



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

ANALYSIS OF THE PROBLEM FOR USE OF THE ARBITRATORS

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Vis East Moot Foundation Limited

Analysis of the Problem

For use of the Arbitrators

If you do not already have a copy of the Problem, it is available on the Vis Moot web site, <https://vismoot.pace.edu/site/25th-vis-moot/the-problem>. If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November which includes Procedural Order No 2 and subsequent comments.

This analysis of the Problem is primarily for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are *strongly urged* not to communicate any of the ideas contained in this analysis to their teams *before* the submission of the Memorandum for RESPONDENT.

The analysis will be sent to all teams after all Memoranda for RESPONDENT have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the problem for the oral arguments. If the analysis contains ideas teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. At the same time the analysis is not intended to give away all possible arguments. For that reason, this analysis often does no more than merely flag the issue without mentioning the arguments for or against a certain position. It does not contain a full analysis of the problem.

All arbitrators should be aware that the legal analysis contained herein may not be the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. The number of issues that arise out of the fact situation makes it necessary for the teams to take a decision which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and their analysis of it. In addition, the decision may be influenced by the presentation to which responded. Full credit should be given to those teams that present different, though fully appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation, if they want to discuss certain issues specifically. They should do so, if they want to make the in-depth discussion of a particular issue part of their evaluation.

The Facts

1) Parties and Contractual History

CLAIMANT, Delicatesy Whole Foods Sp., 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. It is a social enterprise and as a Member of the UN Global Compact initiative committed to produce sustainably and ethically.

RESPONDENT, Comestibles Finos Ltd, is a gourmet supermarket chain in Mediterraneo.

In early March 2014, RESPONDENT's Head of Purchasing, Ms. Annabelle Ming, visited CLAIMANT's stall at the yearly Danubian food fair "Cucina". During that visit and a return visit at RESPONDENT's stall Ms. Ming and CLAIMANT's Head of Production, Mr. Kapoor Tsai, discussed which products would be of interest for RESPONDENT and whether it would be feasible to supply those to the RESPONDENT. Furthermore, Mr. Tsai and Ms. Ming 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.

Shortly after the food fair, with a letter of 14 March 2014, RESPONDENT invited CLAIMANT to participate in a public tender for the delivery of chocolate cakes (Claimant's Exhibit C 1). The invitation referred to the discussion at the food fair and made clear that "a strict adherence to the principles of ethical and sustainable production" was a crucial element for RESPONDENT in the conclusion of the contract. The enclosed Tender Documents (Claimant's Exhibit C 2) provided for the application of RESPONDENT's General Conditions of Contract which declared RESPONDENT's Code of Conduct for Suppliers to be applicable. Furthermore, all invitees which were interested in submitting a bid had to return a Letter of Acknowledgement stating inter alia that they had received all documents and "will tender in accordance with the specified requirement".

Claimant returned the Letter of Acknowledgment on 17 March (Respondent's Exhibit R 1). Its offer of 27 March 2017, however, deviated in several respects from the Tender Documents. Besides deviations in relation to the size of the product and the payment conditions, which were explicitly mentioned in the cover letter to the offer (Claimant's Exhibit C 3) the stationary used for the offer declared it to be "subject to [Claimant's] General Conditions of Sale" (Claimant's Exhibit C 4) and gave a webpage where they could be found.

On 7 April 2014 RESPONDENT informed CLAIMANT that the latter's offer was successful. The letter explicitly accepted the changes requested for the form of the chocolate cakes and for the payment conditions but did not say anything concerning the acceptance of other changes (Claimant's Exhibit C 5). It mentioned, however, that Ms. Ming downloaded CLAIMANT's Code of conduct "out of curiosity".

In accordance with the contract, the CLAIMANT made its first delivery on 1 May 2014. The chocolate used in the production of the cakes came from Ruritania and there were no problems concerning the deliveries in 2014, 2015 and 2016. In January 2017, following a

documentary on the report of the Special Rapporteur for UNEP on deforestation in Ruritania and an article in the leading business newspaper Michelgault in Equatoriana about the wide spread fraud in the issuance of sustainable production certificates in Ruritania (Claimant's Exhibit C 7), RESPONDENT became concerned that CLAIMANT's Ruritanian suppliers might not comply with Global Compact principles.

