



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

THE PROBLEM

Vienna, Austria
October 2017 – March 2018

Oral Hearings
March 24 – 29, 2018

Organised by:
Association for the Organisation and Promotion of the
Willem C. Vis International Commercial Arbitration Moot

And

Fifteenth Annual
Willem C. Vis (East)
International Commercial Arbitration Moot
Hong Kong

Oral Arguments
March 12 – 16, 2018

Organised by:
Vis East Moot Foundation Limited

Contents

Document	Page
Letter Fasttrack (30 June 2017)	3
Notice of Arbitration (30 June 2017)	4
Claimant's Exhibit C 1 (Invitation to Tender Letter Ming – 10 March 2014)	8
Claimant's Exhibit C 2 (Tender Documents)	9
Claimant's Exhibit C 3 (Letter Tsai regarding Sales Offer – 27 March 2014)	15
Claimant's Exhibit C 4 (Sales Offer)	16
Claimant's Exhibit C 5 (Respondent's Decision on Claimant's Offer – 7 April 2014)	17
Claimant's Exhibit C 6 (Respondent's Request for Clarifications/Stop of Payment – 27 January 2017)	18
Claimant's Exhibit C 7 (Excerpt from Michelgault – 23 January 2017)	19
Claimant's Exhibit C 8 (Claimant's Email – 27 January 2017)	20
Claimant's Exhibit C 9 (Claimant's Email – 10 February 2017)	21
Claimant's Exhibit C 10 (Respondent's Contract Termination – 12 February 2017)	22
Claimant's Exhibit C 11 (Prasad's Declaration of Impartiality and Independence and Availability – 26 June 2017)	23
Response to the Notice of Arbitration (31 July 2017)	24
Respondent's Exhibit R 1 (Claimant's Letter of Acknowledgement – 17 March 2014)	28
Respondent's Exhibit R 2 (Photo of Cake from Cucina)	29
Respondent's Exhibit R 3 (Claimant's Business Code of Conduct and Supplier Code of Conduct)	30
Letter Rizzo (Invitation to Case Management Conference – 22 August 2017)	32
Letter Langweiler (Request to Disclose Funder – 29 August 2017)	33
Letter Rizzo (Decision on Request to Name Funder – 1 September 2017)	34
Letter Fasttrack (Disclosure of Funder – 7 September 2017)	35
Declaration Prasad (Connections with Funder – 11 September 2017)	36
Letter Langweiler (14 September 2017)	37
Notice of Challenge of Arbitrator (14 September 2017)	38
Respondent's Exhibit R 4 (Excerpts from Prasad's article – 2016)	40
Respondent's Exhibit R 5 (Witness Statement Ming – 11 September 2017))	41
Letter Prasad (Refusal to Step Down – 21 September 2017)	43
Letter Fasttrack (Refusal to Agree to Removal – 29 September 2017)	45
Letter Rizzo (6 October 2017)	47
Procedural Order No 1 (6 October 2017)	48

Horace Fasttrack
Advocate at the Court
Fasttrack & Partners
14 Capital Boulevard
Oceanside
Equatoriana
Tel. (0) 214 77 32
Telefax (0) 214 77 33
fasttrack@host.eq

30 June 2017

By courier

Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
Mediterraneo

Notice of Arbitration

Delicatesy Whole Foods Sp v Comestibles Finos Ltd

Dear Sirs and Mesdames,

Following our meeting on 30 May 2017 in which it has become clear that no settlement can be reached by mediation please find attached the Notice of Arbitration.

We would have liked to solve the dispute amicably in the interest of our long-standing business relationship. The flat refusal at the last meeting of your CFO and the Head of Legal to make any payments has made the initiation of arbitral proceedings necessary.

We are, however, always at your disposal should you wish to enter into any meaningful discussion concerning the outstanding payments and a resumption of deliveries.

Sincerely yours,



Horace Fasttrack

Attachments:
Notice of Arbitration with Exhibits

Notice of Arbitration
(pursuant to Article 3 UNCITRAL Arbitration Rules)
in the Arbitral Proceedings

Delicatesy Whole Foods Sp v Comestibles Finos Ltd

The Parties

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

- CLAIMANT-

Represented by Horace Fasttrack

Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
Mediterraneo

- RESPONDENT-

Statement of Facts

1. Delicatesy Whole Foods Sp (“Delicatesy”), the CLAIMANT, is a medium sized manufacturer of fine bakery products registered in Equatoriana. Its philosophy is that only the best ingredients are just good enough for its products. Delicatesy is a social enterprise and committed to produce sustainably and ethically. However, in regard to the former it places greater importance on the quality of the product than the ultimate sustainable production. Delicatesy is also a member of Global Compact.
2. Comestibles Finos Ltd (“Comestibles”), the RESPONDENT, is a gourmet supermarket chain in Mediterraneo.
3. CLAIMANT met the RESPONDENT at the yearly Danubian food fair, Cucina, in March 2014. The CLAIMANT was approached by RESPONDENT’s Head of Purchasing, Annabelle Ming, at its stall. Ms. Ming and Kapoor Tsai, the CLAIMANT’s Head of Production, discussed which products would be of interest for RESPONDENT and whether it would be feasible to supply those to the RESPONDENT. Ms. Ming invited Mr. Tsai to visit RESPONDENT’s stall in return which he did. Mr. Tsai and Ms. Ming not only discussed product choices and delivery quantities but also had a general discussion about the cost versus the benefits of ethical and environmentally sustainable production and their respective experiences. Mr. Tsai expressed a clear interest to Ms. Ming in establishing a business arrangement.
4. CLAIMANT was, therefore, pleased when shortly after the food fair it received from RESPONDENT an Invitation to Tender for the delivery of chocolate cakes (**Claimant’s Exhibit C 1**) and the Tender Documents (**Claimant’s Exhibit C 2**). CLAIMANT submitted its tender on

27 March 2014 (**Claimant's Exhibit C 3**). In its tender CLAIMANT made clear that its offer would be subject to the application of its own General Conditions of Sale, including its own Code of Conduct (**Claimant's Exhibit C 4**).

5. CLAIMANT was delighted when it was awarded the contract by letter of 7 April 2014 (**Claimant's Exhibit C 5**) notwithstanding the changes it requested in its offer to the conditions set out in the invitation to tender. RESPONDENT explicitly accepted the changed specifications for the chocolate cakes and the changed payment conditions and did not object to the inclusion of CLAIMANT's standard conditions.
6. In accordance with the contract, the CLAIMANT made its first delivery on 1 May 2014. There were no problems concerning the deliveries in 2014, 2015 and 2016.
7. Thus, CLAIMANT was very surprised about the tone and the content of the email it received from RESPONDENT on 27 January 2017 (**Claimant's Exhibit C 6**). Out of the blue, RESPONDENT demanded that CLAIMANT confirmed by the next business day that Claimant's suppliers all strictly adhered to Global Compact principles. The time limit was not only very short but RESPONDENT threatened to terminate the contract should such a confirmation not be forthcoming. In addition, RESPONDENT announced that until the situation had been clarified no further payments would be made and no deliveries be accepted. The apparent reason for this surprising email was the report of a special rapporteur investigating for UNEP the deforestation in Ruritania and the wide spread fraud and corruption in the various agencies set up to protect the remaining rain forest and its biodiversity. The special rapporteur had indicated that probably many certificates certifying sustainable production methods were forged or obtained by bribery. In its issue of Monday, 23 January 2017, Michelgault, the leading business paper in Equatoriana, reported about the findings of the report and possible consequences thereof (**Claimant's Exhibit C 7**).
8. CLAIMANT replied immediately and promised to investigate the issue further, expressing confidence that its supplier of cocoa from Ruritania would not be party to any fraudulent scheme. At the same time, CLAIMANT made clear that it saw no justification for RESPONDENT to stop payment for the chocolate cakes already delivered. CLAIMANT itself had complied with all its obligations under the contract including using its best efforts to ensure that its suppliers complied with the Global Compact principle which had been certified annually (**Claimant's Exhibit C 8**).
9. Unfortunately, during further investigations it turned out, to CLAIMANT's great dismay, that its supplier, the Ruritania Peoples Cocoa mbH, was involved in the scandal. It had breached its solemn promises and contractual obligations towards CLAIMANT to comply in its production of cocoa with the best practices of sustainable production. It had provided CLAIMANT with forged official papers certifying such production while at least part of the beans came from farms illegally set up in protected areas after the deforestation of such areas. CLAIMANT was shocked and immediately terminated the contract with Ruritania Peoples Cocoa mbH.
10. With email of 10 February 2017 CLAIMANT directly informed RESPONDENT of its discovery. Though CLAIMANT had complied with its contractual obligations to the letter and had been defrauded itself, it was willing to take back the cakes delivered and not yet sold and to discuss with RESPONDENT a financial contribution to possible losses (**Claimant's Exhibit C 9**).
11. To CLAIMANT's big surprise RESPONDENT flatly rejected such an offer, purportedly terminated the contract and threatened to bring an action for damages though it had apparently already sold all chocolate cakes delivered (**Claimant's Exhibit C 10**).
12. CLAIMANT can only speculate about RESPONDENT's true reasons for not paying and purportedly terminating the contract. There were indications that several NGOs were intensively

investigating the production methods of the cocoa industry and there was the fear that they may have targeted the cocoa producers for their next major campaign. It seems likely that RESPONDENT wanted to avoid being affected by such a campaign or even being one of the targets of it by cutting its ties to the cocoa industry. While RESPONDENT may have had its commercial reasons for such a drastic decision it is a clear breach of RESPONDENT's contractual obligations towards CLAIMANT under the contract 1257.

Legal Evaluation

Jurisdiction and Nomination of Arbitrator

13. The dispute has to be decided by arbitration in accordance with the UNCITRAL Arbitration Rules by three Arbitrators. The Parties have included in their contract the following arbitration clause:

Clause 20: DISPUTE RESOLUTION

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution and excluding the application, direct or by analogy, of the UNCITRAL Rules on Transparency.

- a. The number of arbitrators shall be three, one to be appointed by each party and the presiding arbitrator to be appointed by the party-appointed arbitrators or by agreement of the Parties.
 - b. The place of arbitration shall be Vindobona, Danubia.
 - c. The language to be used in the arbitral proceedings shall be English.
14. In line with the aforementioned arbitration agreement, we appoint Mr. Rodrigo Prasad as our arbitrator. His Declaration of Impartiality and Independence and Availability is enclosed to this Notice of Arbitration (**Claimant's Exhibit C 11**).

