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THE 13th LAWASIA INTERNATIONAL MOOT COMPETITION

ASIAN INTERNATIONAL ARBITRATION CENTRE

2019

BETWEEN

CHUIZI LEISHEN'S LLC

(CLAIMANT)

AND

ROBUSTESSE ESPACIAL SOLUCION CORP

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

To settle any disputes arising out of the Contract, Parties have agreed in the arbitration clause to adopt the KLRCA Arbitration Rules.Parties have also agreed on the seat of arbitration to be the Kingdom of Cambodia.

QUESTIONS PRESENTED

ISSUE 1: Whether the impecuniosity of Respondent makes the arbitration agreement incapable of being performed.

I. Whether there are revenues available for this arbitration to continue regardless of Respondent's impecuniosity.

II. Whether scholars and legal practice support the capability of the arbitration agreement when a party is impecunious.

ISSUE 2: Should the Tribunal grant the request of the Claimant to join Vader as a party to the Arbitration

I. Whether at first sight consented to the Arbitration Agreement

II. Whether VADER is bound to the Arbitration Agreement by virtue of the group of companies doctrine

ISSUE 3: Whether there was a valid acceptance to the RESPONDENT's offer

I. Whether RESPONDENT 's proposal constitutes a counter-offer according to Art. 2.1.11 PICC

A. Whether CLAIMANT made an offer

B. Whether that RESPONDENT replied by counter-offer impliedly expressed RESPONDENT's agreementto continue the contract

II. Whether CLAIMANT communicate the acceptance

A. Whether CLAIMANT expressed the intention through statement and conduct in the skype call on 23 November 2016

B. Whether The side-way nod established an international usage by which CLAIMANT and RESPONDENT be bound

STATEMENT OF FATCS

1. The Claimant, Chuizi Leishen's LLC ("**CLAIMANT", Buyer**) is a commercial company incorporated under the laws of China in 2000. **Mr. Kalai Deewarvala,** a Malaysian- Indian construction specialist was employed as the representative of Claimant, possessing the authorization to execute all agreements regarding the project and communication with RESPONDENT.
2. The Respondent, Robustesse Espacial Solucion Corp ("**RESPONDENT", Seller**) is a subsidiary of a UK company- Vader Ltd (**"Vader"**), established in Cambodia in Jan 2013 with the intention of Vader in the effort of entering the Asian market in selling bricks, and to prepare the off chance of Brexit. The representative of RESPONDENT, **Mr. Armando Paredes,** was the Managing Director of RESPONDENT, having the power to execute all agreements on behalf of RESPONDENT in Cambodia and ASEAN.
3. In September 2013, CLAIMANT and RESPONDENT (collectively **"Parties"**) successfully entered into the contract (**"the Contract"**) in which Parties agreed that the RESPONDENT will deliver 1,200,000,000 bricks in four deliveries in each quarter of 2014, the price of each brick is US$0.5. The arbitration clause was also agreed that dispute shall be settled by KLRCA arbitration, and the law applicable to the contract shall be UNIDROIT Principles of International Commercial Contract. The first three deliveries and payment were performed successfully.
4. In October 2014, due to the possible Brexit, Vader business in UK started to be affected. Vader's Board of Directors decided that the operation of RESPONDENT should be independent.
5. In November 2014, **the First Incentive** was agreed between parties. CLAIMANT offered to increase the number of deliveries with an increase of 15% payment if RESPONDENT agree to perform four (04) more deliveries in 2015. RESPONDENT accepted this offer by a handshake. The deliveries and payment in 2014 and 2015 were fully undertaken by the parties.

6. In November 2015, parties extended the agreement throughout 2016 for 4 more deliveries and a second 15% price increase through email without a formal contract.
7. On 23 June 2016, due to the annihilation of Vader's business in EU following the Brexit, Vader's Board of Directors decided that no further financing, monitoring or directives would be given to RESPONDENT, which means that Mr. Paredes had full control over RESPONDENT's activities.
8. On 23 November 2016, the Representatives had a final Skype call to negotiate **the Second Incentive**. CLAIMANT proposed to continue the First Incentive. RESPONDENT, in reply, offered to increase the brick price in for 15% in 2017, with a bonus of 35% at the end of each year, RESPONDENT would provide 8 more deliveries, which is 4 times in 2017 and 4 times in 2018. CLAIMANT agreed by nodding in the Indian way, therefore, the contract had been extended for 2 years. However, RESPONDENT claims that the contract had been terminated as parties had failed to reach agreement.
9. On 15 August 2017, CLAIMANT sent a Notice of Arbitration to RESPONDENT and AIAC, sought the relief of: declaring the contract was existent and enforceable, order RESPONDENT performance in the first two deliveries of 2017 and set the term in contract in writing. AIAC requested a security deposit of U$25,000, RESPONDENT refused to pay its share whilst CLAIMANT paid 50% of the security deposit on the first week of January of 2018.
10. RESPONDENT has many counter-claims to CLAIMANT's claim, but the financial situation made it unable to raise them due to the cost of arbitration. RESPONDENT also could not seek for a third party funder due to its precarious financial situation (debts, no reported profits since incorporation). However, RESPONDENT was of the position that the contract between parties had been terminated in 23 November 2016, providing counter-claim for the lost profit since the second incentive since December 2016 and all the arbitration, attorney fees.