With letter of 27 January 2017 (Claimant's Exhibit C 6) RESPONDENT requested a confirmation from CLAIMANT by the next business day that Claimant's suppliers all strictly adhered to Global Compact principles. RESPONDENT threatened to terminate the contract should such a confirmation not be forthcoming and announced that until the situation had been clarified no further payments would be made and no deliveries be accepted.

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 but not yet paid. CLAIMANT was of the view that 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).

Following further investigations, it turned out, that CLAIMANT's supplier, the Ruritania Peoples Cocoa mbH, was involved in the scandal. It had provided CLAIMANT with forged official papers certifying such sustainable production of the cocoa beans while at least part of the beans came from farms illegally set up in protected areas after the deforestation of such areas. CLAIMANT immediately terminated the contract with Ruritania Peoples Cocoa mbH.

With email of 10 February 2017 CLAIMANT informed RESPONDENT of its discovery and apologized for the problems caused (Claimant's Exhibit C 9). It expressed its willingness to take back the cakes delivered and not yet sold and to discuss with RESPONDENT a financial contribution to possible losses. At the same time CLAIMANT made clear that, as it had been defrauded itself, it considered itself not to be in breach of its own contractual obligations which were in its view determined by its own General Conditions of Sale.

On 12 February 2017 RESPONDENT rejected CLAIMANT's offer and declared a termination of the contract relying on clauses in its own General Conditions of Contract, which it considered to be applicable. (Claimant's Exhibit C 10).

The Parties continued negotiation but could not reach a settlement.

2. Initiation of Arbitration and Statement of Relief Sought:

On 30 June 2017 CLAIMANT initiated the present arbitration proceedings, asking inter alia for the payment of the still outstanding purchase price, a declaration as to the applicable rules for the contractual relationship and for damages for breach of contract.

More specifically, CLAIMANT raises the following claims in the arbitration proceedings:

- 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.*

RESPONDENT asks the Arbitral Tribunal

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

3. Challenge of the Arbitrator appointed by Claimant:

In addition to these claims concerning the merits, during the course of the proceedings an issue concerning the proper constitution of Arbitral Tribunal arose.

In its Notice for Arbitration CLAIMANT appointed Mr. Prasad of Prasad and Partners as its arbitrator. When RESPONDENT subsequently examined the metadata of the electronic version of the Notice of Arbitration, it discovered a deleted comment by Mr. Fasttrack that gave some background information concerning the appointment of Mr. Prasad. Furthermore, the comment showed that CLAIMANT decided not to disclose the involvement of a third-party funder to avoid any challenge to Mr. Prasad. In RESPONDENT's view CLAIMANT's behavior and subsequently disclosed contacts between the third-party funder and Mr. Prasad, respectively his law firm, raise justifiable doubts as to Mr. Prasad's independence. As a consequence, RESPONDENT notified the Arbitral Tribunal on 14 September 2017 that it would challenge Mr. Prasad should the latter not voluntarily resign. Furthermore, RESPONDENT made clear that such a challenge should not be decided by the "Appointing Authority" as defined in Art. 6 UNCITRAL Arbitration Rules but by the Arbitral Tribunal without the participation of Mr. Prasad. In RESPONDENT's view the Parties had excluded any involvement of an appointing authority in their arbitration clause.

In their replies to this challenge Mr. Prasad (Letter of 21 September 2017) and CLAIMANT (29 September 2017) both contested that the existing contacts could raise justifiable doubts as to Mr. Prasad's independence. Furthermore, in CLAIMANT's view any challenge should be decided by the Appointing Authority as determined in accordance with Art. 6 UNCITRAL Arbitration Rules and not by the Arbitral Tribunal, let alone without the participation of Mr. Prasad.