Merits

15. The CLAIMANT is entitled to the full payment of the purchase price for USD 1,200,000 in accordance with Articles 62, 53, 54 CISG. Furthermore, CLAIMANT is entitled to damages for unlawful termination of the contract.
16. CLAIMANT has delivered 600,000 chocolate cakes between 16 December 2016 and 27 January 2017 for which payment has not been made.
17. The cakes which have been delivered by CLAIMANT are in conformity with the requirements of the contract (Article 35 CISG). Contrary to RESPONDENT's allegations, the fact, that not all cocoa was produced in an environmentally friendly manner does not render the cakes non-conforming.
18. The contract is governed by CLAIMANT's General Conditions of Sale. They have become part of the contract pursuant to Article 19 CISG when RESPONDENT accepted CLAIMANT's tender without objecting to them. The Conditions of Sale provide for the application of CLAIMANT's Code of Conduct. There is no provision contained in the contract or CLAIMANT's General Conditions of Sale or its Code of Conduct which set out in sufficient detail an obligation of CLAIMANT towards RESPONDENT concerning the production process of chocolate cake or its ingredients. The general reference to CLAIMANT's adherence to Global Compact principles is not sufficiently specific to result in binding obligations for CLAIMANT which could affect the conformity of the goods.

19. Even if one considered the values underlying the Code of Conduct to be sufficiently specific to set out the requirements for the conformity of the goods also in the relationship between CLAIMANT and RESPONDENT, there would be no breach of contract.
20. According to provisions in its Code of Conduct CLAIMANT could at best have been required to use its best efforts to ensure that its suppliers also complied with CLAIMANT's Code of Conduct. By no means did CLAIMANT guarantee that its suppliers would do so and the final chocolate cake only contained ingredients which had been produced in an environmental friendly way. It is completely impossible to deduce from CLAIMANT's Code of Conduct such an obligation of results.
21. Even if RESPONDENT's General Conditions were applicable, which is not the case, CLAIMANT's Code of Conduct referred to therein also imposes merely an obligation on CLAIMANT to use its best efforts to ensure that its suppliers comply with the relevant standards of environmentally friendly and sustainable production. Contrary to what RESPONDENT has alleged in its communications preceding this arbitration, and will most likely raise again in the arbitration, at no point did CLAIMANT agree to guarantee such a compliance.
22. CLAIMANT has clearly used its best efforts to ensure compliance with the relevant standard. CLAIMANT has made such a production method part of its contract with its supplier and had regularly audited the supplier's main production facility. The fact that the supplier had consistently forged certificates testifying such a production process by tripling the number of beans produced in the examined locations using a sophisticated scheme involving government officials and other cocoa farmers cannot be attributed to CLAIMANT.
23. As the cakes were in compliance with the contract specification, RESPONDENT had no right to terminate the contract and to refuse acceptance of further deliveries. There was no breach of contract by CLAIMANT, let alone a fundamental breach justifying a termination of the contract by RESPONDENT. Quite to the contrary, RESPONDENT's unjustified termination constitutes a breach of contract entitling CLAIMANT to damages. While at present the exact amount of damages cannot be quantified yet it will be at least USD 2,500,000. CLAIMANT reserves the right to increase the amount during the arbitration when the actual damages, in particular any loss of reputation, can be quantified.

Statement of Relief sought:

On the basis of the above CLAIMANT requests the Arbitral Tribunal:

1. to order RESPONDENT to pay the outstanding purchase price in the amount of USD 1,200,000;
2. to declare that the contractual relationship between CLAIMANT and RESPONDENT is governed by CLAIMANT's General Conditions of Sale;
3. to order RESPONDENT to pay damages in the amount of at least USD 2,500,000;
4. to order RESPONDENT to bear the costs of the arbitration.



Horace Fasttrack

Enclosures: Claimant's Exhibits C 1 – C 11.



Kapoor Tsai
Delicately Whole Foods Sp
39 Marie-Antoine Carême Avenue
Oceanside
Equatoriana

10 March 2014

Dear Mr. Tsai,

It was a pleasure meeting you last Monday at the Cucina Food Fair in Danubia and I very much enjoyed our interesting talk.

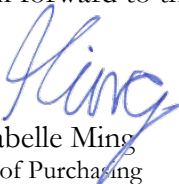
As already indicated at the Cucina Food Fair the quality of your products in combination with Delicately Whole Foods Sp's Global Compact membership and its strict adherence to the principle of ethical and sustainable production make your company a very interesting supplier for Comestibles Finos.

I was particularly impressed by your report about the management of your supply chain, including the regular audits and reporting obligation. As I have told you, 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.

We would therefore be delighted if you participated in our tender process for the supply of chocolate cakes. I have attached the tender document for your convenience.

In light of your experiences with ad hoc arbitration, I have contacted our legal department to ascertain whether our new arbitration clause excluding institutional arbitration is really practicable. Apparently, we have never had any problems concerning the composition of arbitral tribunals and our legal department was confident that the existing arbitration clause would not cause any problems in its application in practice.

I look forward to the submission of your offer and remain


Annabelle Ming
Head of Purchasing

Enclosures: Tender Documents



TENDER DOCUMENTS

CONTENTS

Page No	Section	Description
1	Section I	Invitation to Tender
2	Section II	Tendering Instructions
3	Section III	Specification of the Goods and Delivery Terms
5	Section IV	Special Conditions of Contract
7	Section V	General Conditions of Contract
[...]	[...]	[...]
15	Section VIII	Miscellaneous
16	Section IX	Letter of Acknowledgment
[...]	[...]	[...]
20	Section XX	List of acceptable Banks for Bank Guarantees from Foreign / Nationalized / Scheduled Banks
[...]	[...]	[...]
25	Section XXV	Comestibles Finos' General Business Philosophy
27	Section XXVI	Comestibles Finos' Code of Conduct for Suppliers

Section I

Invitation to Tender

For the provision of 20,000 chocolate cakes daily, Monday to Friday starting on 1 May 2014 as specified under Section III.

To: Delicatesy Whole Foods Sp, 39 Marie-Antoine Carême Avenue, Oceanside, Equatoriana

Contract No: 1257

You are invited to tender for the above contract. The Invitation to Tender consists of the following documents:

- Section II Tendering Instructions
- Section III Specification of Goods and Delivery Terms
- Section IV Special Conditions of Contract
- Section V General Conditions of Contract
- [...]

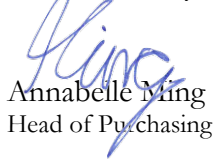
- Section IX Letter of Acknowledgment
[...]
- Section XXV Comestibles Finos' General Business Philosophy
- Section XXVI Comestibles Finos' Code of Conduct for Suppliers

Please read the all Tender Documents carefully and then return the Letter of Acknowledgment to us by Monday, 17 March 2014 if you decide to tender for this contract.

You are required to hold all information pertaining to this tender confidential and to limit the dissemination of information within your organisation on a need-to-know basis.

Your tender must be received by noon on Friday, 28 March 2014, which will be the Tender Date. It is our intention to complete our tender evaluation in such time that the contract for this work will be awarded by the second week of April 2014.

Yours sincerely


Annabelle Ming
Head of Purchasing

Section III

Specification of the Goods and Delivery Terms

Clause 1: SPECIFICATION OF THE GOODS

Comestibles Finos intends to increase with the following contract the range of high quality cakes by a chocolate cake which should have the following paramount specifications:

1. Each chocolate cake will be 3 inches in diameter and will weigh 120 gramm.
[...]
5. Ingredients have to be sourced in accordance with the stipulations under Section IV.
[...]

Clause 2: QUANTITY AND DELIVERY

1. The quantity to be delivered under the contract should be 20,000 chocolate cakes daily, Monday to Friday, excluding Mediterranean public holidays.
2. As the amount needed may decrease or increase and the tenderer should indicate whether a higher or lower amount would be possible as well and what rebates or increase of price that would entail.
3. Delivery should take place DDP (INCOTERMS® 2010), between 2.00 am and 4.00 am to Comestibles Finos' distribution centre at 5 Juan Amador Place, Capital City, Mediterraneo.
[...]

Clause 3: PURCHASE PRICE AND PAYMENT CONDITIONS

1. The price per chocolate cake should not exceed USD 2.50 per unit.
2. The offer should contain indications as to rebates or increases (if any) for amounts in the range between 10,000 and 30,000 units per day.
3. The price should be reviewable yearly at the anniversary of the contract.

Section IV

Special Conditions of Contract

Whereas Comestibles Finos Ltd is a gourmet supermarket chain operating in Mediterraneo and a Global Compact member committed to high standards of integrity and sustainability,

whereas Comestibles Finos has a ‘zero tolerance’ policy when it comes to unethical business behavior, such as bribery and corruption,

whereas Comestibles Finos expects all of its suppliers to adhere to similar standards and to conduct their business ethically,

the Parties, as defined in Article 1, agree on the following Special Conditions of Contract.

Article 1: PARTIES

Seller: *[to be filled in by tenderer]*

and

Buyer: Comestibles Finos Ltd, 75 Martha Stewart Drive, Capital City, Mediterraneo represented by Joan Rocca, Chief Executive.

Collectively “the Parties”

Article 2: SPECIFICATION OF THE GOODS

The Seller agrees to deliver to sell to the buyer the following product complying with all the obligations arising from this contract:

Chocolate Cake *[detailed product name and description to be filled in by tenderer]*

Article 3: DELIVERY

[...]

4. The seller will deliver 20,000 chocolate cakes of the type described in Article 2 daily, Monday to Friday, between 2.00 am and 4.00 am to Comestibles Finos’ distribution centre at 5 Juan Amador Place, Capital City, Mediterraneo.

[...]

Article 4: PURCHASE PRICE

1. The price per chocolate cake will be USD *[to be filled in by tenderer]*.
2. The price shall be reviewable yearly at the anniversary of the contract.
3. The price will be due 60 days after delivery of the goods and invoicing.

Article 5: ORDER OF PRECEDENCE OF CONTRACT DOCUMENTS

The contract is made up of the following documents

- The Special Conditions of Contract
- The General Conditions of Contract
- The Tender Documents

The various documents making up the contract shall be deemed to be mutually explanatory; in case of ambiguity or divergences, they should be read in the order in which they appear above.



General Conditions of Contract

Comestibles Finos Ltd is committed to high standards of integrity and sustainability. Comestibles Finos Ltd has a 'zero tolerance' policy when it comes to unethical business behavior, such as bribery and corruption. We expect all of our suppliers to adhere to similar standards and to conduct their business ethically. As a supplier, 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.

Clause 1: DEFINITIONS

[...]

Clause 4: ORDER OF PRECEDENCE OF CONTRACT DOCUMENTS

1. Save where otherwise provided in the Special Conditions, the contract is made up of the following documents in order of precedence:
 - a. The Special Conditions of Contract
 - b. The General Conditions of Contract
 - c. The Tender Documents
 - d. Comestibles Finos' General Business Philosophy
 - e. Comestibles Finos' Code of Conduct for Suppliers
2. Noncompliance with any of the contractual documents constitutes a breach of contract.
3. Any breach of some relevance of Comestibles Finos' General Business Philosophy or its Code of Conduct for Suppliers shall be considered to constitute a fundamental breach entitling Comestibles Finos to terminate the contract with immediate effect and claim damages.

[...]

Clause 19: CHOICE OF LAW

This Agreement is governed by the UN Convention on the International Sale of Goods ("CISG"). For issues not dealt with by the CISG the UNIDROIT Principles are applicable.

Clause 20: DISPUTE RESOLUTION

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution and excluding the application, direct or by analogy, of the UNCITRAL Rules on Transparency.

