TWENTY-FIFTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, AUSTRIA – MARCH 2018

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF BAHRAIN

ON BEHALF OF:	AGAINST:
Comestibles Finos Ltd	Delicatesy Whole Foods Sp
75 Martha Stewart Drive	39 Marie-Antoine Carême Avenue
Capital City	Oceanside
Mediterraneo	Equatoriana
-RESPOMDENT-	**-CLAIMANT-**

COUNSEL:

EHSAN FATTAH – FERAS AL-ALEM – MOHAMMED ALI SHABAN – SAYED AYMAN ABDULLAH

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List of abbreviations:

&	and
§(§)	paragraph(s)
Art(t).	Article (s)
BGH Bundesgerichtshof	(German Federal Supreme Court)
Cir.	Circuit
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
Cl. Ex. No.	CLAIMANT's Exhibit Number
Cl. Memo	CLAIMANT's Memorandum
Co.	Company
CSR	Corporate Social Responsibility

DAL	Danubian Arbitration Law
ed.	Edition
GCP	Global Compact Principles
i.e.	(that means)
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration (2014)
ICC	International Chamber of Commerce
Inc.	Incorporated
Ltd.	Limited
Mr.	Mister
NASD	National Association of Security Disputes
No.	

	Number(s)
p(p).	
	page(s)
Proc.	
	Procedural
PO. No.	
	Procedural Order Number
Prof.	
	Professor
Res. Ex. No.	
	RESPONDENT's Exhibit Number
U.S.	
	United States
UN	
	United Nations
UNCITRAL	
	United Nations Commission on International Trade Law
UPICC	
	UNIDROIT Principles of International Commercial Contracts
USA	

	United States of America
USD	
	United States Dollar(s)
v.	
	versus

Statement of facts:

Delicatesy Whole Foods (hereafter referred to as CLAIMANT) is a medium sized manufacturer of fine bakery products registered in Equatoriana.

Comestibles Finos Ltd. (hereafter referred to as RESPONDENT) is a gourmet supermarket chain in Mediterrano that aspires to be a Global Compact leading company.

Ruritania Peoples Cacao mbH is the Claimant supplier of cocoa based in Ruritania

March 2014

The Claimant represented by Mr. Tsai was approached by the Respondent represented by Ms. Ming at Danubian food fair.

They discussed various topics including the products that would be of interest to the Respondent and whether it would be feasible for the Claimant to supply them to the Respondent.

[Notice of Arbitration, p. 4, §4]

10 March 2014

Claimant received an invitation to tender from the RESPONDENT soon after the food fair, regarding the delivery of chocolate cakes.

[Notice of Arbitration, p. 4, § 4]

17 March 2014

The Claimant sent a letter of acknowledgement to the Respondent to acknowledge the receipt of the invitation and all the required documents and to express its intent to tender.

[Res, Ex 1,p. 28]

27 March 2014

The Claimant tender was submitted whereby it had made a few changes to the requirement set by the Respondent.

These changes include the specifications of the cakes and the method of payment.

[Notice of arbitration, p. 5, §4]

7 April 2014

The Respondent accepted the Claimant's tender.

Ms. Ming of the RESPONDENT also ascertains that she had read the CLAIMANT code of conduct.

[Response to the notice of arbitration, p. 25, §11]

1 May 2014

The First Delivery of chocolate cakes was made. Thereafter, there were no problems regarding the delivery or the chocolate cakes throughout majority of the contract; which includes 2014, 2015 and 2016. *[Notice of arbitration, p. 5, § 6]*

23 January 2017

Michelgault the leading business paper in Equatoriana, reported on the findings of the rapporteur of the UNEP about the widespread fraud and corruption in Ruritania. *[Cl. Ex. No. 7, p. 19]*

27 January 2017

The Claimant received an email from the Respondent stating that it would be possible to terminate the contract, if the Claimant does not give sufficient proof of it and its suppliers are in compliance with the Global Compact Principles, within one day of receiving the email. *[Notice of arbitration, p. 5, § 7]*

The Claimant replied and assured the Respondent that its suppliers comply with the GCP and attached certificates proving their compliance. *[Notice of arbitration p. 5, § 7]*

*The RESPONDENT basis this on a documentary published by UNEP which investigates corruption in Ruritania which lead to the distribution of forged certificate to several companies regarding compliance with the GCP.

* It should be stated that Ruritania is residence for Claimant's main supplier of cocoa; which is one of the main ingredients for its Chocolate Cakes.

10 February 2017

The Claimant discovers that its supplier, Ruritania Peoples Cacao mbH, was involved in the corruption scheme and informed the Respondent of the discovery.

Moreover, the Claimant has stated that such fraud does not constitute as a breach of contract by them then it offered the Respondent a reduction in price for the inconvenience. *[Notice of arbitration p. 5, § 10]*

12 February 2017

The Respondent rejects Claimant's offer, and states that it will refrain from payment of the Chocolate Cake as it will set-off the amount to be paid to the damages that the Respondent has suffered due to the Claimant's breach of contractual obligations for the nonconformity of the Chocolate Cake. Also, the Respondent terminated the Contract. *[Cl. Ex. No. 10, p. 22]*

30 June 2017

The Claimant submits the Notice to Arbitration.

*The Claimant appointsMr.Prasad as its Arbitrator.Mr.Prasad submits his Declaration to impartiality on 26 June 2017.

31 July 2017

The Respondent submits the Response to the Notice of Arbitration and appoints Ms. Reitbauer. *[Response to the notice of arbitration, p. 24]*

22 August 2017

Prof Rizzo thanking both arbitrators for appointing him as presiding arbitrator and sets a case management conference on 30 august 2017.

29 August 2017

The Respondent sends the appointed arbitral tribunal a notice claiming that sufficient proof was found that the Claimant is funded by a third party, which may affect the impartiality of the arbitrator. *[letter Langweiler, P. 33]*

1 September 2017

The Claimant discloses the information of the Funder. However, it insists that the Respondent discloses how it discovered this information; as it doubts the legality of the method of discovery. *[letter Rizzo, p. 34]*

7 September 2017

Claimant says that it is being funded by Funding 12 ltd and the shareholder is Findfunds LP, Claimant ask the arbitration Tribunal to order the Respondent to disclose how it obtained the information.

11 September 2017

Mr. Prasad sends an email stating that he has acted in two cases which were funded by other subsidiaries of Findfunds. Furthermore, Mr. Prasad mentioned that his firm merged with another firm in Ruritania that has represented a client that has been funded by Findfunds.

14 September 2017

The Respondent submits Notice of Challenge of Arbitrator. In the Notice of Challenge states the following important points: *[Notice of Challenge of Arbitrator, p. 38]*

*It has obtained the information through its IT Security Officer as he conducted a security check on the notice for arbitration which they discovered "Metadata" that included a Word Document, where the Claimant gives statements regarding Third Party Funding and of an article published by Mr. Prasad.