To speed up the arbitral proceedings, the Parties agreed that the two questions concerning the challenge of Mr. Prasad could be decided jointly with two of the preliminary issues on the merits, i.e. whether or not the contract is governed by RESPONDENT's General Conditions of Purchase, including its Code of Conduct for Suppliers and if so, how these have to be interpreted. Irrespective of the fact that the solution found by the parties to the problem of a potentially successful challenge is very unusual, it may be a useful example of how flexible the arbitration procedure can be, if the parties try to find solutions to existing problems.

The Issues

In light of the above agreement, the Arbitral Tribunal has set forth the issues to be decided in the first part of the proceedings, and therefore at issue in the Moot, in Procedural Order No 1 para. 3(1). It has ordered the Parties to address in their next submissions and at the Oral Hearing in Vindobona (Hong Kong) 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 (1) or (2) 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?*

While the Parties are in principle free to select the order in which they address the various issues, it makes sense to start with the challenge procedure. It was explicitly stated by the Arbitral Tribunal that beyond the two preliminary questions under c. and d. no further questions going to the merits of the claims should be addressed.

General Considerations

The case includes several problems which are regularly or at least increasingly encountered in international business transactions. These are the participation of third-party funders, merging law firms, contracting by way of public tenders, battle of forms and the question of how general business policies and resulting Codes of Conducts affect the requirements as to the conformity of the goods.

These problems are to different extents relevant for the “solution” of this case and will have to be addressed in one way or another in the written submissions or the oral pleadings. Both the procedural issues and the substantive issues in the case have to be seen and can also be argued against the background of more general and fundamental questions. In relation to the procedural issues these are the questions, first, as to the role of party appointed arbitrators and that of the challenge procedure, and second, as to the role and positioning of third party funders in the arbitration context. In relation to substance, it is the general problem of corporate social responsibility and the possible enforcement at the contract law level.

The broad topics to be discussed by the students are the following:

- 1) In relation to arbitration:
 - a. How the formulation in the arbitration clause has to be interpreted that the disputes are to be settled “in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution” (emphasis added), in particular whether that

entrusts the Arbitral Tribunal with the power to decide upon the challenge of Mr. Prasad.

- b. Whether CLAIMANT's behavior and the existing relationships between the arbitrator Mr. Prasad and the third party funder Findfunds LP, are sufficient to either by themselves or jointly with other connections to justify the conclusion that there are "reasonable doubts" as to Mr. Prasad's independence.

2) In relation to the CISG:

- a. Which of the standard conditions referred to in the various communications between the Parties have become part of contract.
- b. Whether in case RESPONDENT's standard conditions are applicable, the Code of Conduct for Suppliers contained therein, provides for an obligation of result, that any deviation from a sustainable production process results in the non-conformity of the goods, irrespective of where it occurred.

Unlike in previous years, the procedural and substantive problems of the present case are not closely connected. Taking into account, that a successful challenge may lead to a different composition of the Arbitral Tribunal it seems advisable to start with the procedural issues first and then deal with the merits. However, no order was prescribed by the Arbitral Tribunal.

The following remarks are merely intended to highlight the legal issues arising from the problem. They do not suggest any order in which issues should be treated. They are deliberately only based on a distinction between procedural and substantive issues and follow the order of the questions posed by the Tribunal. It is for the Arbitrators to evaluate whether the Parties have addressed the problems in a convincing and effective order in their written submission and to suggest an order for the oral hearings should the Parties not have agreed upon an order.

A common issue relating to question of procedure as well as to question of substance is the use of imprecise and equivocal terms by the Parties. For example, in connection with the tender incoherent terminology is used to make the students think about the question of what constitutes the offer and what the acceptance. Therefore, it is not completely clear whether the Tender Documents constituted an invitation to tender or already an offer in particular since the term is used in different contexts. Equally, it is not clear what was meant with the addition to the arbitration clause that the arbitration should be conducted "without the involvement of any arbitral institution".

Challenge Procedure: Procedural Order No 1 para. 3 (1 a)

1. Background

CLAIMANT initiated the arbitration on the basis of the following arbitration clause contained in RESPONDENT's General Conditions of Contract:

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.*

As the relevance of that arbitration clause for the arbitration was never challenged and both Parties apparently arbitrate on the basis of the clause, there is at this stage no need to address whether the Parties validly agreed on this clause or another clause. Should there have been no agreement at an earlier stage, one can at least assume an ad-hoc agreement on the clause by both Parties during the arbitration.