- a. The number of arbitrators shall be three, one to be appointed by each party and the presiding arbitrator to be appointed by the party-appointed arbitrators or by agreement of the Parties.
- b. The place of arbitration shall be Vindobona, Danubia.
- c. The language to be used in the arbitral proceedings shall be English.

Clause 21: CONFIDENTIALITY

This Clause relates to all information exchanged between the Parties or of which the Parties become aware in conjunction with the conclusion, execution or termination of the present contract (together defined as the "**Information**").

The Signatories to this Contract undertake to keep confidential, and to exercise their best endeavours to procure that such persons as may be under their control keep confidential, the Information, save only in respect of the following circumstances:

where any Information is already in the public domain, or becomes part of the public domain, other than by the action of any Signatory or any person under their control; or

where each of the Parties has confirmed its specific prior agreement in writing that identified Information can be disclosed; or

where any Signatory is required to disclose or provide details of the Information by a statutory obligation, including without limitation, statutory, regulatory or securities reporting obligations, or to protect or pursue a legal right in bona fide legal proceedings before any court or Arbitral Tribunal of competent jurisdiction.

The Parties shall restrict access to the Information to their employees, accountants, auditors or any professional advisors or consultants who in each case shall need such access for the purpose of compliance with any legal or regulatory obligation or audit review or verification or legal proceedings.

Any breach of this confidentiality obligation will result in a claim for liquidated damages for the other party in the amount of USD 500,000.

Section XXVI

Comestibles Finos' Code of Conduct for Suppliers

PREAMBLE

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

A. Human rights

As a supplier to Comestibles Finos Ltd, you shall

- respect the personal dignity, privacy and rights of each individual;
- refuse to make any person work against his or her will; and
- prohibit behaviour including gestures, language and physical contact, that is sexual, coercive, threatening, abusive or exploitative.

B. Fair labor conditions and child labor

You shall ensure fair labor conditions. In particular, you will

- refrain from employment discrimination based on gender, age, ethnicity, nationality, religion, disability, union membership, political affiliation or sexual orientation;
- respect the rights of employees to freely associate and bargain collectively;
- not tolerate or use child labor in any stage of your activities other than in accordance with all applicable laws and regulations;
- make no use of any forced labor or involuntary prison labor and allow all employees the choice to leave their employment freely upon reasonable notice;
- compensate employees fairly and follow local wage regulations.

C. Health, safety and environmental management

You shall provide a safe and healthy workplace for all of your employees and shall conduct your business in an environmentally sustainable way. In particular, you will

- formally appoint a competent person to manage health, safety and environmental programs and improvements;



- establish appropriate organisational structures and procedures for the effective management of health, safety and environmental risks; and
- ensure that all workers are sufficiently aware of these risks and appropriately trained on the implementation of control measures;
- ensure that your own suppliers comply with the above requirements.

D. Business ethics

You shall conduct your business in an ethical manner. In particular, you will

- refrain from any and all forms of corruption, extortion and bribery, and specifically ensure that payments, gifts or other commitments to customers (including Comestibles Finos Ltd employees), government officials and any other party are in compliance with applicable anti-bribery laws;
- adhere to anti-trust and other competition laws;
- disclose to Comestibles Finos Ltd information regarding potential conflicts of interest relating to your activities as a Comestibles Finos Ltd supplier, including disclosure of any financial interest a Comestibles Finos Ltd employee may hold in your business;
- protect all confidential information provided by Comestibles Finos Ltd and our respective business partners;
- adhere to international trade regulations and export control regulations.

E. Procurement by supplier

You must under all circumstances procure goods and services in a responsible manner. In particular, you will

- select your own tier one suppliers providing goods or services directly or indirectly to Comestibles Finos Ltd based on them agreeing to adhere to standards comparable to those set forth in this Comestibles Finos' Code of Conduct for Suppliers;
- 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.

F. Inspections and corrective actions

In order to ensure and demonstrate compliance with the Comestibles Finos' Code of Conduct for Suppliers, you shall keep record of all relevant documentation, and provide to us supporting documentation upon request.

To verify your compliance, we reserve the right to audit and inspect your operations and facilities, at our own cost and upon reasonable notice, with or without support of a third party. If the results of such an audit or inspection cause us to be of the opinion that you do not comply with this Comestibles Finos' Code of Conduct for Suppliers, you shall take necessary corrective actions in a timely manner, as directed by us. If you fail to comply with this Comestibles Finos' Code of Conduct for Suppliers, we may take action against you, including suspending or terminating your activities as one of our suppliers.

G. Access to remedy

In the context of our business relationship, if you or your employees believe that the terms of this Code of Conduct for Suppliers are not adhered to, or that Comestibles Finos Ltd is not acting in accordance with its own Code of Conduct, then we encourage you to raise your concerns via the Comestibles Finos Ltd stakeholder reporting channels. Visit www.comestibles-wholefoods.com/integrity to learn more about these reporting channels.

Comestibles Finos Ltd thanks you for being part of our quest for “Power and Productivity for a Better World”.



To:
Annabelle Ming
Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
Mediterraneo

27 March 2014

Dear Ms. Ming,

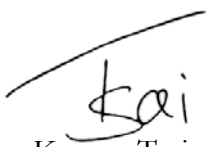
Please find attached our offer following your invitation to tender.

After 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.

The size you require is difficult for us to produce and package so that we have offered a slightly different shaped cake, which is the form you saw at the Cucina Food Fair. Furthermore, we normally require payment by a letter of credit. In your case, we would make an exception and accept an open account payment. The required 60 days after delivery are, however, unacceptable. Thus, we have proposed payment 30 days after delivery. To be completely transparent, we have decided to submit a proper offer containing the changes and have left the relevant sections in the Tender Documents open or refrained from including the changes in the documentation.

Thank you for your information concerning the arbitration clause contained in the invitation to participate in the tender process. We can very well live with the clause as it is, since we are very confident that there will be no need to resort to arbitration. In the unlikely event that a dispute arises and cannot be solved amicably, we are certain that we will be able to overcome any problems relating to the constitution of the arbitral tribunal even without institutional support.

We hope that you find our offer attractive despite the necessary minor amendments. You can be assured that we will do everything possible to guarantee that the ingredients sourced from outside suppliers comply with our joint commitment to Global Compact Principles. If you have any further questions, in particular concerning our applicable sustainability strategy, please do not hesitate to contact me.


Kapoor Tsai
Head of Production



Sales - Offer

Originator:	<i>Kapoor Tsai</i>
Client:	<i>Comestibles Finos Ltd</i>
Description of the Goods:	<i>Chocolate Cake – Queens' Delight</i>
Quantity:	<i>20,000 per day (as per Tender Documents)</i>
Price per Unit:	<i>USD 2</i>
Place of Delivery:	<i>(as per Tender Documents)</i>
Payment Terms:	<i>30 days after delivery and invoicing</i>
Offer Number:	<i>5798 KT (relating to contract no 1257)</i>
The offer remains open until:	<i>11 April 2014</i>

Specific Terms and Conditions:

The 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:

- *Not applicable*

The above offer is subject to the General Conditions of Sale and our Commitment to a Fairer and Better World. Refer to our website www.DelicatelyWholeFoods.com in regard to our General Condition and our commitments and expectations set out in our Codes of Conduct.

39 Marie-Antoine Carême Avenue, Oceanside, Equatoriana; Tel. (0) 214-7765; delicately@new.eq



To:
Mr. Kapoor Tsai
Delicatesy Whole Foods Sp
39 Marie-Antoine Carême Avenue
Oceanside
Equatoriana

7 April 2014

Dear Mr. Tsai,

We are pleased to inform you that your tender was successful notwithstanding the changes suggested by you. The different payment terms and form of the cake are acceptable to us and we are looking forward to a fruitful cooperation.

A decisive element for Comestibles Finos' decision was your convincing commitment to sustainable production. Such commitment is well evidenced in your impressive Codes of Conduct which I downloaded following your tender out of curiosity. 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.

We are looking forward to receiving your delivery of 20,000 chocolate cakes starting 1 May 2014. Please contact Nigella Araki on Tel. (0) 146 77 32-04 or nigella.araki@comestibles-wholefoods.com to confirm arrangements.

Kind regards,


Annabelle Ming
Head of Purchasing



Comestibles
Finos

27 January 2017

9:23 a.m.

To: delicatesy@new.eq

From: info@comestibles-wholefoods.com

Re: Delivery of Global Compact Compliant Chocolate Cakes

Dear Mr. Tsai,

As far as we are aware the chocolate cakes you have delivered in accordance with contract no 1257 contain cocoa from Ruritania. Two weeks ago, the UNEP Special Rapporteur investigating the growing deforestation in Ruritania released a report on the state of the Ruritanian cocoa industry and its compliance with the accepted principles of sustainable farming and Global Compact. In her report, the Special Rapporteur stated that there was widespread fraud and corruption in Ruritania. According to findings of the report nearly all Ruritanian cocoa suppliers are implicated as well as the supervisory authority. Of particular concern for us is that the fraud pertains to falsified zoning plans, certificates of origin and carbon emission statements of the cocoa suppliers.

Can you please confirm for us that the cocoa you are using for producing the chocolate cakes comes from a supplier which strictly adheres to Global Compact by the close of business on Monday, 30 January 2017!

As made clear during the negotiations leading to the conclusion of the contract and as can be derived from our Code of Conduct which is part of the contract we would consider the use of cocoa produced not in compliance with the accepted sustainability standards to constitute a serious breach of contract which entitles us to terminate the contract for cause immediately and claim damages.

We will refrain from taking any further delivery or making any further payment until the issue is solved.

Sincerely,

Annabelle Ming

75 Martha Stewart Drive
Capital City
Mediterraneo
Tel. (0) 146 77 32
info@comestibles-wholefoods.com
www.comestibles-wholefoods.com

THE MONEY WITH ETHICAL BUSINESS

-Review of Documentary: How a Country cashes in on Human Rights-
by Hitoshi Ishihara



Michelgault Business News

Monday,
January 23, 2017

The documentary “How a Country cashes in on Human Rights” is a sobering account how a world-wide commitment to human rights, a fight against climate change, and for a sustainable environment can be circumvented with the help of a government. It also highlights the plight of a developing country to allow its business community to break into the global market. [...]

Shady deals, offshore accounts, money laundering... The report released on 6 January 2017 by the special rapporteur investigating for UNEP the growing deforestation in Ruritania has all the hallmarks of a crime thriller. It is published one month after Ruritanian authorities cracked down on a sustainability certification scheme (SCT) that involved Ruritanian ministers, Government officials and business leaders. [...]

The Ruritanian SCT aimed at minimizing the environmental impact of agribusiness on the one hand and creating a base economy on the other. The Ministry for Agriculture was tasked to make impact and sustainability assessments with regard to the use of land and rainforest in Ruritania.

“The structure was poorly conceived from the start and had some real flaws.”, Virgino Martinez, an environmental economics professor at the


Ruritanian University Business School points out.

Investigators believe that a group of three business people realised this, and devised a scheme to defraud billions of US dollars. The group bribed officials at the Ministry for Agriculture to change the zoning plans and issue permits within nature reserves. The business men then divided those permits into smaller units and sold them on to farmers. The fake zoning meant that none of the conservation laws were applicable.