11. CLAIMANT intended to request Vader, RESPONDENT's parent company to join the arbitration to support the costs of the arbitration for RESPONDENT as RESPONDENT's tense financial situation prevented its further contribution in the near future. In response, RESPONDENT asserted that the Joinder request has to be resolved by the Tribunal, which implied an impossible move ahead at this stage.

SUMMARY OF PLEADINGS

ISSUE 1: THE ARBITRATION AGREEMENT IS CAPABLE OF BEING PERFORMED REGARDLESS OF THE IMPECUNIOSITY OF RESPONDENT

12. The impecuniosity of Respondent does not sufficient to make the arbitration agreement incapable of being performed because **[I]** there are revenues available for Claimant to ensure that the arbitration agreement is operable stipulated by both the law of the seat of arbitration and the institutional rules. **[II]** The view that the impecuniosity of a party should not affect the capability to be performed of the arbitration agreement is widely adopted by various scholars and supported by the legal practice of countries like France and England.

ISSUE 2: TRIBUNAL SHOULD GRANT THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION

13. The arbitral Tribunal should grant the request of the Claimant to join Vader as a party to the Arbitration due to Vader is *prima facie* bound by the arbitration agreement according to Rule 9 of the KLRCA Arbitration Rules. UNIDROIT Principles shall be applied to interpret these *prima facie* intentions **[A]** the CLAIMANT submits that the Vader's implied consent to the Contract can imply its inclusion as a party to the Contract of Arbitration Agreement **[B]**. Moreover, the joinder of the Vader on the basis of the doctrine of group of companies is justified and it is widely applied.

ISSUE 3: THERE WAS A VALID ACCEPTANCE OF RESPONDENT's COUNTER-OFFER

14. Despite the Respondent's allegation in its Statement of Defence, CLAIMANT asserted that**[I]** RESPONDENT clearly made a counter-offer and**[II]** CLAIMANT accepted RESPONDENT's counter-offer in accordance with the UNIDROIT Principles of International Commercial Contracts (PICC).

I. RESPONDENT 's proposal constitutes a counter-offer according to Art. 2.1.11 PICC

15. With the effort of maintaining the contract, the second incentive,[1] CLAIMANT and RESPONDENT came to the negation round through Skype call on 23 November 2016. In this Skype call, **[A]**CLAIMANT clearly made an offer and **[B]**RESPONDENT replied with the counter-offer at the same day.

II. The offer including the second incentive is accepted by CLAIMANT

16. The intention of CL is presented through statement and conduct in the skype call on 23 November 2016[A]. The side-way nod established an international usage by which CLAIMANT and RESPONDENR be bound [B].In this case, despite of the fact that there exist no particular usage between both parties, RESPONDENT could not have been unaware of CLAIMANT's intent because [1] the side-way nod is widely recognized under international trade and [2]it is reasonable for RESPONDENT to be aware of the meaning of the side-way nod.

[1]Moot problem, para. 28

PLEADINGS

ISSUE 1: THE ARBITRATION AGREEMENT IS CAPABLE OF BEING PERFORMED REGARDLESS OF THE IMPECUNIOSITY OF RESPONDENT

17. Respondent's impecuniosity has caused many difficulties for itself to finance the fees and expenses that incur in the proceedings. Respondent, therefore, is trying to bring the matters to the Court. There is also a risk that the arbitration agreement cannot be performed due to the Respondent's incapability to pay for its own share in the deposit for costs. Claimant asserts that impecuniosity of a party does not make an arbitration agreement incapable of being performed by proving that **[I]** the arbitration proceedings can be operated under any circumstances, and **[II]** this view is widely supported by scholars and case laws.

I. The arbitration agreement is operable even when Respondent is impecunious because many revenues remain open for the arbitration to continue.