The arbitration clause is based on the model clause suggested by UNCITRAL with one important modification: instead of determining an appointing authority, as suggested by UNCITRAL as a useful addition to the Model Clause in lit. (a), the Parties explicitly provided that the arbitration should be made "without the involvement of any arbitral institution and excluding the application, direct [or] by analogy, of the UNCITRAL Rules on Transparency".

The background of that explicit exclusion, as explained in the witness statement of Ms. Ming (Respondent's Exhibit R 5), were the bad experiences of RESPONDENT with institutional arbitration in the past. Information about an existing arbitration had been leaked to a competitor which used it for a bad press campaign. RESPONDENT suspected that the information had been leaked by the wife of the competitor's COO who worked at the arbitration institution which administered the arbitration. As a consequence, RESPONDENT had not only included strict confidentiality clauses into its contracts with high penalties for breaches but also replaced the arbitration clause in its General Conditions. Instead of the previously used clause providing for institutional arbitration the present arbitration clause was included providing for arbitration under the UNCITRAL Rules but excluding the involvement of any arbitration institution.

Ms. Ming and Mr. Tsai discussed that "affair" and the change in the dispute resolution policy during their meeting at the food fair, because CLAIMANT had previously made exactly the opposite decision, switching from ad-hoc arbitration to institutional arbitration. That experience of CLAIMANT was then reported by Ms. Ming to her own legal department as she

indicated in her invitation to tender of 10 March 2014 (Claimant's Exhibit C1). No changes were made to the clause as RESPONDENT apparently "never had any problems concerning the composition of the arbitral tribunal" and the legal department was not expecting "any problems in its application in practice".

2. The relevance of the arbitration agreement for the challenge procedure under the UNCITRAL Arbitration Rules.

In the present case, the express exclusion of the "involvement of any arbitral institution" raises, however, questions as to its relationship with the provisions of the UNCITRAL Arbitration Rules dealing with challenges of arbitrators.

Pursuant to Art. 12 UNCITRAL Arbitration Rules an arbitrator may be challenged "if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." Concerning the procedure for challenges Art. 13 UNCITRAL Arbitration Rules provides as follows:

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified in their pertinent parts of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.
2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.
3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.
4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority

Article 6 UNCITRAL Arbitration Rules then contains a fairly elaborate provision on how to determine the "appointing authority" in case the parties have not previously agreed on an appointing authority. It provides in its pertinent paragraphs

1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority.
2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.

4. Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority.

In light of the text of the arbitration clause and its drafting history the teams have to address the following questions:

- Whether the Parties intended with their arbitration clause to derogate from the relevant provisions in the UNCITRAL Arbitration Rules or not also for the challenge of an arbitrator
- Whether such a derogation, if agreed upon, was possible at all (which in turn may also influence the interpretation of the clause)
- If it was possible, whether the Arbitral Tribunal should then decide the challenge with or without the involvement of Mr Prasad.

The first question is a mere question of interpretation which is to be answered on the basis of the applicable law. In the present case, that is the CISG, as is explicitly stated in PO 1 para. 1 2nd bullet point. The file contains a number of facts which can be used as arguments in the context of an interpretation of the clause pursuant to Art. 8 CISG.

The second and the third question are legal questions. In the argumentation issues such as the possible limits of party autonomy, the interplay of the arbitration agreement with chosen arbitration rules, the importance of the challenge procedure for the legitimacy of the arbitral process, and to what extent an arbitrator should decide upon its own challenge and possible safeguards may become relevant (see the reference to some of the discussion in the context of drafting the UNCITRAL Arbitration Rules Binder, Analytical Commentary to the UNCITRAL Arbitration Rules 13-003; 13-026).