To make way for agribusiness, large parts of the rainforest had to be burnt down. [...]

When the fires penetrate the earth, they smoulder for weeks, sometimes months, releasing clouds of methane, carbon monoxide, ozone and exotic gases such as ammonium cyanide. Smoke exposure and pollution is estimated to have caused 100,300 premature deaths in Ruritania. Recent fires burned more than two million hectares and affected 44 million people. [...]

In addition, wrong certificates of origin were issued for cocoa farmed in protected areas so that the beans could be sold as “sustainably grown” despite their real origin.


 Delicately

27 January 2017

WholeFoods Sp 2:35 p.m.

To: info@comestibles-wholefoods.com**From:** delicately@new.eq**Re:** Global Compact Compliant Chocolate Cakes

Dear Ms. Ming,

Following up on your email of this morning I can confirm your recollection that the cocoa used for the chocolate cakes comes from Ruritania and is provided to us by the Ruritania Peoples Cocoa mbH.

We are fairly confident that there is no problem with the cocoa delivered to us from our supplier. We have monitored Ruritania Peoples Cocoa mbH in line with our guidelines. Ruritania Peoples Cocoa mbH have signed our Supplier Code of Conduct which compels them to adhere to our carbon emission standards. In 2014, we instructed the internationally operating Egimus AG which is specialised in providing expert opinion on Global Compact compliance to scrutinize Peoples Cocoa mbH on site. They certified that Ruritania Peoples Cocoa mbH complied with Global Compact and the principles of sustainable production. For the last two years, we have relied regarding our compliance assessment on the documentation sent to us by Ruritania Peoples Cocoa. There was nothing in the documentation which suggested fraud.

I will, however, immediately verify whether Ruritania Peoples Cocoa mbH is in any way implicated in the scandal and will get back to you as soon as possible.


Irrespective of that, I have to insist on payments being made for the cakes delivered. You will remember that the agreed upon payment mechanism deviates from our normal payment mechanism. I personally took the responsibility for deviating from the general rule to require a letter of credit. Therefore, I would consider it to be unfair, if you were to refrain from making any further payment, in particular since we have obviously complied with our obligations under the contract and used our best efforts to ensure that the chocolate cake delivered complies in all respects with the values for which both our companies stand for.

Sincerely,

Kapoor Tsai

39 Marie-Antoine Carême Avenue, Oceanside, Equatoriana; Tel. (0) 214-7765;
delicately@new.eq

-View our Commitment to a Fairer and Better World-

 **10 February 2017**
9:23 a.m.

To: info@comestibles-wholefoods.com
From: delicatesy@new.eq
Re: Global Compact Compliant Chocolate Cakes

Dear Ms. Ming,

To my great dismay and contrary to my original firm belief I have to inform you that we cannot exclude the possibility that some of the cocoa beans used for the production of our chocolate cake have not been produced in accordance with the contractually required principles. It seems very likely that our supplier has not only breached its contractual obligation towards us but has also obtained falsified certificates to cover up such breach of contract.

We have immediately terminated the contract with Ruritania Peoples Cocoa mbH and have in the meantime been able to secure other supplies so that we can start delivery again.

We are naturally very sorry about that incident and understand your anger which we share. I want, however, to reiterate that such fraud by Ruritania Peoples Cocoa mbH does not constitute a breach of contract by us. Delicatesy has always complied with all obligations resulting from the contract 1257, and in particular our General Conditions of Sale which have become part of it. We have always acted in line with our general policy and our commitment to Global Compact in the selection and supervision of Ruritania People Cocoa. In addition, we have also complied with the requirements set out in the Business & Human Rights Act 2012. Thus, we have definitively done everything in our power to make sure that the chocolate cake and its production comply with the values we share.

Irrespective of this absence of any breach of contract from our side and in order to show you our appreciation of the business relationship with you, we are willing to offer you a possible reduction of 25% for the price for the 600,000 cakes delivered and not yet paid.

That offer is naturally without prejudice and should not be interpreted as the assumption of any liability.

Sincerely,

Kapoor Tsai

39 Marie-Antoine Carême Avenue, Oceanside, Equatoriana; Tel. (0) 214-7765;
 delicatesy@new.eq

-View our Commitment to a Fairer and Better World-



12 February 2017

9:23 a.m.

To: delicatesy@new.eq

From: info@comestibles-wholefoods.com

Re: Delivery of Global Compact Compliant Chocolate Cakes

Dear Mr. Tsai,

We have received your email of 10 February 2017.

We appreciate your efforts to investigate the issues and your willingness to find an amicable solution.

Notwithstanding the fact that you may have been defrauded yourself, we have made clear during the negotiations and at all times thereafter that for us the use of cocoa produced not in compliance with the accepted sustainability standards is such a serious breach of contract that we will terminate the contract with immediate effect.

We are entitled to do so pursuant to Clauses 4 (3) of the General Conditions of Contract in conjunction with the principles C and E, in Comestibles Finos' Code of Conduct for Suppliers.

We are presently evaluating the damages which result from such breach of contract and will set off parts of this damage claim with the payment claim you have raised.

Sincerely,
Annabelle Ming

75 Martha Stewart Drive
Capital City
Mediterraneo
Tel. (0) 146 77 32
info@comestibles-wholefoods.com
www.comestibles-wholefoods.com

Mr. Rodrigo Prasad
PRASAD & PARTNERS
Nickol Palais 14
Vindobona, Danubia

I have been asked by Delicatesy Whole Foods Sp, 39 Marie-Antonie Carême Avenue, Oceanside, Equatoriana, to act as a party appointed arbitrator in its arbitration with Comestibles Finos Ltd, 75 Martha Stewart Drive, Capital City, Mediterraneo. In line with Article 11 of the UNCITRAL Arbitration Rules and on the basis of the information available to me, I make the following

Declaration of Impartiality and Independence and Availability

I am impartial and independent of each of the Parties and intend to remain so.

Pursuant to Article 11 of the UNCITRAL Arbitration Rules I wish to disclose the below listed circumstances of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances.

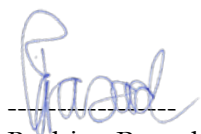
I have been appointed as arbitrator by the law firm of Mr. Fasttrack twice over the past two years. Both cases are completed by now and Mr. Fasttrack has, to my knowledge, not been involved in either of them.

I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

In case of my appointment as arbitrator, I personally will not act in matters involving any of the Parties or related companies until the termination of the arbitration proceedings. I would, however, have to make the reservation that my colleagues at Prasad & Partners may continue current matters and may also accept further instructions involving the Parties as well as related companies, provided that these matters are not related to the subject matter of present arbitration proceedings

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits.

Vindobona, 26 June 2017



Rodrigo Prasad

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo
Tel. (0) 146-9845
Telefax (0) 146-9850
Langweiler@lawyer.me

31 July 2017

Delicatesy Whole Foods Sp v Comestibles Finos Ltd

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

- CLAIMANT-

Represented by Horace Fasttrack

Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
Mediterraneo

- RESPONDENT-

Represented by Joseph Langweiler

RESPONSE TO NOTICE OF ARBITRATION

Introduction

1. In its Notice of Arbitration, CLAIMANT presents an incomplete and therefore distorted picture of the facts. Contrary to CLAIMANT's allegation the source of the dispute is not an "unjustified refusal" of RESPONDENT to pay. The real reason is a serious breach by CLAIMANT of its contractual obligation to deliver conforming goods, i.e. goods which are produced in line with the high ethical and environmental standards requested by RESPONDENT from its suppliers. Thus, none of the claims raised by CLAIMANT has any merits.
2. The payment claim is not justified as the goods delivered by CLAIMANT did not comply with the contractual requirements. Instead, they were non-conforming in the sense of Article 35 CISG, creating the risk of considerable reputational damages for RESPONDENT.
3. To avoid these damages, RESPONDENT had to delist CLAIMANT's products without drawing too much public attention to the fact that the chocolate cakes contained cocoa coming from farms which breach every value RESPONDENT stands for.

Statement of Facts

4. Comestibles Finos Ltd ("Comestibles"), the RESPONDENT, is the leading gourmet supermarket chain in Mediterraneo. Its products are generally sourced locally – if possible from organic farms or plantations. Comestibles attaches great importance to the fact that products from further afield comply with the fair-trade standard or at a minimum do not violate the Global Compact principles.



5. Comestibles is a Global Compact member since 2002 and intends to become a Global Compact LEAD company by 2018. It prides itself in particular with implementing Global Compact Principle 7, the precautionary principle, by sourcing goods and products from sustainable sources.
6. Comestibles' nationwide advertising campaign centres on how its products are part of a healthy, natural world. The campaign thereby draws synergies between Comestibles' products and political and environmental issues such as the Sustainable Development Goals (SDGs) and climate change. The message that the advertising wants to portray is that its food is part of a healthy, fair, and green world.
7. To broaden its cake offerings, the RESPONDENT went to the yearly Danubian food fair, Cucina, from 3 – 6 March 2014. At the food fair, Comestibles discussed its needs with several companies specialised in baking products. Due to the number of possible business partners Comestibles decided to put out a tender. The tender was publicised in the pertinent industry newsletters and sent to five of the businesses RESPONDENT had met at Cucina including CLAIMANT ([Claimant's Exhibit C 1](#)).
8. As it can be seen from the Tender Documents, in particular the requested Letter of Acknowledgment, RESPONDENT made clear that it would only accept offers which complied with the Tender Documents. That was not only to ensure the comparability of the offers received but also to guarantee that the contract would be governed by RESPONDENT's General Conditions of Contract and its Code of Conduct for Suppliers, as was provided for in the Tender Documents. The Code of Conduct obliged all supplier to deliver goods which had been produced ethically, i.e. contained only ingredients which were farmed accordingly ([Claimant's Exhibit C 2](#)).
9. RESPONDENT received six offers: two from businesses, including the CLAIMANT, the RESPONDENT had met at the food fair and four from businesses it had no prior contact with.
10. Like all other offerors, CLAIMANT first submitted the requested Letter of Acknowledgement on 17 March 2014. With that Letter it confirmed its intention to submit a tender "in accordance with the specified requirements", i.e. the Tender Documents ([Respondent's Exhibit R 1](#)).
11. Consequently, RESPONDENT was very surprised when CLAIMANT finally made an offer which obviously deviated from the Tender Documents in two points. The chocolate cake offered did not comply in all details with the requested specification and CLAIMANT asked for different payment terms. Nevertheless, RESPONDENT decided to accept CLAIMANT's offer for two reasons. First, the chocolate cake offered was from CLAIMANT's premium product line, which had won Cucina's best cake award for the last five years. Second, RESPONDENT had been impressed with the CLAIMANT's commitment to ethical production. At the food fair, the CLAIMANT had displayed maps showing from where it was sourcing some of its ingredients and some statements from farmers whose products it was using. Furthermore, it emphasized in the presentation of its newest cake, the vanilla-chocolate cake – King's Delight, that the cake used "sustainable sourced cocoa" ([Respondent's Exhibit R 2](#)).
12. As CLAIMANT accepted all other terms of the Tender Documents, including RESPONDENT's General Conditions of Contract referring to the application of the RESPONDENT's Code of Conduct for Suppliers, RESPONDENT awarded the contract to CLAIMANT and informed the latter about it with letter of 7 April 2014 ([Claimant's Exhibit C 5](#)).
13. CLAIMANT started delivery on 1 May 2014 and delivered its chocolate cake until 27 January 2017. Until that time, RESPONDENT had the impression that it got what it contracted for and paid for: a first-class chocolate cake made out of ingredients from sustainable farming. Only in January 2017 RESPONDENT learned that its belief was wrong and it had bought chocolate cakes made from chocolate beans grown under circumstances which are contrary to RESPONDENT's most basic business values.