*That there are doubt of Mr. Prasad's impartiality due to him publishing a legal opinion which states "non-physical conformity standards" are not to be considered when determining the conformity of the goods.

*Also, the involvement of the third party which Mr. Prasad is involved in may give doubts to his impartiality.

21 September 2017

Mr. Prasad submits letter indicating his "refusal to stand down" from his position and discloses further information regarding his association with the third party and gives his own justifications that the Respondent's discoveries, do not affect his impartiality. *[Letter Prasad, p. 43]*

29 September 2017

The Claimant refuses to agree to the removal of its nominated arbitrator and states he is obligated to disclose any information regarding the funding.

[Letter Fasttrack, p. 45]

6 October 2017

Prof Rizzo send procedural order No 1 *[Procedural order No. 1, p. 48*

Summary of argument:

First, the arbitral tribunal is the entity with the authority to decide on the challenge of Mr. Prasad. This is based on the agreement of the non-involvement of arbitral institution made by the parties. This agreement resulted in the exclusion of Art. 6.1 of the UNCITRAL Rules. Meaning that the Claimant cannot ask for the Involvement of the PCA as it is an institutional entity.

The proper solution therefore would be to refer to the DAL which gives the authority of deciding on the challenge of arbitrators to the arbitral tribunal itself.

In respect to allegations made by the Claimant, the challenge of Mr. Prasad was untimely. It should be noted that Art. 12 of the UNCITRAL Rules gives the party 15 days from the awareness of any circumstances raising justifiable doubts to the arbitrator's impartiality and/or independence to raise a challenge, not 15 days from the date of the first disclosure.

The Respondent in this case became aware of those circumstances on the 11th of September and made its challenge of the 14th of the same month, meaning that the challenge was well within the set time limit.

Second, Mr. Prasad cannot participate as a judge in his own challenge. This is based on the intention of the drafters of the Arbitration Rules, who clearly realised the harm the participation of the challenged arbitrator in his own challenge would inflict on the authority deciding the challenge, since that authority must be unbiased, in addition to the to support given by several notable commentators to this stance.

Third, Mr. Prasad must be removed as subject to both the UNCITRAL Rules and the IBA Guidelines he is partial and dependent.

According to the UNCITRAL Rules, Mr. Prasad due to the non-disclosure of his article regarding the conformity of goods even though he is under the duty to disclose any circumstances that may lead to doubts regarding his impartiality and independence which he did not. He is also dependent according to the same rules, as the previous appointment made by Mr. Horace Fasttrack and Findfunds should be added together not viewed separately.

According to the IBA Guidelines Mr. Prasad is also partial as General Standard 7 shows that his failure to disclose relevant circumstances leads to the presumption of his partiality. He is also dependant base on the guidelines due to his significant commercial relationship and his previous appointment by both Findfunds and the Claimant.

Third, the terms of the Respondent are the terms that govern the contract, as the terms of the Claimant did not meet the standard for incorporation in international deals as set by the applicable laws and court decisions, therefore they were never a part of the contract.

This was made certain through the conduct of the parties which imply the understanding that the terms of the Respondent are the applicable terms are the only terms applicable. A clear example of that would be the decision of the Claimant to raise its claim in front of an ad hoc arbitral tribunal as stipulated by the terms of the Respondent and contrary to its own terms.

Alternatively, even if the terms of the Claimant were properly incorporated, the application of any of the battle of forms theories would lead to their exclusion.

Finally, the obligation of delivering conforming goods is an obligation of result, which was not fulfilled as the goods delivered by the Claimant did not conform to the particular purpose set by the Respondent, which is for the goods to be sourced in an environmentally sustainable way.

Excuses that Respondent had no right to rely on the Claimant's skill and judgment since the Claimant actually specialised in cake production and also boasted its method for ensuring compliance of suppliers when dealing with the Respondent. In addition, claims that Respondent passed up its right to claim non-conformity as it had enough time to inspect the goods are illogical since the fault at hand is an intangible one and cannot be inspected.

It should be noted that the claims regarding breach of contract are not to be discussed as instructed by the arbitral tribunal in Procedural Order No.2.

Procedural arguments:

First question:

The arbitral tribunal must decide on the challenge against Mr. Prasad without his participation.

First: The arbitral tribunal has the authority to decide the challenge against Mr. Prasad.

1. The arbitral tribunal has the jurisdiction to decide on Mr. Prasad as the parties' autonomy principle compel them to respect the non-involvement of an arbitral institution agreement, in addition that the challenge is a timely challenge.

A- To achieve the parties' autonomy the tribunal must decide the challenge

2. The arbitral tribunal has the authority to decide on Mr. Prasad challenge, since the arbitration clause clearly excludes the intervention of any institutional entity in the arbitration. *[Cl. Memo. § 26]*

3. The exclusion is not directly concerning Art.13.4 of the UNCITRAL Rules, but as a subsequent to the reference made by the aforementioned Art. for the appointing authority that has been defined by Art. 6, *"If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority."* *[UNCITRAL Rules Art 13(4)]*.

4. The solution provided by the UNCITRAL Rules in Art. 6.1 is to designate the PCA Secretary General to appoint the appointing authority, the PCA is considered to be an institutional entity that cannot take any part in this arbitration, giving the fact that the parties agreed to prevent the involvement of any institutional entity in their dispute resolutions. *"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 Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority."* *[UNCITRAL Rules Art 6(1)]*

5. If the tribunal decided to deviate from this agreement and did not decide the challenge, the award may not be recognizable nor enforceable according to the New York Convention

and the Model Law as the Model Law states: *"the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place" [New York ConventionArt.V.1 (d)] [DAL. Art. 36a, para 4] [Born, p. 414*, to avoid the aforementioned situation, the tribunal must adhere to the rules of the *lex-arbitri* i.e. DAL to fill the gap regarding who must decide the challenge. *[Cl. Memo. §§ 24, 25, 27]*

6. The DAL in Art. 12 states that the tribunal itself must decide the challenge, hence no arbitral institution should interfere in the arbitration, and the parties' autonomy is going to be achieved.

B- The Claimant waived its right to designate an appointing authority

7. Art. 6.2 of the UNCITRAL Rules provided a time-limit to designate an institution or a person to appoint the appointing authority mentioned in Art. 13.4, the Claimant had the right to nominate any private individual to appoint the appointing authority. *"If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance 7 with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority" [UNCITRAL Rules, Art 6(2)] [Caron & Caplan, p. 256]*

8. But, the Claimant chose not to use its right and waived it by not nominating any person, thus, this right was the only approach to be taken if the Claimant wanted to enact both the arbitration clause and the UNCITRAL Rules. *[Cl. Memo. § 28]*

9. Therefore, the arbitration clause must be strictly enacted without any deviation from the agreement to exclude any intervention from an institutional entity, otherwise the award would be challenged, thus, as mentioned above the *lex-arbitri* must fill this gap.

