

Case Summary and Questions

1. Case Summary

CLAIMANT, Delicately Whole Foods Sp., is a medium sized manufacturer of fine bakery products registered in Equatoria. 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.

On 30 June 2017 CLAIMANT initiated the present arbitration. 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 USD1,200,000; 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.

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.

2. Questions

You may choose to write on one or more among the following questions or develop any legal perspective of your own. You are expected to give clear answer to the question, and to develop your legal or factual reason(s) in a logical and comprehensive way.

a. whether the Arbitral Tribunal could decide on the challenge of Mr. Prasad and if so with or without his participation?

Relevant law:

UNCITRAL Arbitration Rules: Art. 6, 13, 17, 33;

UNCITRAL Model Law: Art. 13; CISG: Art. 8.

b. In case the Arbitral Tribunal has authority to decide on the challenge, should Mr. Prasad be removed from the Arbitral Tribunal? Please choose one or more of these suggested perspectives:

1. Time-window: UNCITRAL Arbitration Rules: Art. 6, 13

2. Repeat appointments: IBA-Guidelines: para. 3.1.3, para. 3.3.8

3. Publication: IBA-Guidelines: IBA-Guidelines: para. 4.1

Relevant law:

UNCITRAL Arbitration Rules: Art. 12;

IBA-Guidelines: General Standard 6(b), para. 2.3.6.

c. Which standard conditions govern the contract, CLAIMANT's or RESPONDENT's or none of them?

Relevant law:

CISG: Art. 8, 14, 18, 19.

Relevant reference:

CISG Advisory Council Opinion 13.

d. Is there a battle of form situation in this case? If there is, which rule should be applied and what is the result accordingly?

Relevant law:

CISG: Art. 19;

UNIDROIT Principle: 2.1.22.

Relevant reference:

CISG Advisory Council Opinion 13.

e. In case RESPONDENT's General Conditions are applicable, has CLAIMANT delivered non-conforming goods pursuant to the contract?

Relevant law:

CISG: Art. 35(1);

UNIDROIT Principle: 5.1.4, 5.1.5.

f. In case RESPONDENT's General Conditions are applicable, has CLAIMANT fulfilled its obligation under 35(2) CISG?

Relevant law:

CISG: Art. 35(2), 79.