18. Parties in this case did not explicitly choose the procedural law, however, they did choose the place of arbitration as Cambodia.[2] In such case of silence, the procedural law will be that of the seat of arbitration.[3] As a result, the Commercial Arbitration Law of the Kingdom of Cambodia [hereinafter **Cambodia Arbitration Law**] is the procedural law that governs the arbitration agreement.

19. The Competence- Competence principle is especially stipulated under Art. 24(1) of the Cambodia Arbitration Law, that the arbitral tribunal is the only competence to have the power to decide on the matter.[4] This entails the power of the arbitral tribunal on deciding the

[2] Moot Problem, para 15f).
[3] Gary B. Born, *International Commercial Arbitration* (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2014) p. 1613-1615; [hereinafter **Born 2014**]; United Nations on Trade and Development, *The Course on Dispute Settlement in International Trade*, *Investment and Intellectual Property*, Dispute Settlement, 5.2 The Arbitration Agreement, p. 51.
[4] *Cambodia Arbitration Law*, Art. 24(1): "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. [...]"

termination of the proceedings, according to Art. 40(3), when the arbitral tribunal finds that the proceedings have been unnecessary or impossible to continue.[5]

20. In this case, Respondent is relying on its impecuniosity to claim that the arbitration agreement is incapable of being performed, and subsequently, the arbitration proceedings would be terminated. However, the tense financial situation of a party is not sufficient to make the arbitration agreement inoperable as there are possible solutions available for Claimant. The first solution is that **[A]** it is stipulated by Cambodia Arbitration Law that the proceedings can take place without Respondent's counter-claims. The second way is that: **[B]** As suggested in *BDMS Limited v Rafael Advanced Defense Systems* [hereinafter **BDMS case**] and the applicable institutional rules which are KLRCA Arbitration rules,[6] there are other options to ensure the continuation of proceedings.

A. Under Cambodia Arbitration Law, the proceedings still continue even if Respondent fails to submit its counterclaims due to its impecuniosity.

21. Respondent stated that it could not present its counter-claim due to its tense financial situation and expressed its position that the agreement is null due to its incapable to pay for the costs incurring in the future phases of the arbitration.[7] Claimant opposes to these arguments of Respondent as the arbitration can still proceed even when Respondent is impecunious.

22. It is especially stipulated under Art. 33(2) of the Cambodia Arbitration law that even if respondent fails to communicate his statement of defense, the arbitral tribunal shall continue to proceed without treating such failure to defense as an admission of claimant's allegations.[8] In this case at hand, even if Respondent fails to submit its counter-claims due to its impecuniosity, the arbitration proceedings can still continue without having to be

[5] Ibid., Art. 40(3): "The arbitral tribunal shall issue an order for the termination of the arbitral Proceedings when the arbitral tribunal finds that the continuation of the proceedings has, for any other reason, become unnecessary or impossible."
[6] Moot Problem, para. 15f).
[7] Moot Problem, para. 57.
[8] *Cambodia Arbitration Law*, Article 33(2): "Unless otherwise agreed by the parties, if, without showing sufficient cause, the respondent fails to communicate his statement of defense in accordance with Article 31(1) of this Law, the arbitral panel shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations."

terminated or suspended. In other words, Respondent's reasoning for the incapability to be performed due to its impecuniosity is not sufficient.

23. In conclusion, even when Respondent cannot submit its counterclaims due to its impecuniosity, or having submitted its counter-claims but cannot pay the security for deposits on costs for such counter-claims, the law of the seat will ensure the arbitration proceedings to be operated, which means that it is not incapable of being performed regardless of Respondent's impecuniosity, and therefore is not terminated or suspended.
24. There are many avenues remains open to Claimant in this case for the arbitral proceedings to continue, therefore, the arbitration is operable. In the other words, impecuniosity of Respondent does not affect the capability to be performed of the arbitration agreement.

B. As suggested in *BDMS* case and stipulated by KLRCA Arbitration rules, there are other options available to Claimant ensure the continuation of proceedings.

25. Besides the aforementioned mechanism provided to Claimant from KLRCA Arbitration rules, there are other avenues remain open to Claimant that allow it to proceed with the arbitration. The decision in a similar UK case known as *BDMS* case[9] had suggested guidance for possible solutions for the claimant when the respondent refused to pay its share of the advanced on costs required under the applicable institutional rules.[10] The English Commercial Court concluded that the arbitration agreement was valid as the claimant can: first, paying respondent's share permitted by the applicable institutional rules; secondly, posting a bank guarantee for the requested security for respondent's costs; or seeking an interim order or final award requiring the respondent to pay its share.[11] These solutions are applicable in this case at hand. Claimant hereby asserts that Rule 14 KLRCA Arbitration rules provides mechanisms for the payment to be paid in full by Claimant.