C- The challenge is a timely challenge according to the chosen arbitration rules

10. According to Art. 12 of the UNCITRAL Rules; the challenge shall be made within 15 days starting from the next day of the awareness of any circumstances raising justifiable doubts regarding the independence and/or impartiality of an arbitrator, the respondent did not raise any challenge after the 26th of June disclosure, since the circumstances in that disclosure by 'itself' does not raise any justifiable doubts. *[Cl. Ex. C11 p. 23][UNCITRAL Rules, Arts. 2.6 & Art.12]*

11. But, after the second disclosure the appearance of a third-party funder and the attempts of the Claimant to cover it, the respondent puzzled out a justifiable doubt to challenge the arbitrator, hence, the 15 days limitation to raise this challenge started on the 13th of September not on the 26th of June. *[Declaration Prasad p. 36]*

12. The notice of challenge has been submitted on the 14th of September, which is after 3 days from the awareness of the circumstances that raised the threat of bias of Mr. Prasad. *[Notice of challenge of arbitrators p. 38]*

13. Therefore, the challenge is a timely challenge and the allegation of the Claimant based on the time-limit has no legal merits. *[Cl. Memo. § 16]*

14. The lack of disclosure by Mr. Prasad about his article is the reason of the threat regarding his partiality, any arbitrator is under the duty to disclose any related matter to the dispute whether it is a connection to the parties or to the subject of the dispute, an article regarding the main substantive question in the case is indeed must be mentioned in the declaration of impartiality and independence of Mr. Prasad. *[Cl. Memo. § 18]*

15. The parties in arbitrations are not under the duty to make a full background check on to the arbitrators, since those arbitrators are already under the duty to provide any information may affect their ruling.

16. Also, a false allegation by the Claimant that the respondent "visited" the website and chose to not raise the challenge earlier is a non-sourced allegation; the Claimant did not provide any valid proof to this allegation. *[Cl. memo. § 20]*

17. To the respondent, Mr. Prasad has not been in any bias threat situation before the appearance of the third-party funder problem, hence the Respondent in a good faith trusted the declaration of Mr. Prasad and did not see the need to do a full check up on his background and read all his publications just to pick a challenge against him.

18. As consequence of the Claimant's misconduct by attempting to hide fundamental information i.e. the funding of FindFund LP, the Respondent believed that Mr. Prasad is indeed an honourable man, and Claimant is hiding this information on him, and therefore the respondent -in good faith- asked Mr. Prasad to withdraw from the tribunal willingly without the need to challenge him. *[Cl. Memo. § 21]*

19. The misconception provided by Respondent that an acknowledgment of the honourability of Mr. Prasad is an acknowledgment of his impartiality and independence is a wrong understanding, since the partiality and dependence of an arbitrator do not affect his honourability. *[Cl. Memo. § 34]*

Second: Mr. Prasad must not participate in the challenge

20. The participation of Mr. Prasad in his own challenge is against both the chosen procedural rules and the IBA Guidelines, which is also against the commentators approaches in this regard.

A- The chosen procedural rules refuse the participation of the challenged arbitrator

21. It is indisputable that the drafters of the UNCITRAL Model Law agreed to not prevent the challenged arbitrator from the participation in his challenge, and it was intentionally not mention any provisions regarding the participation of the challenged arbitrator because the Model Law was drafted by the UNCITRAL to be adopted by states, to achieve that purpose, some of its provisions left undecided for the states to fill their gaps.

22. An example of which is the article in hand, even though it is permitted for the challenged arbitrator to decide in his own challenge, some laws did ratify the Model Law and changed this Art. to avoid this participation.

23. But this is not the case, because the parties did not choose the UNCITRAL Model Law as the procedural law, they chose the UNCITRAL Rules, which means that if the tribunal is going to look at any interpretation or intention of the drafters it should look at the intention of the drafters of the UNCITRAL Rules. *[Cl. Memo. § 32]*

24. Giving the fact that the tribunal adhered to the UNCITRAL Model Law principles just to fill the gap raised by the question of the authority that decide the challenge against the arbitrators, and this adherence does not extend to any further questions could be answered by the UNCITRAL Rules.

B- The commentators support the non-participation of the challenged arbitrator

25. The participation of the challenged arbitrators in his own challenge has been a debated subject between the international commentators, whether this participation is in the decision making or even in the deliberations.

26. Some of the domestic legislations ended this debate when they adopted the UNCITRAL Model Law and amended the provisions of Art. 13(2) and expressly excluded the participation of the challenged arbitrator.

27. While on the other hand, commentators in the international community supported this approach, and presented various arguments to support it, as to Karel Daele; the *self-policing* characteristic of the arbitration required only the non-challenged arbitrators to decide the challenge. [*Daele, p. xix]*

28. Another argument concerning the partiality and objectivity of the tribunal, if they let the challenged arbitrator decide the challenge, as the objectivity of the arbitral tribunal would be questioned if the challenged arbitrator participates in the challenge. *[Winnie Jo-Mei, p. 301*]

C- The IBA Guidelines consider the challenged arbitrator as a partial arbitrator in his challenge

29. The IBA Guidelines are considered to be code of conduct to the arbitrators in their relationship with parties and the subject matter of the case, even if the Claimant is going to argue about the legal statues of the guidelines, tribunals and parties often refer to them, which means that respondent is entitled to demand the application of the guidelines. *[PO. No. 2]*.

30. But the Claimant in its memorandum accepted the application of the guidelines which obligated them to follow their provisions. *[Cl. Memo. § 35]*

31. The non-waivable Red List of the guidelines is the only list that the parties cannot accept the ruling of an arbitrator whenever one or more of the situations mentioned in the list appeared, which means that these circumstances cannot be waived by an agreement between the parties.

32. Following the general standards of the guidelines, the IBA group clearly stated that the main idea of the non-waivable Red List is to avoid any situations where the arbitrator becomes a judge in his or her own cause *[IBA Guidelines, Explanation to General Standard 2, (d)]*.

33. This stipulation from the IBA group in the general standards supported also by another stipulation in the introduction of the practical applications "the lists" *[IBA Guidelines, introduction (2)]*.

34. The challenge in hand has a significant interest towards Mr. Prasad whether in the financial aspect or the personal one, giving the fact that the outcome of the challenge is either to remove Mr. Prasad or let him remain in the tribunal.

35. This significant interest is provided in the non-waivable Red List of the IBA Guidelines (1.3):

"*The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.*"

36. Claimant alleges that IBA Guidelines support the participation of the challenged arbitrator in his or her own challenge *[Cl. Memo. § 34]*. Contrary to the Claimants allegation the IBA Guidelines have been drafted to prevent any arbitrator from participating in a challenge connected to him.

