

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.



TENDER DOCUMENTS

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[...]	[...]	[...]
15	Section VIII	Miscellaneous
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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: Delicately 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
- [...]

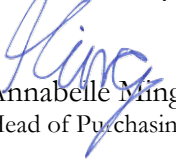
- Section IX Letter of Acknowledgment
[...]
- Section XXV Comestibles Finos' General Business Philosophy
- Section XXVI Comestibles Finos' Code of Conduct for Suppliers

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.



Section V

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”.





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.DelicatesyWholeFoods.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; delicatesy@new.eq

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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.


Joseph Langweiler

Annexes:

Respondent's Exhibits R 1 – 3.

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

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)