[9] *BDMS Limited v Rafael Advanced Defence Systems* [2014] EWHC 451 (Comm) (Hamblen J).
[10] Juan Pablo Moyano, *Impecuniosity and the Courts' Approach to the Validity of the Arbitration Agreement*, in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2017, Volume 34 Issue 4), p. 640.
[11] *A party's failure to pay its share of the advance on costs: BDMS Limited v. Rafael Advanced Defence Systems*, ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2014, Volume 32 Issue 4) p. 867.

26. Previously, in order to ensure the preliminary hearing can take place, Claimant has fulfilled its payment obligation when covering Respondent's share in the initial non-specific security for deposit[12] in accordance with Rule 14(3) KLRCA Arbitration rules,[13] when Respondent refused to pay its share. Once the preliminary hearing took place, Respondent addressed that it could not afford to submit its counter-claims and declared that its incapability to pay any costs incurs in further move ahead of the proceedings[14] that leads to the arbitration agreement null and void. However, once again, Claimant is required by KLRCA Arbitration rules to make the required payment for Respondent's share.

27. In particular, under Rule 14(7), the advanced deposits on costs shall be covered by Claimant if it is not paid in full, otherwise the arbitral tribunal may order the suspension or termination of the arbitration proceedings.[15] The advanced costs are provided in Rule 14(6), which is fixed by the Director on separate advance deposits on cost for claims and counterclaims when Respondent submits its counter claims.[16]

28. In the present case, if Respondent submits its counter-claims and cannot pay the advanced deposit corresponding to its claims, Claimant will be the default party to cover the remaining amount of the required payment. Therefore, it is unreasonable and inappropriate of Respondent to declare that the arbitration agreement had become null and incapable to perform it, because in fact and stipulated by law, Claimant's financial status is the decisive factor to affect the capability of the arbitration agreement to be performed. Since Respondent does not pay anything, the mechanism will automatically and mandatorily seek the payment from Claimant. As the payment is paid in full by Claimant, the arbitral proceeding will be able to continue and Respondent's right of access to justice is ensured by submitting its counter-claims.

29. In brief, provided that Claimant has fulfilled Respondent's payment under Rule 14(3) KLRCA Arbitration rules and is the default party to be responsible for Respondent's share

[12] Additional Clarifications to the Moot Problem, para. 2 and 4.
[13] *KLRCA Arbitration rules*, Rule 14(3)
[14] Moot Problem, para. 59.
[15] *KLRCA Arbitration rules*, Rule 14(7)
[16] Ibid, Rule 14(6)

on its required payment, Claimant has full position to ensure the arbitration and to pursue its right to access to justice and seek remedies for its damage. Claimant's payment for Respondent's share will also ensure Respondent's right of access to justice and equality of the two Parties permitted by Rule 14(7) KLRCA Arbitration rules. As there are avenues remain open to Claimant under the Rules, Claimant therefore has its right to have its claim decided by arbitration.[17]

II. Scholars and case laws support the view that impecuniosity is not the ground to declare an arbitration agreement incapable of being performed.

30. The situation that the impecuniosity of a party has been reviewed by scholars and case law of different jurisprudences, which are about to be mentioned as followed, to not affect the capability of the arbitration agreement.

31. In the field of international arbitration, there is no legal definition of the concept of impecuniosity,[18] and the issue relating to the applicability and enforcement of the arbitration agreement when a party that executes an arbitration agreement become impecunious, and thus cannot afford to pay the so called advance on costs of the arbitration[19] still remains unsettled.[20] However, various scholars including Hunter & Redfern agree that "an inability to pay "the advances on the costs" of the arbitration should not mean that an arbitration clause is inoperative or incapable of being performed,[21] or, in other words, impecuniosity cannot invalidate an arbitration agreement.[22]

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[17] *A party's failure to pay its share of the advance on costs: BDMS Limited v. Rafael Advanced Defence Systems*, ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2014, Volume 32 Issue 4) p. 867.

[18] Detlev Kühner, "*The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany*", Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2014, Volume 31 Issue 6), pp. 807.

[19] Mauricio Pestilla Fabbri: Bacharel em Direito pela Pontifícia Universidade Católica de São Paulo (PUC/SP). Especialista em Processo Civil pela COGEAE da PUC/SP e em Arbitragem pela Fundação Getúlio Vargas (FGV/SP). Mestre (LL.M.) em International Dispute Resolution pelo King's College London. Advogado de Souza Cescon Barrieu & Flesch Advogados.