Second question:

First: Mr. Prasad should be removed from the arbitral tribunal as the justifiable doubts standard of the UNCITRAL Rules has been met

A- The bias of Mr. Prasad is apparent because he is partial

37. The fact that Mr. Prasad has written an article that addresses the issue of conformity of the goods under Art. 35 of the CISG, published in the (Vindobona Journal of International Commercial Arbitration and Sales Law) represents in this case, a clear indicator that Mr. Prasad has an opinion regarding an issue directly connected to the dispute. If one was to read this article, it would be safe to say that Mr. Prasad does not agree with the concept of ethical production falling within the scope of conformity as clearly stated within the article "*such a broad concept of conformity should be rejected*". Such statements show that the state of mind of Mr. Prasad is a partial one.

1- The lack of disclosure by Mr. Prasad on his scholarly article raises justifiable doubts regarding his impartiality

38. The excerpt of Mr. Prasad's article was sent by Respondent not by Claimant which would indicate that there was an attempt to conceal anything regarding this published article, the notice of challenge of arbitrator would concur with this as it was stated in the notice from what was discovered by Respondent via virus check, retrieved metadata from the files sent by Claimant obtained that Mr. Fasttrack said "Mr. Prasad is the perfect arbitrator for our case given his view expressed in an article on the irrelevance of CSR on the question of the conformity of the goods". *[Notice of Challenge of Arbitrator p.38 § 3] [Re. Ex. R4]*

2- Mr. Prasad's publication is a circumstance that he was obligated to disclose about.

39. The term "*shall disclose any circumstances likely to give rise to justifiable doubts*" used in Art. 11 of the UNCITRAL Rules has a wide meaning. Disclosure of an arbitrator includes any circumstance that possibly and not necessarily may give rise to justifiable doubts. Examples of such circumstances include where the arbitrator may have taken a position on these issues in academic publications, in a public speech or in an expert opinion. *[Daele, p.8]*

40. The fact that Mr. Prasad's Article could have been found on his website does not mean that he is exempted from disclosing the Article An arbitrator is under the obligation to disclose any circumstance which may rise to justifiable doubts unless they have informed the parties of such circumstances. The term "unless" would indicate that he had already disclosed such circumstances, and Mr. Prasad did not disclose about his Article nor did he inform Respondent about it. *[Daele, p.24]*

41. The agreed upon law governing the procedural matters is the UNCITRAL Rules, Respondent assures that it was Mr. Prasad's duty to disclose about his article and was obligated to do so in accordance with the agreed upon law *[UNCITRAL Rules,Art.11] [Cl. Memo. § 42]*

42. Looking back to the case and taking into consideration the facts of the case on the clearly intended failure to disclose the scholarly article, Respondent is certain that such failure served the Claimant, as Claimant knew about the article and its convenience in appointing Mr. Prasad as its arbitrator and as it was Mr. Prasad's duty and obligation to disclose while he did not do so.

3- The article itself is relevant to the case and addresses an issue directly connected to the case

43. The subject of conformity of goods in sales contracts was the whole reason behind the termination on behalf of Respondent, and Mr. Prasad clearly stated his opinion in the article and said, "*such a broad concept of conformity should be rejected*", an opinion which clearly opposes Respondent's point of view. *[Cl. Memo. § 45]*

44. Regardless of whatever arguments the Claimant may provide on the impossibility to find an arbitrator that has no opinion on a matter in hand, it is clearly shown that court decisions do not agree with such arguments. Rather, it has been indeed found that an issue such as the presence of an article published by an arbitrator, should it have relevance to the case in which the arbitrator is acting within is an important issue that cannot be disregarded.

45. The ICC Court accepted the challenge of an arbitrator that had previously published four legal opinions opposing policies of the party raising the challenge, which clearly indicated his partiality. *(Daele, p.381)[Cl. Memo. § 47]*

B- The bias of Mr. Prasad is apparent because he is dependent.

46. The questioning on the dependence of Mr. Prasad is raised by Respondent, due to the information provided regarding the multiple previous appointments of Mr. Prasad, as an arbitrator by subsidiaries of the main shareholder that its funding Claimant's claim in this arbitration. Such circumstances indicate that there are external factors involved, represented by relationships between Mr. Prasad and the third-party funder which prove the dependency of Mr. Prasad.

1- The previous appointments of Mr. Prasad between each of Horace Fasttrack and FindFunds LP raises justifiable doubts as to his independence.

47. In the email sent by Mr. Prasad on 11th of September 2017 he mentioned that he had been appointed twice in previous times, as an arbitrator and the arbitral proceedings had been funded by subsidiaries of the main shareholder of the third-party funder funding Claimant's claim, Funding 12 Ltd. which is Findfunds LP making this appointment the third appointment of Mr. Prasad in a arbitral proceeding funded by FindFunds LP. Such circumstances are indistinguishable from the ones mentioned within the waivable Red List of the IBA Guidelines *[Declaration Prasad Connections with Funder, p.36]*

48. In addition to that, in the same email Mr. Prasad mentioned the merger of his law firm with another law firm located in Ruritania (Slowfood) and a former partner of this law firm is representing a client as an arbitrator to an arbitral proceeding which is also funded by the same questioned funder which is FindFunds Lb. *[Declaration Prasad Connections with Funder, p.36] [Cl. Memo. § 45]*

49. Given in hand the above stated facts of the case, Mr. Prasad is indeed biased because he is dependent as the events and relationships between him and the third-party funder, its subsidiaries and affiliates are both directly and indirectly present, therefore, Mr. Prasad cannot be independent.

2- The presence of a third-party funder raises justifiable doubts.

50. Funding 12 Ltd. is the third-party funder funding Claimant's claim in this arbitration, which would mean that there is an agreement upon percentage of the award that would go to Funding 12 Ltd if the award falls in Claimant's favour. If the award does not fall in favour of the Claimant, Funding 12 Ltd. would lose their investment. Disclosure therefore is an

important issue when it comes to third party funding because an arbitral tribunal will base its decisions on facts brought before it and these facts will impact proceedings and decision making. *[Von Goeler, p.125]*

51. Respondent reasoned its request that the Claimant discloses the name of the funder which is funding its claim as it could have serious repercussions on the conduct of the proceedings, although Claimant eventually disclosed the requested information yet showed reluctance and stated that these requests were unjustified and irrelevant and a right to request disclosure is provided to both parties regardless of the exercise of this right. *[Letter Fasttrack Disclosure of Funder p. 35] [Declaration Prasad Connections with Funder p.36]*

52. There were no justifiable doubts regarding the disclosure of the funder initially yet this idea is exclusive to the initial disclosure and upon becoming aware of the previous appointments the situation changed as the information provided in the second disclosure raises justifiable doubts. [*Declaration Prasad Connections with Funder p.36].*

3- The unethical conduct of Claimant assures the presence of justifiable doubts.

53. The lack of disclosure about third party funding has an effect on arbitral proceedings, because arbitrators need to be aware of such funding in order for them to evaluate what must they disclose that might for a possible conflict of interest. In addition to that, disclosure of third party funding serves the parties interest as a sign of procedural good faith. *[Burcu Osmanoglu, p.339]*

54. Although it is not an uncommon practise in arbitration that the proceedings and claims are funded by parties other than the ones concerned in the dispute, yet the information obtained by the Respondent regarding Claimant and its funder lead to a thread of information that made it clear that the Claimant appointed an arbitrator who is partial and dependent and it was Claimant's obligation to disclose without the need for a request from Respondent for such disclosure, and the lack of disclosure in this manner shows the intention of hiding information.