Grounds for Challenge: Procedural Order No 1 para. 3 (1 b)

1. Background

Mr. Prasad had been appointed by CLAIMANT in the Notice of Arbitration. When RESPONDENT subsequently (27 August 2017) examined the meta-data of the electronic version of the Notice of Arbitration, it discovered the following deleted comment, which gave the reasons for CLAIMANT's choice of Mr. Prasad.

“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.”

In the article referred to (Respondent’s Exhibit R 4) Mr. Prasad advocates a narrow understanding of the concept of conformity which – outside narrow categories “where the parties actually trade not only in goods but also in emotion” – should not extend to extraneous factors such as the production process or other ethical conduct.

At the time of his appointment Mr. Prasad was neither aware of the reasons for his appointment, nor about the involvement of any third-party funder let alone CLAIMANT’s decision not to disclose such involvement to avoid challenges. Consequently, Mr. Prasad’s original Declaration of Impartiality and Independence and Availability of 26 June 2017 (Claimant’s Exhibit C 11) merely mentioned his existing contacts with the law firm of Mr. Frasttrack. The latter had appointed him twice as arbitrator in the past two years. Both arbitrations were terminated and according to the knowledge of Mr. Prasad, Mr. Fasttrack himself had not been involved in any of the cases (but see PO 2 para. 9).

Following a disclosure request by RESPONDENT (29 August 2017) and an ensuing order by the Arbitral Tribunal (1 September 2017) CLAIMANT disclosed on 7 September 2017 that it was funded in the arbitral proceedings by Funding 12 Ltd. The latter’s major shareholder is Findfunds LP which owns 60% of the shares in Funding 12 Ltd. and has brought in another fund for the remaining 40% (PO 2 para. 2). That is the participation structure Findfunds LP also uses for its other arbitrations, for each of which it creates in principle a new special purpose vehicle (PO 2 paras 1 et seq.).

As a reaction to CLAIMANT’s disclosure about the involvement of Funding 12 Ltd, Mr. Prasad informed the Parties by Letter of 11 September 2017 about existing contacts with Findfunds LP. He had acted as arbitrator in two cases which were funded by other subsidiaries of Findfunds. Both proceedings had been terminated the previous month and involved different parties and different areas of law. In one of the arbitrations the subsidiary of Findfunds LP only entered into the Funding Agreement after Mr. Prasad had been appointed. Furthermore, another subsidiary of Findfunds LP is funding an arbitration by a partner of the law firm Slowfood, with which Mr. Prasad’s law firm merged with effect of 1 September 2017. The oral hearing in that arbitration was going to take place in the following week and Post-Hearings Briefs were to be filed by the end of November 2017. Mr. Prasad informed the Parties that in the latter arbitration all necessary precautions had been taken to ensure that no he would have no contacts with the case. Mr. Prasad made clear that in his view none of the contacts with the funder led to justifiable doubts as to his independence and he only disclosed the contacts “for the utmost caution and in the interest of full transparency”.

2. Challenge

RESPONDENT does not share Mr. Prasad's view and has challenged him with a Notice of Challenge of 14 September 2017. On its view the various contacts disclosed by Mr. Prasad individually and in combination with CLAIMANT's behavior revealed by the discovered comment raise "justifiable doubts" as to Mr. Prasad's independence in the sense of Art. 12 UNCITRAL Arbitration Rules. As neither CLAIMANT nor Mr. Prasad agreed to the challenge a decision of the Arbitral Tribunal is required to decide whether the facts reported lead to justifiable doubts as to Mr. Prasad's independence.

In answering the question, the following considerations, contacts and behavior may be of relevance to justify a challenge either individually or jointly:

- CLAIMANT's selection of an arbitrator who had already publicly expressed a view on crucial legal question for the case
 - Probably not in itself but eventually in combination with the additional behavior, i.e. CLAIMANT's interest in avoiding a challenge
- CLAIMANT's behavior of not disclosing the involvement of a third party funder
 - Is there an obligation to disclose the involvement of a third party funder? Assumed under the IBA-Rules but contested in practice by some funders
 - Can CLAIMANT's behavior (should it be reproachable) which was not known to Mr. Prasad and upon which he had no influence have any relevance for determining Mr. Prasad's independence (e.g. other standard / attributed to Mr. Prasad due to his appointment by CLAIMANT)
- Contacts with CLAIMANT's law firm
 - In themselves probably not sufficient but could be included into an overall evaluation
- Contacts with the third party funder
 - Status of a funder: Comparable to party or to the party's law firm
 - Relevance that funding is provided by different legal entity
 - Relevance of ongoing arbitration with partner of merged law firm