[20] Mauricio Pestilla Fabbri, *'Inapplicability of the arbitration agreement due to the impecuniosity of the party*', in João Bosco Lee and Daniel de Andrade Levy (eds), Revista Brasileira de Arbitragem, (© Comitê Brasileiro de Arbitragem CBAr & IOB; Kluwer Law International 2018, Volume XV Issue 57), page 67.

[21] Ibid., p. 75.

[22] See Albert van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p. 159 (Kluwer 1981) ('The possibility of a lack of financial resources to satisfy an award must be deemed not to render an arbitration agreement incapable of being performed within the meaning of Article II(3)'); Anne-Carole Cremades &

32. The arbitration practice in many jurisdiction from different countries also support the above idea of scholars, especially in France and England. For example, in Lola Fleurs case,[23] the Paris Court of Appeal held that a manifest inapplicability of the arbitration agreement cannot be inferred from the financial incapacity of a party.[24] In a case brought before the London Court of Appeal,[25] the claimant stated that he could only be able to legally enforce his right by bringing the case to the state courts with the help of legal aid.[26] However, the court addressed that "impecuniosity is not sufficient under English law to make arbitration "*incapable of being performed*", and that an impecunious party cannot terminate an arbitration agreement on the grounds of its impecuniosity."[27]

33. In conclusion, it is supported by either the law of the seat and dispute resolution adopted by Parties that impecuniosity of Respondent does not make the arbitration agreement incapable of being performed and the proceedings, therefore, will not be terminated. Various scholars and cases in different countries also support this view. As a result, Claimant opposes to Respondent's submissions and finds Respondent alleged submission unreasonable.

ISSUE 2: TRIBUNAL SHOULD GRANT THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION

34. Tribunal should grant the request of the Claimant to join Vader as a party to the Arbitration due to Vader is *prima facie* bound by the arbitration agreement according to Rule 9 of the KLRCA Arbitration Rules. *The words "prima facie"*, according to Black's Law Dictionary,

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Alexandre Mazuranic, *Costs in Arbitration*, in *International Arbitration in Switzerland: A Handbook for Practitioners* (Elliot Geisinger & Nathalie Voser eds, Kluwer 2013)., at 184–186; Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford 2015), para. 2.203; see also, Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer 2003), p. 343-344; Michael Pryles, "*When Is An Arbitration Agreement Waived?"*, Journal of International Arbitration, Volume 27 Issue 2, Kluwer (2010)., at 112.

[23] Cours d'Appel de Paris, Pôle 1 Ch. 1, 26 février 2013, n° 12/12953, *Lola Fleurs Case*.

[24] Cour d'appel de Paris, Pôle 1 ch. 1, 26 Feb. 2013, No. 12/12953. F.-X. Train, *Société Pirelli & Cie Spa v. Société Licensing Projects et autres, Supreme Court of Cassation of France, First Civil Law Chamber, Arrêt no. 392 FS-P+B+I, pourvoi no. N 11-27.770, 28 March 2013*, Revue de l'Arbitrage 746 (No. 3, 2013). See also Valentine Chessa&Nataliya Barysheva, *Impecuniosity And Denial Of Justice: Walking On Eggshells*, 15th November 2016, available at <http://arbitrationblog.kluwerarbitration.com/2016/11/15/impecuniosity-and-denial--of-justice-walking-on-eggshells/> accessed on August 2018; Kühner, p. 809.

[25] *Paczy v Haendler & Natermann* [1981] 1 Lloyd's Report 302 (CA).

[26] Klaus Sachs, *International Arbitration and State Sovereignty*, Revista Brasileira de Arbitragem, (© Comitê Brasileiro de Arbitragem CBAr & IOB; Comitê Brasileiro de Arbitragem CBAr & IOB 2007, Volume IV Issue 13) p. 104-105.

[27] Ibid., p. 105.

means "at first sight" or "on first appearance but subject to further evidence or information.[28]And the term "additional party prima facie be bound by the arbitration agreement" may join non-signatories, such as a parent company to a party in proceedings in appropriate cases.[29] Therefore, two arguments below is followed up: First, VADER at first sight consented to the Arbitration Agreement [**I**]. Second, VADER is bound to the Arbitration Agreement by virtue of the group of companies doctrine [**II**].

I. Vader consented to the arbitration agreement

35. To understand the intention to be bound by the arbitration agreement of Vader, first, **[A]** UNIDROIT Principles shall be applied to interpret these intentions; second, **[B]** the CLAIMANT submits that the Vader's *prima facie* implied consent to the Contract can imply its inclusion as a party to the Contract of Arbitration Agreement.