55. Relationships such as these present in the this case are sufficient to constitute a firm conclusion that an arbitrator is partial, in other words, such relationships build up grounds for challenging the arbitrator and upon such challenges court decisions on removing the arbitrator were found.

56. In a case which a Claimant raised separate grounds for disqualifying the arbitrator was the relationship between the arbitrator's law firm and the respondents.

57. The Claimant contended that one of the partners of the arbitrator's law firm had acted in the past as official legal advisor to one of the respondents, including in the period when the contract underlying the arbitration had been negotiated and during the first four years when the contract was in effect. The challenge was sustained. [*Daele, p.380]*

Second: In compliance with the IBA Guidelines, Mr. Prasad should be removed from the arbitral tribunal

58. The IBA Guidelines is a soft law in principle, meaning that it is considered binding where the parties have agreed to. Another aspect of the IBA Guidelines is that they may be used as a tool to help arbitrators, counsels, and parties in order to set a level playing field, as these guidelines consist from a set of lists. The non-waivable Red List, the waivable Red List, the Orange List. All of which contain a number of situations that may form a possible conflict of interest.

59. The IBA has no power to legislate on the conduct of lawyers or parties in their approach to arbitration. The guidance produced should be applicable only where the parties so agree. *[Klausegger, p.206]*

60. Although the IBA Guidelines are only concerned with substantive issues and Claimant ought to have not referred to them in procedural matters even so, according to the IBA Guidelines the justifiable doubts standard comes to enactment when the facts of the case are brought to a reasonable third person which is not part of the case would he consider these facts likelihood to raise justifiable doubts a standard which has been met *[IBA Guidelines general standard (2)(b)].[Cl. Memo. § 46]*

A- The partiality of Mr. Prasad concurs with the IBA Guidelines

61. The lack of disclosure from Mr. Prasad's end shows an apparent intention by him to not inform the Respondent and this arbitral tribunal about his published article, because the published article and its relevance to the case add up to form evidence of his partiality and therefore bias.

62. General standards 7(a) of the IBA Guidelines clearly states the reasoning behind a challenge of an arbitrator by one of the parties.

63. Mr. Prasad ought to have disclosed by himself without the need for a request on behalf of Respondent and that is because had he been truly independent and impartial, he would see no need to dismiss this type of disclosure, in addition to this, he ought to have disclosed voluntarily to avoid unmeritorious challenges brought against him and voluntary disclosures would have protected him.

64. As the general standad 7 (a) of IBA Guidelines states: "*A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team.is reputation.*"

B- Mr. Prasad's dependence appears in situations provided by the IBA Guidelines lists

65. Looking back and take into consideration the issue of the multiple previous appointments in which Mr. Prasad was appointed as an arbitrator, and the issue of the relationships which Mr. Prasad is involved in constitute the description of a dependent arbitrator.

1-Art. 2.3.6 of the Waivable Red List of the IBA Guidelines agrees with the removal of Mr. Prasad.

66. As Mr. Prasad stated in his disclosure that a former partner of Slowfood, the law firm which he has merged with located in Ruritania, has a significant commercial relationship with FindFunds LP due to his presentation as an arbitrator to a client of which the arbitration has been funded by FindFunds LP, which consequently means that an amount of the revenues of this arbitration case is for FindFunds LP. *"The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties."*

67. Pursuant to a contract, *Jean* and *Leonard Schmitz* and *Zilveti, Meris*, and *Prudential-Bache Securities Inc.* submitted a dispute to arbitration before the National Association of Securities Dealers Under the submission agreements.

68. The dispute was to be arbitrated in accordance with the NASD's A Code of Arbitration Procedure. Three arbitrators were chosen: *John R. Conrad, Carolyn J. Yamasaki*, and *Richard G. MacMillan. Conrad*, and a lawyer, was chosen as chairperson of the arbitration panel.

69. Each arbitrator in this case completed a disclosure form indicating affiliations, if any, with the parties to the arbitration and any other matter he or she believed was required to be disclosed. The parties were given these forms, neither side objected to any of the three arbitrators.

70. The initial decision made after the discussion of the challenge against Conrad was rejected, and it was assured that he was unaware of such circumstances, and was not obligated to investigate, in a later on conclusion the challenge was reversed, and the award was vacated. *[Schmitz v. Zilveti]*

2-Art. 3.1.3 of the Orange List in the IBA Guidelines agrees with the removal of Mr. Prasad

71. Mr. Prasad has acted as an arbitrator in two cases and these two cases were funded by subsidiaries of FindFunds LP the main shareholder of the third party funder funding Claimant's claim and those two cases were concluded only a month ago, while the Orange List of the IBA Guidelines clearly states a situation in which if the arbitrator has been appointed within the past three years twice or more by one of the parties or an affiliate of one of the parties there is a possible conflict of interest at hand. *"The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties."*

72. These circumstances adhere to the circumstances of a case in which a presiding arbitrator was involved in, and it was decided that the arbitrator which is in a position similar to Mr. Prasad's, was indeed found dependent, the facts of the case were:

73. Three arbitrators were chosen: *John R. Conrad*, *Carolyn J. Yamasaki*, and *Richard G. MacMillan. Conrad*, a lawyer, was chosen as chairperson of the arbitration panel in an arbitration case in which *Jean* and *Leonard Schmitz* and *Zilveti, Meris*, and *Prudential-Bache Securities Inc.* were part of. *Conrad's* law firm represented the parent company of *Pru-Bache*, *Prudential Insurance Co.*, in at least nineteen cases during a period of 35 years; the most recent representation ended approximately 21 months before this arbitration was submitted.

74. *Conrad* had reviewed, prior to the hearing, documents stating that *Prudential Insurance Co.* was the parent company of *Pru-Bache*. Yet *Conrad* only ran a conflict check for *Pru-Bache*. He disclosed prior to the hearing none of the many *Prudential Insurance Co.* cases his law firm had handled.

75. Even though, the initial decision of the court was to reject the challenge that was brought against Conrad due to the above stated facts, yet this decision was later on reversed and the award was considered vacant. *[Schmitz v. Zilveti]*

Substantive arguments:

First question:

First: The terms of the Respondent are the applicable terms to the contract

77. The issue at hand revolves around the sales offer made by the Claimant on the 27th of March 2014 *[Cl. Ex. No. 4]*. With the dispute being that Claimant purports that this offer, which is claimed to be the final offer made, alters the contract between the Claimant and Respondent to make it that the Standard terms of the Claimant be the terms governing the contract.