14. On 19 January 2017, the Equatorian state news channel showed a documentary that critically assessed ethical food production, in particular the inefficiency of some certification schemes. In that context the documentary drew attention to the irregularities in the Ruritania certification practice with regard to sustainable farming which had been criticized in a report of a special rapporteur investigating on behalf of UNEP problems of deforestation in Ruritania. Referring to undisclosed sources the documentary reported about a major police investigation into a scheme with falsified certificates for environmental production.
15. In an article published on 23 January 2017 in Michelgault, the leading business newspaper in Equatoriana, further details of that assumed fraud were disclosed (**Claimant's Exhibit C 7**). RESPONDENT was worried and started its own investigation.
16. As these investigations largely confirmed RESPONDENT's concerns that the chocolate cake bought from CLAIMANT may have been affected, RESPONDENT immediately contacted the CLAIMANT. In its email of 27 January 2017, RESPONDENT sought clarification whether the delivered chocolate cake contained cocoa obtained from Ruritania and, if so, whether the cocoa beans sourced from Ruritania came from sustainable farming (**Claimant's Exhibit C 6**). In light of the results of its own investigation, RESPONDENT also immediately stopped taking any further deliveries or making any payments and reserved all remedies in case its suspicion should prove correct.
17. The CLAIMANT replied the same day, stating that it did not believe that its supply of cocoa beans was affected by the certification scandal but promised to investigate the issue further (**Claimant's Exhibit C 8**).
18. With email of 10 February 2017 CLAIMANT finally confirmed RESPONDENT's fear that the chocolate cake was made with cocoa beans which had not been farmed in a sustainable way but in clear contradiction to the requirements of the contract. In this email, in an obvious attempt to downplay its breach, CLAIMANT alleged for the first time that the contract would be governed by its own Conditions of Sales and not RESPONDENT's General Conditions which formed part of the Tender Documents (**Claimant's Exhibit C 9**).
19. RESPONDENT immediately terminated the contract and informed CLAIMANT that it would make no further payments but set-off the alleged payment claims, if any, against its own claims for damages or price reduction for the cakes delivered and paid for (**Claimant's Exhibit C 10**).
20. The complete destruction of trust in CLAIMANT's ability to deliver chocolate cakes which comply with the requirements of sustainable farming made a continuation of the supply relationship impossible. In the segment of the market RESPONDENT is operating in, bad press can lead to considerable losses in turnover and revenues. The detrimental influence of bad press had been a major issue in the discussion of Mr Tsai and Ms Ming at the Cucina Food Fair in 2014. Ms Ming had actually justified the strict confidentiality policy of RESPONDENT by the wish to avoid any bad press.
21. Furthermore, due to CLAIMANT's completely unreasonable insistence of being paid for the non-conforming cake and its refusal to make any payments to RESPONDENT any settlement was made impossible.

Nomination of Arbitrator and Jurisdiction of Arbitral Tribunal

22. RESPONDENT recognizes the jurisdiction of the Arbitral Tribunal and has no objection to the appointment of Mr. Rodrigo Prasad despite the restrictions in his declaration of independence.
23. RESPONDENT nominates as its arbitrator in this case Ms. Hertha Reitbauer. Her declaration of impartiality and independence is attached.

Legal Evaluation

24. CLAIMANT's claims have no merits. That applies to the payment claims as well as to its damage claims. The payment claim lacks any justification as the chocolate cakes delivered were clearly non-conforming. They were made from cocoa which was not farmed in accordance with the principles of sustainable farming. Under the contract, CLAIMANT was obliged to deliver chocolate cakes made out of cocoa beans which were farmed in line with the principles enshrined in RESPONDENT's General Business Philosophy and its Code of Conduct for Suppliers.
25. Contrary to CLAIMANT's view, RESPONDENT's General Conditions of Contract and its Code of Conduct for Suppliers are governing the purchase of the chocolate cakes. They were both part of the Tender Documents and Clause 4 of the General Conditions explicitly refers to the Code of Conduct for Suppliers. CLAIMANT unsuccessfully tries to equate the present public tender situation with an ordinary battle of forms situation. In a publicized tender the terms of the contract are always determined by the party initiating the tender. Accordingly, CLAIMANT had explicitly confirmed in its Letter of Acknowledgement that its offer would be made in line with the Tender Documents (**Respondent's Exhibit R 1**). In light of this clear statement, CLAIMANT cannot justify the application of its own General Conditions of Sale by the general reference found on its standard off form which it conveniently used for making its offer (**Claimant's Exhibit C 4**).
26. RESPONDENT's Code of Conduct for Suppliers requires CLAIMANT not only to comply itself with the values under the Code of Conduct but also to ensure compliance of its own suppliers with such principles, as is clearly stated in principles C and E. Interpreted in light of the surrounding circumstances, that means nothing else but that the CLAIMANT guaranteed that also the ingredients supplied by its suppliers were farmed in compliance with sustainable farming methods. Contrary to what CLAIMANT alleges, the Code of Conduct does not merely contain an obligation of best efforts in this regard but an obligation of results.
27. It is telling that CLAIMANT has included in its own Supplier Code of Conduct largely comparable provisions to which its suppliers have to subscribe to ensure that CLAIMANT is able to meet the guarantee given to RESPONDENT, that the chocolate cake does not contain cocoa farmed in violation of the principles of sustainable farming (**Respondent's Exhibit R 3**).
28. CLAIMANT has obviously breached that obligation entitling RESPONDENT to all remedies provided for under the contract and the CISG. Thus, it may not only reduce the price for the 600,000 cakes delivered and not yet paid but also claim damages for these 600,000 cakes as well as all previous deliveries. While RESPONDENT can at present not yet quantify these damages, it is certain that the damages will be far beyond the amount claimed by CLAIMANT. Therefore, RESPONDENT was not only entitled to terminate the contract and refuse the acceptance of any further deliveries but also to refuse payment due to its existing higher counterclaims which it sets-off against any payment claim brought forward by CLAIMANT.
29. RESPONDENT hereby declares once more explicitly to set-off its existing damage claims against potential the payment claims of CLAIMANT, should the price not have to be reduced to zero anyway. Furthermore, it declares its intention and reserves the right to raise the remainder of its damage claims as a counterclaim in this arbitration.
30. In the absence of any breach of contract by RESPONDENT the damage claim raised by CLAIMANT does not exist.

In light of this, RESPONDENT requests the Arbitral Tribunal

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

Langweiler

Joseph Langweiler

Annexes:

Respondent's Exhibits R 1 – 3.

Statement of Impartiality and Independence of Ms. Hertha Reitbauer [not reproduced].



LETTER OF ACKNOWLEDGEMENT

Date: 17 March 2014

To:

Annabelle Ming
Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
Mediterraneo

Sender:

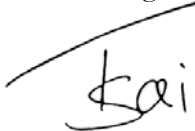
Delicately Whole Foods Sp
39 Marie-Antoine Carême Avenue
Oceanside
Equatoriana

CONTRACT FOR PROVISION OF CHOCOLATE CAKES

Dear Ms. Ming,

1. We acknowledge receipt of your Invitation to Tender package.
2. We have received all the documents listed in the Invitation to Tender.
3. We have read the Invitation to Tender and will tender in accordance with the specified requirements.

Kind regards,



Kapoor Tsai
Head of Production

39 Marie-Antoine Carême Avenue, Oceanside, Equatoriana; Tel. (O) 214-7765; delicately@new.eq
- View our Commitment to a Fairer and Better World -

Vanilla-Chocolate Cake – King's Delight



DELICATESY WHOLE FOODS SP – BUSINESS CODE OF CONDUCT

Preamble

[...]

Delicatesy is guided by the wish to be recognized as a company that cares for the environment and the communities it lives and works in. These ambitions are the basis for Delicatesy's long standing commitment to the responsible stewardship of environmental resources as well as to a respectful attitude towards nature. [...]

Confidential Information

Employees are required to keep Company information confidential, including, but not limited to customer lists, sales records, business plans, know-how, technology, recipes, trade secrets and other proprietary commercial information. Unless required by law or authorized by their supervisor, employees shall not use or disclose any such confidential information to any person. All such information constitutes valuable, special and unique property of Delicatesy, the disclosure of which would cause Delicatesy substantial harm. As a general rule, do not disclose confidential information to anyone outside the Company, including family and friends.

Bribery & Corruption

Delicatesy condemns any form of bribery and corruption. Bribes are linked to unjustified preferential treatment of the giving party. They can be in the form of gifts, meals, entertainment, vouchers, discounts and various other financial advantages. Employees must never give or receive bribes, whether directly or through a third party and they shall not engage in activities that could create the impression of improper dealings. [...]

Preservation & Regeneration Of Environmental Resource Bases

Delicatesy wants to continuously reduce any negative impact its business has on the environment. As these impacts derive from multiple sources within its business processes, Delicatesy acknowledges that its environmental effort must be comprehensive and implemented at different stages of its activity.

For this reason, Delicatesy is issuing the following principles:

- Legislation: Assure compliance with all applicable environmental legislation and adhere to stipulations of standards and certification schemes Delicatesy is committed to.
- Investments: Consider environmental impact of capital investment projects as i.e. energy consumption & -efficiency, transportation & logistics in addition to usual quality, capacity and financial aspects.
- Procurement: Seek the environmentally responsible procurement of raw materials and natural resources through the provision of information material, advice and training among Delicatesy employees and suppliers.
- Working environment: Establish a working environment that allows employees, suppliers, partners and customers as well as governmental, non-governmental and community organizations to freely address environmental concerns as well as suggestions and ideas for the improvement of Delicatesy's environmental performance.
- Continuous improvement: Analyze and evaluate regularly opportunities promising significant improvements to Delicatesy's environmental performance, with particular attention given to reduction of i) greenhouse gas emissions, ii) energy consumption, iii) waste volume and iii) fresh- and waste water volume.
- Set and measure environmental goals: Define environmental "Key Performance Indicators", with focus on the reduction of greenhouse gas emissions, energy consumption, waste volume and fresh- and waste water volume, set measurable long term improvement targets of the KPI's and measure respective performance regularly. Participate in international initiatives as i.e. the "Carbon Disclosure Project" (CDP) to benchmark with peer companies.
- Communicate & Report: Demonstrate that environmental issues are acknowledged and taken seriously by communicating internally and externally in a transparent manner.