In particular in relation to the funder the case concerns a number of detailed information which can be used in the Parties' arguments (For issues which may play a role in the evaluation see the commentaries on Articles 11 and 12 in Croft, Kee, Waincymer, "A Guide to the UNCITRAL Arbitration Rules" Cambridge University Press, 2013).

One further issue which may become relevant is the time when the various contacts became known and the timing of the challenge. In principle, challenges have to be raised within 15 days after a particular contact became known. In the case compliance with that time limit is only beyond doubt in relation to the contacts between the funder the new law firm. To what extent the other contacts have been known before (sufficiently?) or can be included in an overall evaluation of Mr. Prasad's independence can be discussed by the Parties.

For a possible waiver/estoppel discussion also the limitations in Mr. Prasad's declaration of independence may be relevant.

Determination of applicable standard conditions: Procedural Order No 1 para. 3 (1 c)

1. Background

The so called “battle of forms” is a common problem in international transactions. It is characterized by the facts that the parties to a transaction all try to rely on their respective general conditions which have been referred to at some point during the contract negotiation phase. Often such references are not the result of a positive case specific decision by the parties to submit their relationship to their own general conditions but result from an unspecific use of stationary containing them. In present case, the “battle of forms” problem appears in setting which deviates from the standard situation of negotiations between two parties at eye level. Instead it is set in a tender situation. There the buyer often unilaterally determines the specific conditions and compliance with the specifications made is regularly necessary to be able to compare the various bids submitted. Whether that affects the answer to the question of which general terms prevail is one of the issues which the students should discuss.

In the case at hand the answer to the question which standard conditions apply, if any, may have a bearing on the question whether there was a breach of contract in form of a delivery of non-conforming goods. As CLAIMANT has been defrauded itself by its supplier and there are no apparent signs that it acted not with the necessary care in supervising its suppliers a breach of contract is only possible, if one assumes that RESPONDENT’s general conditions are applicable. From the mere wording of RESPONDENT’s general conditions, it cannot be excluded that they provide for an obligation of results and not merely for a promise of best efforts. It seems clear that such an obligation of results cannot be read into the standard terms of CLAIMANT.

In the end, the issue which general terms are applicable depends on two factors; first an interpretation of the Parties’ declaration and behavior under Art. 8 CISG and second, but closely related, how Art. 19 CISG must be understood.

Art. 8 CISG provides as follows:

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Art. 19 CISG states:

- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Some authors deduce from Art. 19 CISG that the CISG adheres to the “last shot doctrine”, that those standard terms apply which have been referred to last. Their submission constitutes the last counteroffer which has then be accepted by the other party through the performance of the contract (see Ferrari, Art. 19 paras 15 et seq. in Kröll/Mistelis/Perales, UN-Convention for the International Sale of Goods (CISG) – A Commentary, 2011 (see also paras 14 et seq., in 2nd ed. 2018).

Other authors want to solve the issue by relying on the so called “knock out rule”. They consider the contract to be concluded with the standard terms of both parties as long as they do not contradict each other. By contrast, conflicting standard terms do not become part of the contract irrespective of when they have been submitted. Due to the existing conflicts between them, they “knock each other out”. (Schroeter, Art. 19 paras 38 et seq. in Schlechtriem & Schwenger, Commentary on the UN Convention on the International Sale of Goods (CISG) 4th ed. 2016).

The particularity in the present case is that in principle both Parties argue that their own standard conditions have become part of the contract (with a notable exception concerning the arbitration clause). Thus, neither of them is relying explicitly in their first written submission on the knock out rule. To what extent they could do so, has to be appreciated by the Parties. In particular, CLAIMANT could probably also use the knock out rule as an auxiliary argument. RESPONDENT’S argument that CLAIMANT gave a guarantee as to the compliance of CLAIMANT’S suppliers with the Global Compact principles, depends largely upon the application of RESPONDENT’S general conditions.