78. That being based on the minute line at the bottom of the Claimant's sales offer which states, *"The above offer is subject to the general conditions of sale and our commitment to a fairer and better world"*. Keeping in mind that the Claimant did not include any standard terms with the offer, but instead provided a link of its website where the Claimant's general conditions are available as well as its commitments and expectations.

A- The terms of the Claimant were not properly incorporated as a part of the contract

1- A standard for incorporating standard terms in a contract was set by the CISG digest and courts applying the CISG

79. The CISG does not directly provide a manner for including standard terms as a part of a contract, yet the CISG digest provides "*A majority of courts apply the provisions of Part II of the Convention and its rules of interpretation in Art. 8, as well as the rules on practices and usages in Art. 9, to determine whether the parties have agreed to incorporate standard terms into their contract*". *[CISG digest, p.84]*

80. In the interpretation of the above statement, a court ruled: "*The CISG requires that the offeror's intention to incorporate his standard terms in the contract be recognizable by the party receiving the offer.*" *[Generators case]*

2- Claimants method of incorporation did not meet the above standard

81. The Claimant did not provide its terms in the offer itself, nor did include them in any of the written documents exchanged during the negotiation period. Instead the Claimant provided the link of its website where the rules may be found.

82. According to a court decision, in international deals, the intention of a party to include its standard terms is not sufficient, instead, that party must provide the text of those terms to the other party. [*Broadcasters case*]

83. In the above case the Standard terms were provided through a link to the offeror's website, the court ruled that the terms did not meet the set requirement for incorporation, therefore, the court ruled that they were never a part of the contract. Which directly proves that the terms of the Claimant were not properly incorporated as a part of the contract. *[Cl. Memo. ∫ 67]*

3- The phrasing used by the Claimant does not meet the standard

84. The wording used by the Claimant "subject to general conditions of sale" is not a clear indicator within itself, as it does not specify which conditions of sale it refers to. Which is another way the offer does not qualify to the standard set by the CISG and courts when including standard conditions.

4- The Claimant should have sent its standard Terms as a part of the written documents exchanged in negotiating the deal

85. The proper method of incorporating the terms would have been to send the text of the Terms to the Respondent to clearly indicate the intention to include its standard terms and conditions *[Metal ceiling materials case]*

B- It is clear through the actions of both parties that it was understood that the terms of the Respondent govern the contract

86. According to Art. 8(3) of the CISG: In 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.

87. The conduct of both parties in the following case would indicate that their intention was never to apply the terms of the Claimant, but to apply the terms of the Respondent.

This is as follows:

1- The form used by the Claimant for invoicing contains the same footer as the order form

88. This is an indication that the line is actually more of an automatic signature used by the Claimant, therefore, it cannot be interpreted as an actual representation of intention from the Claimant to include its standard terms as a part of the offer.

2- The letters sent by both the Respondent and Claimant support that they understood the Respondent's terms were the only terms incorporated with the sales offer.

89. In the beginning of this letter, the Claimant admits that it has decided to make a few changes to the original terms sent by the Respondent. Respondent later on, specifies these changes which are: The size of the cake, method of payment, time of payment, but does not mention the standard conditions. *[Cl. Ex. No.3]*

90. Looking at the offer made by the Claimant all the changes made were mentioned in the letter except the standard conditions leading to the conclusion that the Claimant never intended to change the standard conditions, or they would have mentioned it in the letter with all the other changes.

91. Furthermore, the Claimant discusses the Respondent's arbitration clause, stating that "*We can live with the clause as it is*" with the full knowledge that the arbitration clause is a part of the Respondents standard conditions. Further indicating that there was no intention to replace the standard conditions set by the Claimant.

3- The choice of the Claimant to raise the claim in before an ad hoc arbitral tribunal is a clear indicator of the understanding between both parties.

92. As per **PO. No. 2** Claimants terms of conditions contain in Art. 11 the model ICC Arbitration Clause fixing the place of arbitration in Equatoriana and declaring Equatorianian law to be applicable. That is different to the ad hoc arbitration clause set by the conditions of the Respondent.

93. Had the Claimant's intention been to include its own standard terms as part of the contract and exclude the Respondent's terms, the Claimant would have raised its claim before the ICC as per their standard conditions.

94. Instead the Claimant by its own will, decided to raise the Claim in front of an ad hoc tribunal according to the standard conditions of the Respondent specify.

95. In conclusion, the conduct of the Claimant is an exact application of the standard conditions of the Respondent. Clearly indicating that both parties' intention was to never incorporate the conditions of the Claimant, but instead, to apply the standards set by the Respondent in the invitation to tender.

C- It does not matter who made the final offer, or whether the invitation to tender is an offer, the situation cannot become a battle of forms. The terms of the Respondent still govern the contract

96. Based on the above arguments, any claims from the Claimant that its standard conditions are the only conditions to govern the contract since it made the final offer or through the application of the last shot theory is rendered moot.

97. Those arguments are all based on the proper incorporation of the standard terms of the Claimant, but since those conditions were never a part of the contract, the only terms applicable are the terms of the Respondent.

Second: Alternatively, if the terms of the Claimant were incorporated as a part of the contract they still would not be applied.

A- Claims made by Claimant regarding the applicability of its terms and eluding a battle of forms cannot be applied

1- Contrary to claims made by the Claimant, Respondent did not agree to the Claimants standard terms

98. The Respondent did not actually accept the terms set by the Claimant, it clearly indicated that the changes it has accepted, the Respondent stated: "*The different payment terms and form of cake are acceptable to us*" *[Cl. Ex. No.5]*. While remaining silent regarding the standard terms of the Claimant.

99. Subject to Art. 18(1) of the CISG "*Silence or inactivity does not in itself amount to acceptance*." Especially since the two parties did not have any previous agreements. Therefore, the Respondent's terms regarding the standard terms cannot be translated as an acceptance.

2- None of the parties accepted the terms set by the other party directly, yet neither stated that they would not want such terms to apply

100. The mechanism for excluding the application of the standard terms is set by the UPICC principles as they clearly indicate in Art. 2.1.22 that a party must clearly indicate that "*it does intend to be bound*" by the terms of the other party.

101. Therefore, simply adding a Minute clause at the bottom of a document to incorporate the Claimant's standard terms, does not meet that standard. Especially since it is allowed by the applicable law to have two sets of standard terms incorporated within the same contract.

3- Therefore, a battle of form situation cannot be escaped

102. In case it is ruled that the terms of the Claimant were incorporated as a part of the contract, this would lead to the contract having two conflicting terms as a part of it, this is supported by the CISG digest and the UPICC principles is a battle of forms situation, as the UPICC principles define it in Art. 2.1.11: "*A situation where both parties use standard terms and reach agreement except on those terms.*"

103. In this situation, the contract is deemed to be concluded based upon the terms that are mutual in substance.

B- The result of the application of any of the battle of form theories or solutions mentioned in the applicable laws would exclude the application of the Claimant's terms

1- The applicable theory in this case is the knockout theory

104. In the application of the battle of forms theories, the CISG remained silent, yet the commentary on the UPICC Principles provides that the knockout theory applies when parties refer to their terms more or less automatically.