A. UNIDROIT Principles Shall Be Applied To Interpret The Intention of Vader to Join the Arbitration Agreement.

36. Parties to a transnational contract may designate their choice of law to apply to the arbitration agreement itself as separate from the contract in general.[30] However, the Contract is lack of the dispute resolution settlement arising out of it. Hence, Arbitral Tribunal has to choose the most appropriate law to establish that VADER has intention to be bound by the arbitration agreement.

37. As the parties did not directly and indirectly choose the law governing procedural issue arising from the arbitration agreement, thus, the law that has the closest and real connection is applied.[31]There are only two real possibilities that emerge: **[1]** the law of Kingdom of Cambodia which is the law of the seat of the arbitration or **[2]** UNIDROIT Principles the law is either identical to that of the substance contract.[32]

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[28]Kyongwha Chung, Prima Facie Case on the Merits in Emergency Arbitrator Procedure

[29] Gary Born, Jonathan Lim, Dharshini Prasad, International Arbitration Alert 2016 SIAC Rules, 29 July 2016
[30] Danilowicz, supra note 2, at 237.
[31] Sul América Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] 1 Lloyd's Rep 671 (CA), para 25
[32] Louis Flannery ,The Law Applicable To The Arbitration Agreement Paper For International Arbitration Conference Dublin, p. 5

1. The application of the conflict norms of the arbitral seat

38. English law clearly favors the orthodox theory whereby the law of the seat is necessarily the procedural law governing the arbitration. In Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd, the Court held that the presumption in favor of the law of the "seat" was "irresistible" in the absence of an explicit choice of some other law.[33]

39. As Kingdom of Cambodia is the seat of arbitration, the Cambodian law shall apply for the procedures of the arbitration. However, neither the Cambodian Law on Commercial Arbitration nor the Cambodia Commercial Law set criteria to define the intention to the Contract of parties, which is the key factor to bound VADER. Thus, it is challenging to adopt whether the third party is involved in the arbitration agreement or not. Therefore, the second principle that the substantive law applicable of the case should be used to understand Vader's intention.

2. The law governing the substance of the dispute is applicable for the arbitration agreement

40. Where the dispute relates to an international commercial contract, it may be advisable to resort to the UNIDROIT Principles as a source to interpret for the intent. UNIDROIT Principles should be applied indirectly for this procedure issue, because it is the most appropriate.

41. In Ingeborg Schwenzer's doctrine, she wrote to support the use of substantive law for procedural issues: "Finally, one may not argue that the clauses discussed here are of a procedural nature and that the CISG is only concerned with substantive but not with procedural matters. It is now widely held that it is up to the CISG itself to autonomously decide which questions are covered by it, regardless of whether domestic laws characterize them as procedural and or substantive in nature. Additionally, it has been convincingly argued that the strict distinction between procedural and substantive matters in general is

[33] Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] AC 334.

"outdate"".[34] Moreover, a case "Bremen v. Zapatavi" of US Supreme Court necessarily applied their local substantive rules to analyse procedural issues in such contract formation.[35]

42. The law governing the substance of the dispute is the law governing the contract.[36] In this case, the applicable law for substance is the UNIDROIT Principles. Moreover, the arbitration agreement was contained in the main contract of the parties. Therefore, UNIDROIT Principles is applied to lessen the problem arising about the applicable law.

43. Following the doctrine of Schwenzer and case above, in this circumstance, to interpret the intention of the third party to join the arbitration agreement, UNIDROIT Principles should be applied.

B. Vader's *prima facie* implied consent to join Arbitration Agreement

44. Vader may be prima facie joined as parties to the arbitration if all the parties have expressly or impliedly consented to the joinder.[37]

45. Under Article 4.2(2) of the UNIDROIT Principles, statements or conduct 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. In order to establish whether the parties had a common intention, Article 4.3 listed the most important relevant circumstances, which particularly in this case is criteria (a) "preliminary negotiations between the parties" ***[1]*** and (d) "the nature and purpose of the contract"[38]***[2]***

1. Preliminary negotiations between Vader and Claimant established common intention

46. In Decision 4A_450/2013 of the Supreme Court of Switzerland, where both the parent and the subsidiary corporation had behaved in such a way that the other party could have

[34] Schwenzer, Ingeborg and Tebel, David, The Word is not Enough - Arbitration, Choice of Forum and Choice of Law Clauses under the CISG, page 747
[35] US Supreme Court, Bremen v. Zapatavi
[36]Doug Jones, Choosing the law or rules of law to govern the substantive rights of the parties, para 3
[37]Bernard Hanotiau, Non-Signatories, Groups Of Companies And Groups Of Contracts In Selected Asian Countries : A Case Law Analysis, para 36, page 11.
[38] PICC, Article 4.3 (a)

believed, in good faith, that it had a legal relationship with the parent corporation, the Court held that the parent corporation should be held bound by the terms of the contract.

