	Limited
Mar.	March

Mr.	Mister
Ms.	Miss
n.	Note
No.	Number
Notice	Notice of Arbitration
Nov.	November
Oct.	October
Op.	Opinion
p./pp.	Page/Pages
Para.	Paragraph
Plc	Professional Liability Corporation
P.O.	Procedural Order
R	Respondent
Response	Response to Notice of Arbitration
Sept.	September
SP	Sole Proprietorship
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	Versus
Vol.	Volume

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