105. While the last shot theory applies when there is a clear indication by the party sending its terms that it wants its terms to apply alone, giving a clear indication that it is not willing to contract under any terms other than its own.

106. In cases where the knockout theory was applied, there occurred a conflict in the standard terms of both the parties were incorporated according to the courts as a part of the contract. As both parties made a clear indication according to the court that it wanted to incorporate its standard terms as a part of the contract, by attaching them to the order forms sent by them.

107. Both parties did not object to the incorporation of the other party's standard terms upon receiving those terms from each other, therefore, the court ruled that the terms that were similar in substance would remain as a part of the contract, while the differed terms would be excluded from application, and the terms set by the applicable law would be applicable on the matters that were regulated by the excluded terms. [*Powdered milk case*]

108. Furthermore, regarding the application of the last shot theory, in accordance with the UPICC principles, courts applied the last shot theory in cases where one of the party not only made it clear that it would like to apply its terms to the other party and supplying that party with the text of those terms.

109. The above-mentioned party also clearly indicated in its standard terms that "*Any standard terms of purchase of the orderer that contradict these terms are not legally binding This applies even in case the orderer attempts to include such standard terms of purchase into the contract and also in case we do not expressly contest them.*" *[Powdered milk case]*

110. In this case, if it is ruled that the reference made by the Claimant counted as a clear indication that it wished to include its terms as a part of the contract, none of the parties made a condition regarding the application of its terms its viewed that the knockout theory should be applied, and the conflicting terms be excluded therefore excluding the terms set by the Claimant.

111. Also, it should be mentioned that courts regularly favour the application of the knockout theory with one court clearly stating: "*According to the prevailing opinion, partially diverging general terms and conditions become an integral part of a contract (only) insofar as they do not contradict each other; the statutory provisions apply to the rest*" Further adding to the argument that the knockout theory is to be applied. [*Powdered milk case*]

2- Alternatively, if the last shot theory was to apply, the terms of the Respondent would be the applicable terms.

112. If the tribunal finds that the applicable theory to this battle of forms situation is the last shot theory, then the terms of the Claimant should be the terms excluded rather than the terms of the respondent. *[Cl. Memo. § 68]*

113. As mentioned above, the Respondent did not agree to the terms of the Claimant, in its reply, the Respondent accepted all the changes made by Claimant EXCEPT the terms and conditions of the Claimant where it remained silent. *[Cl. Ex. No.5]*

114. According to the applicable law "*Silence or inactivity does not in itself amount to acceptance.*" *[CISG, Art. 18(1)]* Making any claims made by the Claimant, the Respondent accepted its offer invalid.

115. This argument is supplemented by the interpretation of Peter Schlechtriem on the *[Powdered milk case]* " *for the silence of the Plaintiff [buyer] to the last reference of the Defendant [seller] to its own terms could not, under good faith and fair dealing principles - the Court erroneously invoked Art. 7(1) CISG here - be interpreted by the Defendant [seller] as a willingness of the Plaintiff [buyer] to let only those clauses in the Plaintiff [buyer]'s form be accepted which were favourable for the Defendant [seller*]"

116. Therefore, it can be said that the Respondent's reply to the offer made by the Claimant was an acceptance that introduced a limit by not accepting the entirety of the Claimant's offer. *[Cl. Memo. § 64]*

117. According to the law agreed upon by both parties *"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*" *[CISG, Art. 19(1)]*

118. This means that the final offer was actually made by the Respondent not the Claimant. Consequently, the application of the last shot theory would lead to the application of the terms of the Respondent. *[Cl. Memo. § 69]*

Second Question:

First: The Claimant delivered nonconforming goods as his obligation was making a result obligation

119. The Claimant's obligation was an obligation of making a result which it failed to fulfil, as it did not deliver products that are fit for the purpose that was made clear by the Respondent.

120. Instead of delivering goods that are fit for the purpose, the Claimant is arguing that his obligation was merely an obligation of doing his best efforts to deliver conforming goods.

A- There is no usage in the bakery industry, thus Art. 9 of the CISG does not apply

121. The arbitral tribunal made clear that there is no trade usage pertaining to environmental, ethical or sustainable production in the bakery industry *[PO. No.2, § 35*], thus *[CISG Art 9(2)]* does not apply regarding having usages impliedly made applicable to the contracts. *[Cl. Memo. §§ 77-79]*

B- The Respondent has stated that it wants to be a global compact "LEAD" member which results in making it a making a result obligation

122. The Respondent has made clear that it wants to be a global compact LEAD company by 2018 and a decisive element in that is a proper supply chain management. Furthermore, the Respondent wants the Claimant to be sure that their suppliers adhere to Comestibles Fino's Philosophy as well.

123. To determine the intent of a party *[CISG Art (8)]* applies as *[CISG Art (8)(3)]* states that:

"*In 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.*"

124. To decide the intent of a party, due considerations is to be given to all relevant circumstances of the case including the negotiations and any subsequent conducts of the parties.

125. In determining the obligation of the Claimant of it being an obligation of making a result or best effort, the consideration should be given to what did the Respondent mean when it stated that it wants to be a global compact LEAD company.

126. Global Compact LEAD is *"an exclusive group of sustainability leaders from across all regions and sectors that represent the cutting edge of the UN Global Compact" [Lead]*

127. Being a LEAD company in GCP means being a company that "aim to achieve higher levels of performance, tackle frontier corporate sustainability issues and encourage greater action by the broader business universe". [Lead]

128. Looking at what does it mean and take to be a Global Compact LEAD company, the intention of the Respondent is clear for the obligation of the Claimant to be a making a result obligation, as achieving highest level of performance tackling frontier corporate sustainability issues, and being the company that represents the cutting edge of UN Global Compact, means having a very strict adherence to its principles, thus making a result obligation. *[Cl. Memo. §§ 80-82]*

Second: The goods delivered by the Claimant are not conforming pursuant to Art. (35) CISG

A- The goods were not of the quality ordered by the Respondent.

129. The Respondent has ordered in his code of conduct for supplier that the Claimant shall conduct his business in an environmentally sustainable way *[Cl. Ex. C2, p.13, § C]*, and has stated in the procurement by suppliers that the Claimant should select its tier one suppliers, based on them agreeing to adhere to standards comparable to those set forth in the Comestible Fino's code of conduct for suppliers *[Cl. Ex. C2, p.14, § E]*, Accordingly, it is clear that the Respondent has ordered the Claimant to deliver goods that are ethically produced.

130. Commentators have stated that "Goods processed under conditions violating the contractually fixed ethical standards are not of the quality asked for by the contract. 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, p.267]*

131. To conclude, ethical production is considered as a part of the quality of the goods delivered, thus not delivering goods of quality ordered constitutes the delivery of non-conforming goods pursuant to *[CISG Art 35(1)]*. *[Cl. Memo. § 84]*

B- The goods were not fit for their particular purpose.