It is difficult but not impossible for RESPONDENT to argue that there is no real conflict between the different general conditions concerning the question of compliance with the Global Compact principles and the obligation of the suppliers to do so.

Teams may also try to distinguish between the applicability of the Respondent’s General Conditions of Contract (containing also the arbitration clause) on the one hand and the

Respondent's Code of Conduct for Suppliers on the other hand. While the General Conditions of Contract clearly refer to the application of the Code of Conduct both are separate bodies of rules contained in different sections of the Tender Documents.

2. Determination of applicable standard conditions

The starting point for an interpretation in the present case are the discussions between the Parties at the trade fair. From these discussions which are described in some detail in the witness statements of Ms. Ming (Respondent's Exhibit R 5) and in some of the communications exchanged, including RESPONDENT's cover letter to the invitation for tender (Claimant's Exhibit C 1), it can be deduced that compliance with the Global Compact Principles was a very important issue for RESPONDENT.

The documentary starting point for an interpretation are RESPONDENT'S cover letter to the Invitation to Tender and the Tender Document (Claimant's Exhibits C 1 and C 2). The Invitation to Tender, which forms Section I of the Tender Documents, requires participants in the tender to "read all Tender Documents carefully and the [to] return the Letter of Acknowledgment to us". CLAIMANT has returned that Letter of Acknowledgement on 17 March 2014 (RESPONDENT's Exhibit R 1). In addition to acknowledging receipt of the Invitation to Tender package (para. 1) and of all documents listed in the Invitation to Tender (para. 2) it states in para. 3:

"We have read the Invitation to Tender and will tender in accordance with the specified requirements" (emphasis added)"

The Tender Documents provide for an application of RESPONDENT's General Conditions. They are not only part of the Tender Documents (Section V) but are explicitly mentioned in the Special Conditions of Contract (Section IV) as being part of the contractual documents.

Irrespective of that commitment in the Letter of Acknowledgment CLAIMANT in making its bid did not merely fill in the blanks in the Tender Documents. Instead CLAIMANT – as further explained in the Cover Letter (CLAIMANT's Exhibit C 3) to its offer – submitted an offer which contained different terms. In the Cover Letter CLAIMANT expressed that he had to make "minor amendments to the documents received" which relate "primarily to the goods and the mode of payment". After specifying the changes in relation to the two points the letter justifies the submission of an offer which does not merely fills in the blanks in the tender documents by stating:

"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."

The offer was then made using the standard offer form of CLAIMANT, inserting the necessary information concerning the commercial terms of the contract (parties, specification of the

goods and quantity; price and payment terms etc.). In the section headed “Specific Terms and Conditions” CLAIMANT had inserted a “not applicable”.

At the bottom of the page the standard Sales-Offer form contains, together CLAIMANT’s address, the following pre-printed reference:

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.

On 7 April 2014 RESPONDENT awarded the contract to CLAIMANT (CLAIMANT’s Exhibit C 5). The letter explicitly refers to the changes suggested concerning payment terms and the form of the cake but no other changes stating in the pertinent part:

“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.”

Furthermore, it gives the following reason for the awarding of the contract to CLAIMANT.

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 Delicately 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.

No further discussions concerning the applicable standard conditions took place between the Parties. In the communications in January 2017 both Parties make clear that they consider their own standard conditions to be applicable.

RESPONDENT relies heavily on this Letter of Acknowledgment for its interpretation of the subsequent offer by CLAIMANT on 27 March 2014. According to Respondent the Cover Letter to that offer (CLAIMANT’s Exhibit C 3) and the offer itself (CLAIMANT’s Exhibit C 4) have to be interpreted in light of this acknowledgment, i.e. narrowly. Thus, the only changes proposed and then subsequently accepted by RESPONDENT were those relating to the specification of the goods and the payment terms, explicitly mentioned in the cover letter. By contrast a change in the applicable standard conditions was never properly suggested and resulted only from the use of the stationary and was definitively not accepted.