47. In this case, VADER played a major role in the conclusion of the Contract. Vader's CEO, by its participation in the negotiation of the Contract created an impression that it would stand behind the Contract.[39] Thus, it laid a mutual intention to reach the agreement of both parties.

2. The nature and purpose of the contract established common intention

48. The nature of the contract is that Respondent did not have any assets from the beginning and it had to rely on its sole share's owner of VADER.[40] In this case, it is also significant that VADER was a founding partner of RESPONDENT, which was established with the explicit purpose of providing a market for Vader's products.[41]Clearly, Respondent even had no conduct to object the present of Vader in the negotiation round. Despite the fact that the Contract was signed by the representatives of parties, the CEO of VADER expressed his assent to the content of the Contract.

49. Hence, VADER approached RESPONDENT, worked on the Contract and, therefore, was not only involved but the driving force in the conclusion of the Contract. VADER cannot oppose its joinder to the arbitration while two requirements above are met to interpret the intention to be bound by the arbitration agreement.

II. Vader is bound to the arbitration agreement by virtue of the group of companies doctrine

50. Claimant has demonstrated that VADER is an additional party to the Arbitration Agreement.[42]Nonetheless, regardless of whether this Arbitral Tribunal were to conclude that VADER is not a party to the Arbitration Agreement, it is bound by virtue of the group of companies doctrine. The Supreme Court referred to the principle applied in a number of

[39]MP, para 10
[40]Clarification of the MP, para 2
[41]MP, para 6
[42]KLRCA Rule 9 (1)

arbitral awards, according to which a non-signatory affiliate or sister or parent company can be subjected to arbitration provided the disputed transactions were within a group of companies and there was a clear intention of the parties to bind both the signatory as well as the non-signatory parties.[43]

51. In the present case, firstly, [**A**] the group of companies doctrine is applicable internationally. Second, [**B**] all requirements of the GoC doctrine are met.

A. The Group of Companies Doctrine Is Applicable Internationally

52. First, the application of the GoC doctrine does not negate the Cambodian Court's previous practice, consequently there is no reason to assume that the Tribunal would not uphold an award that bases the Tribunal's jurisdiction over VADER on the GoC doctrine.

53. Second, there are notableauthors such as Blessing,[44] Fou-Chard/Gaillard/Goldman,[45] and Girsberger/Voser,[46] support the GoC doctrine. Furthermore, several jurisdictions such as Belgium,[47] Brazil,[48] Egypt[49] and France[50] have explicitly recognised the GoC doctrine. Therefore, the Tribunal should consider to adopt and toapply the GoC doctrine.

B. All requirements of Group of Companies are met

54. The Group of Companies Doctrine is based on two elements which are divided as objective and subjective. The objective element refers to the actual existence of a group of companies under common ownership that is VADER and RESPONDENT constitutes one economic reality**[1]**. The subjective one is represented by VADER played an active role in the conclusion and performance of the contract**[2]**.

1. VADER and RESPONDENT constitute one economic reality

[43]Rajasthan High Court, Jitender Singh And Others vs Viyom Networks Ltd on 17 January, 2014, para 66,67
[44]*Law applicable, pp 175-178;* BORN (*p 1448)*
[45]EMMANUEL GAILLARD/JOHN SAVAGE (eds), Fouchard, Gaillard, Gold-*Lard/Goldman* on International Commercial Arbitration Kluwer Law International 1999Arbitration, *paras 500-506* [hereinafter***Fouchard, Gaillard, Goldman***]
[46]DANIEL GIRSBERGER/NATHALIE VOSER, International Arbitration in Switzerland 2nd edn, Schulthess 2012, *para 238*
[47]Gerhard Wegen/Stephan Wilske (eds), Arbitration in jurisdictions Worldwide Getting the Deal Through 2013, para 103 [hereinafter ***Wegen/Wilske***]
[48]Tribunal de Justiça São Paulo 24 May 2006 Trelleborg do Brasil Ltda et al v Anel Empreendimentos Partici-pações Agropecuária Ltda Case No 267.450-4/6 in: Revista Brasileira de Arbitragem, vol III issue 12 (2006),pages 124-125
[49]*Egyptian Court of Cassation, Case No 4729, pages 105-106; SALAH, pages 76-79*
[50]*Isover v Dow, p 100; Wegen/Wilske, page 202*

55. VADER and Respondent form one and the same economic reality, which encourages to the application of the group of companies doctrine and the expansion of the Arbitration Agreement to VADER.