Implementation & Enforcement

The CEO is responsible for ensuring that all employees are informed and educated on the Business Code of Conduct. The CEO is expected to enforce the strict adherence to the rules and regulations of the Business Code of Conduct. It is critical that the CEOs and their management teams and supervisors lead and guide by example.

The CEO and his/her representative have to ensure suppliers adhere to the Supplier Code of Conduct which is based on this Business Code of Conduct.

Failure to read the Business Code of Conduct does not excuse an employee or supplier from compliance with the Business Code of Conduct. Any failure to comply with this Business Code of Conduct may result in disciplinary action, including the possibility of dismissal or in case of a supplier termination of the contract, and, if warranted, legal proceedings or criminal sanctions.

DELICATESY WHOLE FOODS SP – SUPPLIER CODE OF CONDUCT

At Delicatesy Whole Foods Sp we are committed to behaving responsibly, ethically and sustainably – it's fundamental to our growth, and it makes good business sense. We want to engage with suppliers who share this commitment.

The goal of this Code of Conduct is to positively influence the supply chain. This means enabling and supporting suppliers to review their current approach to sustainability and make tangible improvements that will benefit their business, and ours, as well as society and the environment. Therefore, our Supplier Code of Conduct outlines the expectations we have of all our suppliers, their suppliers or sub-contractors. Any non-compliance with the provisions of this Code of Conduct will be considered to be a fundamental breach of contract and Delicatesy Whole Foods Sp will make use of the remedies available to it:

1. Ethical Business

We expect our suppliers to:

- conduct their business activities with integrity and in accordance with all applicable laws, regulations and ethical standards of the country where they are doing business. This includes but is not limited to – competition and fair trading laws; insider trading laws; environmental laws and regulations; and anti-corruption laws of countries where it does business;
- not engage in any form of corruption including bribery, facilitation payments, extortion, money laundering or other illegal or unethical gratitudes;
- be transparent about their practices and actively engage sustainable policies and processes.

2. Human Rights and Labour Standards

We expect our suppliers to:

- ensure that all its employees, agents and sub-contractors comply with regulatory and statutory requirements in relation to workforce policies and human rights – for example employment practices, human rights, discrimination, harassment, equal opportunities, and global labour standards;
- respect human rights and ensure no employee shall suffer harassment, physical, mental or other forms of abuse;
- not use forced or compulsory labour and ensure that employees are employed voluntarily and of their own free will;
- not use child labour, and to comply with International Labour Organisation (ILO) standards.

3. Health and Safety

We expect our suppliers to:

- ensure that all its employees, agents and sub-contractors comply with regulatory and statutory requirements in relation to workforce and health and safety policies;
- provide policies and procedures for health and safety which meet legal requirements, and commit to continuous improvement of occupational health and safety; [...]

4. Environmental Management

We expect our suppliers to:

- comply with all applicable laws, regulations and standards of the country where they are doing business;
- conduct their business and operations in a way that minimises their impact on the environment;
- ensure that their suppliers and sub-contractors to comply with the principles of this Supplier Code of Conduct;
- adopt practices that deliver benefits to their own operations and supply chains, and improve their and our sustainable performances over time;
- actively participate in projects that contribute towards making a difference to the environment.

5. Monitoring

Suppliers are expected to maintain and be able to provide Delicatesy Whole Foods Sp with documentation which demonstrates compliance to this Supplier Code of Conduct. We regularly monitor our suppliers and ask about their business practices through questionnaires to help us identify and assess potential risks. We reserve the right to audit compliance to these guidelines in accordance with criteria formulated by us. If a supplier does not meet our expectations we will work with our suppliers to address the findings through remedial actions.

PROF. CAROLINE RIZZO
STEIRERECK PARK 2
VINDOBONA, DANUBIA

By courier

Horace Fasttrack
Advocate at the Court
Fasttrack & Partners
14 Capital Boulevard
Oceanside
Equatoriana

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo

22 August 2017

Delicatesy Whole Foods Sp v Comestibles Finos Ltd

Dear Mr. Fasttrack,
Dear Mr. Langweiler,

First of all, I would like to thank you and your clients for your consent to my appointment by Mr. Prasad and Ms. Reitbauer. I look forward to working with you in solving the dispute between the Parties.

The Arbitral Tribunal invites the Parties to a Case Management Conference via telephone on 30 August 2017 to discuss the further conduct of the arbitral proceedings.

At the Case Management Conference, we want to discuss with you in particular the timetable for submissions/hearings and possible other issues, which you may consider relevant.

The dial-in details for the telephone conference and a detailed agenda will be provided in due course.

Kind regards,



Caroline Rizzo
(Presiding Arbitrator)

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo
Tel. (0) 146-9845
Telefax (0) 146-9850
Langweiler@lawyer.me

29 August 2017

By email

Members of the Arbitral Tribunal

Horace Fasttrack
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana

Delicatesy Whole Foods Sp v Comestibles Finos Ltd

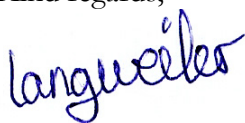
Dear Colleagues,

Respondent has obtained reliable information that Claimant is financed by a third-party funder in this arbitration.

Since that could have serious repercussions on the conduct of the proceedings we would like to discuss the issue at tomorrow's Case Management Conference.

Ahead of the Conference we request Claimant to provide us with the name of the funder as well as the relevant documentation to facilitate discussion.

Kind regards,



Joseph Langweiler

By courier

Horace Fasttrack
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo

1 September 2017

Delicately Whole Foods Sp v Comestibles Finos Ltd

Dear Mr. Fasttrack,
Dear Mr. Langweiler,

Following yesterday's Case Management Conference and the discussion concerning a possible involvement of a third-party funder on Claimant's side the Arbitral Tribunal has made the following decisions:

1. Claimant is ordered to disclose to Respondent and the Arbitral Tribunal by 7 September 2017 at the latest whether its claim is financed by a third-party funder.
2. In case the claim is funded by a third-party funder, Claimant should disclose at the same time the identity of the funder, as well as the funder's major shareholders/investors/beneficiaries.
3. The Arbitral Tribunal will, for the time being, not order the submission of the funding agreement.

Acknowledging the difficulties in finding a possible date for a hearing, the members of the Arbitral Tribunal have managed to free the only possible date in March 2018. Both Parties are requested to reserve the time from 24 – 29 March 2018 for an oral hearing in Vindobona (Vienna). The exact timing and venue will be fixed in a separate Procedural Order.

Kind regards for the Arbitral Tribunal,



Caroline Rizzo
(Presiding Arbitrator)

Horace Fasttrack
Advocate at the Court
Fasttrack & Partners
14 Capital Boulevard
Oceanside
Equatoriana
Tel. (0) 214 77 32
Telefax (0) 214 77 33
fasttrack@host.eq

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo

7 September 2017

Delicatesy Whole Foods Sp v Comestibles Finos Ltd

Dear Mr. Langweiler,

In compliance with the orders of the Arbitral Tribunal in its letter of 1 September 2017 the Claimant declares that its claim is funded by **Funding 12 Ltd.**

The main shareholder of Funding 12 Ltd is **Findfunds LP.**

Claimant wishes to reiterate that it only complies with the order to speed up proceedings and does not consider the order to be justified. That is even more so as Respondent can only have obtained the information from a third party which has breached its confidentiality obligation.

Claimant repeats its request that the Arbitral Tribunal shall order the Respondent to disclose where the information came from.

Sincerely yours,



Horace Fasttrack

Mr. Rodrigo Prasad
Prasad & Slowfood
Nickol Palais 14
Vindobona, Danubia

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo

Horace Fasttrack
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana

CC: Members of the Arbitral Tribunal

11 September 2017

Dear Mr. Langweiler,
Dear Mr. Fasttrack,
Dear Colleagues,

In light of the information provided by Claimant upon the request of the Arbitral Tribunal in its letter of 7 September 2017, I would like to inform you that I have acted as arbitrator in two cases which were funded by other subsidiaries of Findfunds LP.

These two arbitrations involved none of the entities, persons or law firms which are participating in the present arbitration and the disputes related to completely different fields of law. Both arbitral proceedings were completed last month. Furthermore, in one of these proceedings Findfunds LP only entered into a funding agreement after the arbitral tribunal, including myself, had been appointed.

Furthermore, as you may have seen in the legal press and from the new letter head, with effect of 1 September 2017 my law firm has merged with Slowfood, a leading law firm from Ruritania to form Prasad & Slowfood. One of the former Slowfood partners is representing a client in an arbitration which has been funded by Findfunds LP. The oral hearing will be next week and the Parties will submit their post-hearing submissions by the end of November. All necessary precautions have been put in place to avoid any contact with that case.

I do not consider such funding to be of any relevance for the question of my impartiality or independence and such disclosure is only made for the utmost caution and in the interest of full transparency.

Kind regards,



Rodrigo Prasad

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo
Tel. (0) 146-9845
Telefax (0) 146-9850
Langweiler@lawyer.me

14 September 2017

By courier

Horace Fasttrack
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana

Mr. Rodrigo Prasad
Prasad & Slowfood
Nickol Palais 14
Vindobona, Danubia

CC: Members of the Arbitral Tribunal

Delicatesy Whole Foods Sp v Comestibles Finos Ltd

Notice of Challenge of Arbitrator
(pursuant to Article 13 UNCITRAL Arbitration Rules)

Dear Mr. Fasttrack,
Dear Colleagues,

Please find enclosed our Notice of Challenge pursuant to Article 13 UNCITRAL Arbitration Rules in the above referenced arbitral proceedings concerning Mr. Prasad, the arbitrator appointed by CLAIMANT.

We are confident that Mr. Prasad, after having become aware of CLAIMANT's conduct underlying this challenge, will withdraw from his office.

Should Mr. Prasad, contrary to our expectations, not withdraw from his office we will ask a decision from the two other members of the Arbitral Tribunal.

Kind regards,



Joseph Langweiler

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo
Tel. (0) 146-9845
Telefax (0) 146-9850
Langweiler@lawyer.me

14 September 2017

Delicatesy Whole Foods Sp v Comestibles Finos Ltd

Notice of Challenge of Mr. Prasad
(pursuant to Article 13 UNCITRAL Arbitration Rules)

Dear Colleagues,

1. We herewith challenge Mr. Prasad as arbitrator in the above referenced proceedings. There are serious and justifiable doubts as to his impartiality and independence resulting from his connections with the third-party funder Findfunds LP and CLAIMANT's efforts to conceal such connections.
2. On 30 June 2017, CLAIMANT sent its Notice of Arbitration to RESPONDENT. Besides the hardcopy, electronic versions of the Notice of Arbitration were included in PDF and Word format. During a virus check of these two versions the relevant IT-Security officer of RESPONDENT managed to retrieve the Metadata of the Word file sent by CLAIMANT.
3. Attached to para. 14, in which CLAIMANT nominated Mr. Prasad as its arbitrator for the proceedings was the following comment, probably from Mr. Horace Fasttrack, judging by the initials.