CLAIMANT by contrast, considers its standard conditions to be applicable due to the clear reference in the offer made which was then accepted by RESPONDENT’s letter of 7 April 2017. As that letter also indicates that the RESPONDENT was aware of the content of the general conditions there should be no discussion whether a reference to a website is sufficient.

The case contains sufficient information which can be used by both Parties for their arguments. Additional circumstances which may play a role are:

- Parties’ discussions at the trade fair and subsequently

- Membership of both in Global Compact and RESPONDENT's aspiration to become a Global Compact LEAD Company

1. Background

During the last decades private companies have increasingly become aware of their social responsibility towards society at large, in particular concerning the protection of the environment and the observance of human rights. Many companies have adopted so called Corporate Social Responsibility-policies, often combined with more detailed Codes of Conduct to implement such policies by imposing inter alia sufficiently specific and enforceable obligations on their suppliers. A driving force in this development have been the United Nations with their Global Compact Principles and their Sustainable Development Goals.

In the present case both Parties adhere to the Global Compact principles and RESPONDENT wants to become a Global Compact LEAD Company. Furthermore, both Parties have their own Corporate Social Responsibility Strategy (CLAIMANT: Business Code of Conduct– provided as Respondent’s Exhibit R 3; RESPONDENT: General Business Philosophy – Section XXV of Tender Documents – not provided by largely identical to the UN-Global Compact Principles -PO2 para. 31). In both cases the general policy has been converted into a more specific Code of Conduct for Suppliers which contains specific obligation for the suppliers.

As the discussion is to be based on the assumption that RESPONDENT’s General Conditions and the Code of Conduct for Suppliers are applicable the only question which arises in the present case is the interpretation of the relevant provisions in the Code of Conduct. It becomes clear from the introduction of the General Conditions of Contract that CLAIMANT as a supplier “must comply with all applicable laws and regulations, the requirements set out in Comestibles Finos’ Code of Conduct for Suppliers and [its] contractual obligations to [Respondent]. Consequently, in the present case the more general question which often arises in the context of the broadly stated general policies, whether they translate into enforceable contractual obligations, is of limited relevance.

2. Interpretation of Obligations arising from the Code of Conduct for Suppliers

According to the Preamble of RESPONDENT’s Code of Conduct for Suppliers CLAIMANT has to be aware of RESPONDENT’s General Business Philosophy and adhere to it. The purpose of the Code of Conduct for Suppliers is “to guarantee adherence” with the Philosophy by setting our measures and conduct expected from the suppliers.

Principle E deals specifically with Procurement by Suppliers. It provides:

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.*

Furthermore, also Principle C contains an obligation for Claimant to “ensure” that also its “suppliers comply with the above requirements” as to health, safety and environmental management.

RESPONDENT is of the view that principles C and E interpreted

“in light of the surrounding circumstances, [mean] 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.”

For that interpretation RESPONDENT also relies on the commitments imposed by CLAIMANT in its own Code of Conduct for its suppliers which are meant 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”.

By contrast CLAIMANT is of the view that the relevant provisions “impose 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”.

In interpreting the provisions and determining the Parties' intentions at the time of contracting the following circumstances may be of relevance in the context of Art. 8 CISG:

- The Parties discussions at the trade fair
- The Parties status as companies adhering to Global Compact principles as well as RESPONDENT's communicated aspiration to become a Global Compact LEAD Company
- The wording of the various parts of the Tender Documents, in particular – but not limited – that of the Code of Conduct for Suppliers
- The Parties' subsequent behavior
- Ability to ensure compliance by suppliers (see Schwenger/Hachem/Kee, Global Sales and Contract Law, paras 31.86 et seq.)

The discussion as to the content of the Respondent's Code of Conduct for Supplier may be conducted without any reference to Art. 35 CISG or in the context of Art. 35 (1) CISG or Art. 35 (2) (a) or (b) CISG.

That the UN-Global Compact Principles already contain a practice established between the Parties or even a usage in the sense of Art. 9 CISG will be difficult to argue but not impossible.