132. To determine if the seller's obligation is to delivered goods that are fit for the purpose expressly or impliedly made known to him *[CISG Art 35(2)(C)]* applies as it states:

"(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;"

133. For this standard to be implied, three requirements must be fulfilled which are, information about the purpose, reliance on seller's skill and judgement and reasonableness of reliance. *[Kröll, p. 518]*

134. All of those standards have been met yet the Claimant delivered nonconforming goods as they did not meet the particular purpose needed by the Respondent.

1- The Claimant was aware about the purpose and had information about it

135. For the first standard to be applied, which is providing information about the purpose it is important that the seller is informed about the special purpose needed by the buyer. *[Kröll, p.518]*

136. In this case, the Respondent (buyer) has made clear for the Claimant (seller) the special purpose the cakes were needed for in which is being supplied to Comestible Fino's *(Cl. Ex. C1, p.8, § 8)*, which is a leading gourmet supermarket in Middeterraneo, where it attaches great importance to the fact that products from further afield comply with fair-trade standards and do not violate the Global Compact principles *[Response to notice of arbitration, p.24, § 4]* , and that those cakes must be ethically produced in an environmentally sustainable way *[Cl. Ex. C2, p.13, § C]*. Furthermore, the particular purpose may be made known to the seller when the buyer's firm reputation is in context with ethical values is widely known in the trade sector concerned. *[Schewenzer, p.267]*

137. Having stated this, the first requirement for the standard of the particular purpose to be implied has been met as the seller was aware of the information about the special purpose needed by the Respondent.

2- The Respondent has the right to rely on the skills and judgement of the Claimant to deliver conforming goods as per the contract.

138. For the second and third standard for the particular purpose to be implied, it is important to rely on the seller skills and knowledge to deliver conforming goods as per the contract.

139. In majority of the cases, where the seller is also the producer of the products it is rationale for the buyer to rely on the skills and knowledge of the seller, as it knows the specific features of the goods better than the buyer, and in present case the Claimant is the producer of the cakes; it must be aware of the specific features of the cakes.

140. Thus, the Respondent has all the right to rely on the Claimant skills and knowledge to deliver goods that are fit for the particular purpose.

141. Furthermore, the lack of seller's knowledge and skill may become relevant particularly in the cases where the seller informs the buyer of his lack of knowledge, which did not happen in this case. [Kröll, p.518]

142. Hence, the Respondent has all the right to rely on the Claimant skills and judgement to deliver conforming goods, as per their particular purpose and in such cases, that are related to ethical production the reliance on the seller skills and judgement should not cause any problem. *[Schewenzer, p.267]*

143. To conclude, having all the standards being met for the particular purpose standard to be fulfilled, the Claimant has failed to deliver goods that are fit for the particular purpose made known to him in the time of conclusion of the contract, as it delivered cakes containing unethically produced cocoa resulting in making the Claimant deliver non-conforming goods. *[Cl. Memo. § 86]*

C- Nonconformity based on non-ethical production is intangible thing, thus, can not be inspected.

144. The seller is relieved of the liability of non-conformity if the buyer knew or could not have been unaware of the non-conformity at the time of which the contract was concluded pursuant to: *[CISG Art (35) (3)]*.

145. The point of time where this Art. is relevant is to the extent of time of conclusion, later discovery of the defects, even if they occurred before the actual delivery, is irrelevant. *[Kröll, p.529]*

146. Furthermore, the discovery of the lack of conformity from the Respondent happened after the conclusion of this contract, thus this Art. is irrelevant.

147. If the Respondent had the chance to inspect the goods before the conclusion of the contract, being aware of non-conformity requires the buyer to inspect the products to find the lack of conformity in it. Looking at the meaning of inspection in *[OED]* it states that inspection means: *"Look at (someone or something) closely, typically to assess their condition or to discover any shortcomings"*.

148. Clearly it is not possible to look at the non-ethical production and assess the product to be unethically produced as unethical production is something intangible, thus, cannot be inspected.

149. The liability of the seller is only excluded for the apparent defects, liability for the hidden defects which can only be discovered by examinations involving extra cost, time or complexity beyond those which can reasonably be expect is not excluded by *[CISG Art 35(3)]*. *[Kröll, p. 529]*

150. All the cases brought by the Claimant refers to defects that can be inspected and examined or where the defects were known by the buyer before the time of conclusion of the contract. In these cases, *[CISG Art 35(3)]* can be applied as all of the conditions of applying the Art. is met, but none of the conditions of applying this Art. is met in our case. *[Cl. Memo. §§ 88-89]*

Third: The arbitral tribunal does not need to discuss damages and breach of contract.

151. The arbitral tribunal is in no need in this stage of arbitration to discuss whether the breach of contract is a fundamental or substantial breach of contract. Furthermore, the arbitral tribunal does not need to discuss any relief sought for damages or the costs of arbitral tribunal.

A- In procedural order No.2, Mr. Caroline Rizzo has made it clear that at this stage of arbitration no need to discuss breach of contract and damages.

152. The presiding arbitrator Mr. Caroline Rizzo has made it clear that at this stage of arbitration there is no need to discuss whether the breach is fundamental or if the damages or due and if so in which amount. *[PO. No.2, § 48] [Cl. Memo. §§ 89-97]*

B- The arbitral tribunal shall only discuss whether the products are conforming or that the Claimant has delivered non-conforming products.

153. Mr Caroline Rizzo ordered that at this point of arbitration the arbitral tribunal does only need to discuss whether the products delivered by the Claimant are conforming products or non-conforming, and to leave the discussing of breach and damages to another stage of the arbitration. *[PO. No.2, § 48]*

Request for relief

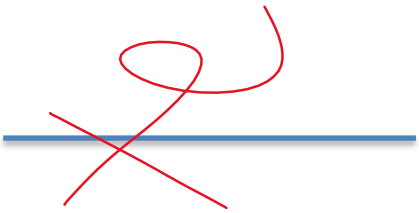
Considering the above submissions council for Respondent requests the tribunal to find that:

1. The tribunal is to decide on the challenge without the participation of Mr. Prasad.
2. Remove Mr. Prasad based on his partiality and dependence.
3. apply the terms of the Respondent on the contract while excluding the terms of the Claimant.
4. Rule that the goods delivered by the Claimant are non-conforming.

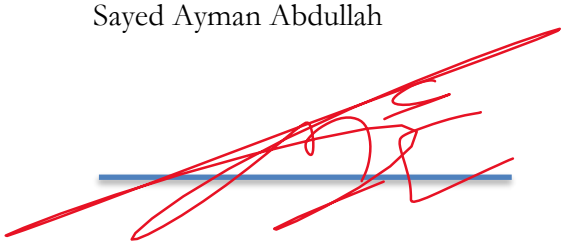
We hereby confirm that this Memorandum was written only by the persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Mohammed Ali Ahmed

Feras Al-Alem



Sayed Ayman Abdullah



Ehsan Fattah