"HF May 4, 2017

Verify with Findfunds whether there exist any contacts between Mr. Prasad and Findfunds. If contacts exist we should definitely do our best to keep the funding secret and not disclose it to the Respondent, to avoid potential challenges of Mr. Prasad. Prasad, whom I know from two previous arbitrations, is the perfect arbitrator for our case given his view expressed in an article on the irrelevance of CSR on the question of the conformity of goods."

4. As a consequence of this discovery, RESPONDENT immediately contacted the Arbitral Tribunal indicating that it had reliable information that CLAIMANT had involved a third-party funder in this arbitration and requested further details concerning the funder and the funding arrangement.
5. Furthermore, it investigated the article referred to in the comment, which made Mr. Prasad such a "suitable" arbitrator in the eyes of CLAIMANT that it was willing to violate its disclosure obligation. In his article in the Vindobona Journal of International Commercial Arbitration and Sales Law Mr. Prasad positions himself very clearly against the modern trend in the understanding of the conformity concept in Art. 35 CISG, which goes beyond the mere physical characteristics of the goods and includes the production process as well as the legal entities involved (**Respondent's Exhibit R 4**).
6. RESPONDENT is aware that this unfortunate situation giving rise to reasonable doubts as to Mr. Prasad's impartiality and independence is primarily due to CLAIMANT's unethical conduct of deliberately concealing the fact that it has received third-party funding from Findfunds LP. Given the egregious character of such conduct, RESPONDENT has little doubt that Mr. Prasad

had no involvement in this plot and was probably unaware that CLAIMANT had received funding from a third-party funder.

7. Irrespective of that we are convinced, that as an experienced lawyer and honorable man, Mr. Prasad will withdraw to avoid becoming part of such unethical behavior of CLAIMANT.
8. Should Mr. Prasad not withdraw or CLAIMANT not agree to the challenge, we already hereby request the two other members of the Arbitral Tribunal to decide upon the challenge. RESPONDENT will definitively pursue the challenge. In light of the clear agreement of the Parties, that the dispute should be settled “without the involvement of any arbitral institution” the only body to decide the challenge is this Arbitral Tribunal. RESPONDENT had explained to CLAIMANT that it wanted as few persons as possible to know about the arbitration and had no confidence that a dispute would be kept confidential by any institution (**Respondent's Exhibit R 5**). Thus, the Parties excluded the application of Article 13 (4) UNCITRAL Arbitration Rules. As a consequence, as is normal in ad hoc proceedings, the Arbitral Tribunal has to decide the challenge. That should be done without the participation of Mr. Prasad. If he were to decide on a challenge brought against him, he would be a judge in his own cause, something which should be avoided. Article 13 (4) shows that the drafters of the UNCITRAL Arbitration Rules wanted to avoid that the challenged arbitrator decides in its own cause. That is the only reason why the task to decide on the challenge is entrusted to the appointing authority.
9. In deciding the challenge, the Arbitral Tribunal should take into account General Standard 7 (a) of the IBA-Guidelines on Conflict of Interest in International Arbitration, which evidences best practices in this regard. According to General Standard 7, a Party has to disclose that it is funded by a third party. CLAIMANT has deliberately not done so. Instead, CLAIMANT has tried to conceal such fact. Such unethical behavior must affect the standard to be applied for challenges against the arbitrator appointed by that party. Connections existing with such an unethically acting party gain a greater weight due to the complete annihilation of trust in the fair play by that party.
10. At least such conduct should be taken into account in determining whether, in the eyes of RESPONDENT, justifiable doubts exist as to Mr. Prasad's impartiality and independence. There can be no doubt about that. Already in “ordinary cases” the IBA-Guidelines consider repeat appointments by a party/law firm to be problematic. In the present case, Mr. Prasad had been appointed twice before by Mr. Fasttrack's lawfirm and two times by Findfunds LP. These appointments have to be added.
11. Furthermore, one of Mr. Prasad's partners is acting for a client in an arbitration which is funded by Findfunds LP. The IBA-Guidelines in para. 2.3.6. consider that to be an issue which disqualifies an arbitrator unless both Parties after having become aware of the case “expressly state their willingness to have such a person act as an arbitrator”.
12. In principle, each of these facts in itself is sufficient to justify a challenge, in particular taking into account that hardly any steps have been taken so far in the arbitral proceedings. Taken together they leave no doubt that in the eyes of a reasonable person in RESPONDENT's situation there are justifiable doubts as to Mr. Prasad's independence.
13. It follows from the above, that Mr. Prasad is not suitable to act as arbitrator in the present proceedings and should be replaced by a different arbitrator.

Yours sincerely,



Joseph Langweiler

VINDOBONA JOURNAL

OF INTERNATIONAL COMMERCIAL ARBITRATION AND SALES LAW

2016, 123 et seq.

The notion of conformity in Art. 35 in the age of Corporate Social Responsibility Codes and “Ethical Contracting”

By Rodrigo Prasad

I. Introduction

50 years ago, the concept of Corporate Social Responsibility Codes (CSR-Codes) hardly existed and had definitively no relevance for sales law. Today, an own Corporate Social Responsibility Policy and Codes of Conduct or Ethics implementing such policy are standard for all internationally operating companies from the developed world. There is abundant literature on such codes from the economic, socio-economic or social perspective and during the discussion concerning the role and responsibility of multinationals the issue has also been treated from the perspective of public international law. By contrast, there is only a very limited literature concerning the private law effects of such codes. The present article discusses whether and, if so, to what extent Corporate Social Responsibility Codes play a role in sales law, in particular to what extent they are relevant for defining the requirements goods have to comply with to be conforming. [...]

III. Changing Concept of Conformity

Traditionally the conformity of the goods depended to a large extent on their physical properties. In recent years, there is a growing tendency in the sales law literature which promotes a wider understanding of the concept of conformity. These authors also consider extraneous factors relating to the goods such as the production process and other ethical conduct of the seller to be part of the conformity-requirements. That may be true, where the parties specifically make compliance with certain production standards part of the goods. A well-known example are cases where the buyer wants to buy goods which bear the label of fair trade. However, 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. In 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. Such statements are by far too general and unspecific to result in an enforceable contractual obligation. [...]

Witness Statement by

Annabelle Ming

My name is Annabelle Ming and I am 50 years old. I am an economist by training and have been working for 15 years for Comestibles Finos (Respondent) in various functions. Since January 2012, I am the Head of Purchasing at Comestibles Finos.

In my present function, I regularly visit the Cucina Food Fair to see new trends and products and to talk to potential suppliers. At the Cucina Food Fair 2014 I met Mr. Tsai of Claimant for the first time and we had a long discussion about numerous topics surrounding ethical production. One of the issues covered was the detrimental impact negative press can have in the field of ethical production and the resulting need to monitor suppliers.

Mr. Tsai talked about the changes made by Claimant to its production processes, internal organization and the relationship with its suppliers and customers after it had become a Global Compact member. He was very proud of these changes, which had been largely instigated and implemented by him. In his view, the reporting obligations and the auditing possibilities provided for in Claimant's Code of Conduct allowed them to monitor also the activities of their suppliers in a way, that they could largely guarantee compliance with the Code by their suppliers.

I told him, that this was very interesting for us given our past experiences with a supplier and the intention to become a Global Compact LEAD Company. We had been targeted in a press campaign initiated by one of our competitors for allegations which emerged from arbitral proceedings initiated by us against a supplier for the breach of a delivery obligation. That supplier had tried to justify its non-delivery of goods by alleging that he had received secret information that we were part of a "laundromate" scheme used by slush funds to launder money. Somehow, this information had been leaked to our competitor who presented it to the press as a given fact. The effect of that bad press had been a considerable drop in our sales. While there is no definitive proof we assume that the information about the unjustified allegation was leaked by the wife of the competitor's COO who worked for the arbitration institution where we had initiated the case.

As a consequence of that affair and the damage done to our reputation, we have included in all our contracts a very strict confidentiality clause with a high penalty for breaches. Furthermore, we switched our arbitration clause from an institutional arbitration clause to an ad hoc clause providing for arbitration under the UNCITRAL Arbitration Rules and explicitly excluding the involvement of any arbitral institution. Mr. Tsai was very interested in the affair since Claimant was in the process of reviewing its own contract models. I remember that discussion very well because he told me that they had moved some years before the other way from ad hoc arbitration to institutional arbitration. That had been the consequence of a bad experience with the appointment of the presiding arbitrator by the state court. The latter had not only taken very long but in the end appointed a chairman whose only qualification was that he knew the judge.

Upon my return from Cucina I immediately contacted our legal department to ask them whether the experience of Claimant necessitated any change to the dispute resolution clause contained in our

General Conditions. Our lawyers promised to look into that. When we prepared the Tender Documents, I was told that they did not see the necessity to make any changes and did not enquire any further.

I pointed that out to Mr. Tsai when I sent him the invitation to participate in the tender which has already been submitted by Claimant as its Exhibit C 1.



Annabelle Ming

11 September 2017

Mr. Rodrigo Prasad
Prasad & Slowfood
Nickol Palais 14
Vindobona, Danubia

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo

Horace Fasttrack
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana

cc: Members of the Arbitral Tribunal

21 September 2017

Dear Mr. Langweiler,
Dear Mr. Fasttrack,
Dear Colleagues,

In its challenge of 14 September 2017 RESPONDENT raised doubts as to my impartiality and independence and therefore my suitability to continue to act as arbitrator in these arbitral proceedings.

I naturally regret the unfortunate situation which has been created by the comment apparently made by CLAIMANT in its annotated version of the Notice of Arbitration. I have only become aware of the involvement of a third-party funder when CLAIMANT confirmed RESPONDENT's allegations following the telephone conference of 30 August 2017. At that stage, I immediately declared that I had acted in two arbitral proceedings as arbitrator appointed by parties which had been funded by entities which were 100% subsidiaries of Findfunds LP.

In my view, these connections to Findfunds LP cannot lead to justifiable doubts as to my impartiality and independence. The IBA-Guidelines on Conflict of Interest, should they be applicable, include direct connections with third-party funders into those contacts which should be disclosed. In my case, there are, however, already doubts whether I fall under the disclosure obligation since in both cases the funding was provided by a separate entity and not Findfunds LP directly.

In addition, the fact that circumstances should be disclosed does not mean automatically that they justify a challenge. Findfunds LP is known in the industry to take little influence on the actual conduct of the arbitration, in particular the appointment of the arbitrator. In one of the two cases, they only signed the funding agreement after I had been appointed. Consequently, my involvement in the other two cases would not give rise to justifiable doubts even if one were to equate Findfunds with its subsidiaries.

CLAIMANT's failure to disclose these circumstances does not justify a different conclusion. For the question of whether there are justifiable doubts as to my impartiality and independence, only my conduct and contacts can be relevant and not that of the party which appointed me.

Equally, I do not see why the remote connection to Findfunds LP which has been created through the merger of my previous law firm with Slowfood should create doubts as to my independence. Those connections clearly do not constitute a “significant commercial relationship with one of the parties, or an affiliate of one of the parties” (IBA-Guidelines on Conflict of Interest, para. 2.3.6).

It is also generally recognized that publications, which treat a legal question in a general and abstract manner not connected to the case in question do not justify the challenge of an arbitrator. In my case the article was written and published in 2016, well before these arbitral proceedings were started and the opinion expressed in the articles is not in any ways influenced by the case or will influence my decision in the case. In the publication, I have expressed my view that, in principle, the conformity of goods under the CISG is solely dependent on the physical nature of the goods themselves and not their production process or even other seller related component. At the same time, I have, however, stated that this may be different in cases where the contractual provision explicitly makes the production process part of the description of the goods.

As a consequence of the above, and taking into account the importance of the right for each party to choose its own arbitrator, I will not withdraw from my office as arbitrator.

Yours sincerely,



Rodrigo Prasad

Horace Fasttrack
Advocate at the Court
Fasttrack & Partners
14 Capital Boulevard
Oceanside
Equatoriana
Tel. (0) 214 77 32
Telefax (0) 214 77 33
fasttrack@host.eq

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo

cc: Members of the Arbitral Tribunal

29 September 2017

Dear Mr. Langweiler,
Dear Colleagues,

We consider the challenge against Mr. Prasad to be devoid of any merits and therefore do not agree to it. It is an obvious attempt by RESPONDENT to derail these arbitral proceedings and to postpone the date when it will be ordered to pay the amount long overdue.

The facts submitted by RESPONDENT do not create any justifiable doubts as to Mr. Prasad's impartiality or independence.

First of all, there is no legal obligation for CLAIMANT under the applicable arbitration law, i.e. Danubian Law, or the applicable arbitration rules, i.e. the UNCITRAL Arbitration Rules, to make any disclosure. Consequently, RESPONDENT – unsuccessfully – tries to deduce such an obligation from the IBA-Guidelines on Conflict of Interest. These are, however, not applicable to the present arbitration as Parties have never agreed upon their application.

Second, even if those rules were to be applicable, as is not the case, CLAIMANT had no obligation to disclose the funding let alone would a failure to make such a disclosure affect the standard relevant for a successful challenge. CLAIMANT had not been funded by Findfunds LP, but by Funding 12 Ltd. While Funding 12 has been set up by Findfunds, it is a completely separate legal entity and has never before appointed Mr. Prasad. Furthermore, RESPONDENT has not even alleged, let alone proven that the existing connections fulfill the requirement of materiality existing under the IBA-Rules.

The further factors invoked by RESPONDENT for its challenge are not only irrelevant but cannot be relied upon. They have been disclosed by Mr. Prasad in his Declaration of Impartiality and Independence and Availability (*Claimant's Exhibit C 11*) either directly or, in case of the publications, were available on his website. As RESPONDENT did not invoke them at the time, it is barred to do so now.

The most obvious evidence for the purely dilatory character of the challenge is RESPONDENT's reliance on the connections allegedly created by the merger of the two law firms. RESPONDENT first consented to Mr. Prasad's qualified declaration which allowed Mr. Prasad's existing partners to take on new work related to one of the parties in an arbitration. Now, however, RESPONDENT tries to fabricate a ground for challenge from the remote and previously existing contacts one of the new

partners of Mr. Prasad has to Findfunds LP. That is telling. The case is nearly finished, all important decisions have already been taken and all precautions have been taken to avoid any contacts.

Should RESPONDENT, as announced, nevertheless intend to pursue its obviously hopeless challenge, the challenge must be decided in accordance with the procedure listed in Art. 13 (4) UNCITRAL Arbitration Rules. CLAIMANT never had the intention to deviate from the challenge procedure when it agreed to the addition in the arbitration clause. It thought that the provision was only relevant for the appointment of arbitrators.

Even if one were to follow RESPONDENT's allegation that it intended to exclude the application of Art. 13 (4) UNCITRAL Arbitration Rules in the arbitration agreement, in light of the fundamental nature of the right to challenge an arbitrator, a clearer wording would have been required for a deviation from the standard procedure.

Irrespective of that, the default provision would then be a decision by the full Arbitral Tribunal with the inclusion of Mr. Prasad and not a decision by the two remaining arbitrators.

The only reason RESPONDENT alleges a deviation from the normal rule and insists on a decision by the two remaining arbitrators is, that Ms. Reitbauer has articulated in an article a very critical view on third party funding, advocating inter alia extensive disclosure obligations. It is telling that RESPONDENT accuses CLAIMANT of unethical behavior but itself forget to disclose the real reasons for its obvious procedural schemes.

Irrespective of which procedure is going to be adopted, it will not result in a success of RESPONDENT's hopeless challenge.

To avoid that RESPONDENT reaches the primary goal of its challenge, which is to delay the proceedings, CLAIMANT is willing to discuss – and provisionally fund – solutions which ensure that the arbitration can proceed as originally planned during the Case Management Conference.

The most obvious solution would be the immediate appointment of a potential replacement arbitrator who could immediately take over the role of Mr. Prasad, in the unlikely event that RESPONDENT's challenge is successful. The costs for that replacement arbitrator would provisionally be paid by CLAIMANT and should then be allocated according to the outcome of the challenge.

CLAIMANT is happy to discuss this and/or other possible solutions in another telephone conference with the Arbitral Tribunal and RESPONDENT. CLAIMANT's counsel would make itself available at any time next week.

Sincerely yours,



Horace Fasttrack

PROF. CAROLINE RIZZO
STEIRERECK PARK 2
VINDOBONA, DANUBIA

To:
Horace Fasttrack
Advocate at the Court
Fasttrack & Partners
14 Capital Boulevard
Oceanside
Equatoriana

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo

Vindobona, 6 October 2017

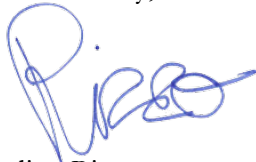
Delicatesy Whole Foods v Comestibles Finos

Dear Colleagues,

Following yesterday's telephone conference, please find enclosed Procedural Order No 1 in the above referenced arbitration proceedings.

Both Parties are requested to comply with the orders made and the Arbitral Tribunal reserves the right to draw negative inferences from any non-compliance with any part of Procedural Order No 1.

Yours sincerely,



Caroline Rizzo
(Presiding Arbitrator)

Encl.: Procedural Order No 1

Procedural Order No 1

of 6 October 2017
in the Arbitral Proceedings

Delicatesy Whole Foods Sp v Comestibles Finos Ltd

1. Following the discussions and the agreements reached in the telephone conference of 5 October 2017, the Arbitral Tribunal takes note of the following facts:
 - Neither Party challenges the jurisdiction of this Arbitral Tribunal in principle but CLAIMANT contests the power of the Arbitral Tribunal to decide upon the challenge of Mr. Prasad.
 - Both Parties agree that the arbitration agreement is subject to the CISG.
 - Both Parties agree that to speed up proceedings in case the challenge of Mr. Prasad should be successful, CLAIMANT appoints already now Ms. Chian Ducasse as a potential replacement of Mr. Prasad. All submissions will be made available to her and she will be present at the oral hearing to be able to replace Mr. Prasad should the challenge be successful either before this Arbitral Tribunal or an appointing authority designated in accordance with Article 6 UNCITRAL Arbitration Rules.
 - The Parties are in agreement that in light of that arrangement and the issues in dispute, the Parties will bifurcate the proceedings. The first part of the proceedings, i.e. the next round of submissions as well as the first oral hearing, will be devoted to the challenge of Mr. Prasad as well as to the question of whether the cakes delivered by CLAIMANT were conforming to the contractual agreement between the parties.
 - Both issues will be presented jointly at the oral hearing at which Ms. Ducasse is allowed to participate as a potential replacement arbitrator.
 - The costs for the involvement of Ms. Ducasse will provisionally be borne by CLAIMANT. In its final award on costs, the Arbitral Tribunal will decide upon such costs, taking into account the outcome of the challenge.
2. Both Parties have agreed in the telephone conference of 5 October 2017 that irrespective of the outcome of the first part of the proceedings a final decision on costs should be reserved for a separate award. The rationale for such agreement is to allow both Parties to make their submissions on costs in light of the outcome on the merits, to avoid eventually unnecessary submissions on the controversial question as to the recoverability of funding costs.
3. In the light of these agreements and considerations the Arbitral Tribunal hereby makes the following orders:
 - (1) In their next submissions and at the Oral Hearing in Vindobona [Hong Kong] the Parties are required to address the following issues:
 - a. Should the Arbitral Tribunal decide on the challenge of Mr. Prasad and if so with or without his participation?
 - b. In case the Arbitral Tribunal has authority to decide on the challenge, should Mr. Prasad be removed from the Arbitral Tribunal?
 - c. Which standard conditions govern the contract, CLAIMANT's or RESPONDENT's or none of them?
 - d. In case RESPONDENT's General Conditions are applicable, has CLAIMANT delivered non-conforming goods pursuant to Article 35 CISG as the cocoa was not farmed in accordance with the ethical standards underlying the General Conditions and the Code of Conduct for Suppliers, or was CLAIMANT merely obliged to use its best efforts to ensure compliance by its suppliers?

No further questions related to the merits of the claims should be addressed in the first part of the arbitration.

- (2) For the Parties' submissions the following Procedural Timetable applies:
 - a. CLAIMANT's submission: no later than 7 December 2017.
 - b. RESPONDENT's submission: no later than 19 January 2018.
- (3) The submissions are to be made in accordance with the Rules of the Moot agreed upon at the telephone conference.
- (4) It is undisputed between the Parties that Equatoriana, Mediterraneo, Ruritania and Danubia are Contracting States of the CISG. The general contract law of all four states is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. All states have adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments.
- (5) In the event Parties need further information, Requests for Clarification must be made no later than 26 October 2017 via their online party [team] account and comply with Rules 28 et seq. of the Vis Rules. No team is allowed to submit more than ten questions.
- (6) For those institutions participating ONLY IN THE VIS EAST questions should be emailed to clarifications@vismoot.org. Where an institution is participating in both Hong Kong and Vienna, the Hong Kong team should submit its questions together with those of the team participating in Vienna via the latter's account on the Vis website.
- (7) Clarifications must be categorized as follows:
 - (1) Questions relating to the discussions and negotiation preceding the Tender Documents and the drafting of the latter.
 - (2) Questions relating to the negotiation, drafting and conclusion of the Sales Agreement.
 - (3) Questions concerning the Code of Conducts and the Parties' Corporate Social Responsibility policies.
 - (4) Questions concerning the arbitration clause.
 - (5) Questions concerning the relationship of Mr. Prasad to the Third Party Funder and its subsidiaries.
 - (6) Questions concerning the relationship of Mr. Prasad to the law firm Fasttrack & Partners
 - (7) Questions concerning other issues relating to the alleged lack of independence and impartiality.
 - (8) Questions relating to the applicable laws and rules to the case and in the countries concerned.
 - (9) Other questions.

4. Both Parties are invited to attend the Oral Hearing scheduled for 24 – 29 March 2018 in Vindobona, Danubia [12 – 16 March 2018 in Hong Kong]. The details concerning the timing and the venue will be provided in due course.

For the Arbitral Tribunal,



Caroline Rizzo
(Presiding Arbitrator)