56. A parent and a subsidiary can be considered a single economic entity when there exists a tight group structure and solid organizational and financial connections.[51] Furthermore, where the assets of one company are used to financially support the other members of the group, the group can be considered a single economic reality.[52]

57. VADER as the parent and Respondent as its subsidiary are members of the same group of companies and its relation to the Contract is effectively inseparable. VADER exercises significant control over Respondent because Vader caused the incorporation of Respondent and owns 100% of Respondent's shares.[53] Furthermore, as soon as Respondent was established, Vader's CEO assigned former employees of its own to key positions in Respondent's management, that was Mr. Paredes.[54] Consequently, there are strong financial and organisational links between Respondent and Vader.

58. In light of the above, Respondent and Vader form a group that is sufficiently close to constitute a single economic entity under the GoC doctrine.

2. VADER played an active role in the conclusion and performance of the contract

59. For the doctrine to apply, the third party must have played an active role in the negotiation, performance or the termination of the contract in which the arbitration agreement in question is included.[55] An active involvement at the negotiation stage is the most relevant factor.[56] In ICC Case No. 6519, the tribunal allowed joinder of a third party on the basis

[51] Stavros L. Brekoulakis, Third Parties in International Commercial Arbitration Oxford University Press 2010, para 5.15 [hereinafter ***Brekoulakis***]
[52] Brekoulakis, para 5.21
[53] Clarifications to the Moot Problem, para 3
[54] MP, para 12
[55] Stavros L Brekoulakis, Arbitration and Third Parties, Thesis for the Degree of Doctor of Philosophy (2008), p.94; ICC Case No. 5103
[56] Brekoulakis, para 5.40

that the third party had participated in the negotiations leading to the agreement and was at the heart of these negotiations.[57]

60. In addition, as soon as RESPONDENT was established, VADER assigned former employees of its own to key positions in RESPONDENT's management and this was Mr. Paredes, the representative.Consequently, Vader exercises significant control over Respondent in daily business as well as financially. In the present case, Mr. Chap, who was representing Vader made impression during the negotiations and his role was consequential in reaching the final terms of the Contract.[58] He was also responsible for the Respondent as a part of his job profile as a CEO of the parent company and therefore, played a significant and active role in the conclusion of the Contract.

ISSUE 3: THERE WAS A VALID ACCEPTANCE OF RESPONDENT'S COUNTER – OFFER

61. Despite the Respondent's allegation in its Statement of Defense, CLAIMANT asserted that RESPONDENT entered into the contract including the second incentive with CLAIMANT. because RESPONDENT clearly made a counter-offer **[I]**, and CLAIMANT accepted RESPONDENT's counter-offer **[II]** in accordance with the UNIDROIT Principles of International Commercial Contracts (PICC).

I. RESPONDENT 's proposal constitutes a counter-offer according to Art. 2.1.11 PICC

62. With the effort of maintaining the contract, the second incentive,[59] CLAIMANT and RESPONDENT came to the negation round through Skype call on 23 November 2016. In this Skype call, **[A]**CLAIMANT clearly made an offer and **[B]**RESPONDENT replied with the counter-offer at the same day.

A. CLAIMANT clearly made an offer

[57] ICC Case No. 6519
[58]MP, para 10
[59]Moot problem, para. 28

63. Article 2.1.2 PICC states that an offer is valid when a proposal to conclude the contract is sufficiently definite. The proposal is normally sufficiently definite when it accurately recognizes the goods and determines the quantity and price of the goods, either explicitly or implicitly.[60]

64. In the current case, in the proposal, CLAIMANT implicitly identify the goods, which is brick, through his statement *"maintain the First Incentive".*[61] *Reading in connection with previous dealing, it shall be understood that the good is brick.*[62]CLAIMANT impliedly mentioned the brick's price and the quantity of the brick *"15% price increase per year and 4 more deliveries"*[63] as well as others conditions *"a bonus to the Seller after 4 compliant and timely new deliveries"*[64]

65. In conclusion, CLAIMANT clearly made an offer through his statement.

B. RESPONDENT replied by making a counter-offer though which impliedly expressed RESPONDENT's agreement

66. Pursuant to Article 2.1.11 (1) PICC, 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.[65]Party's proposal shall be considered as a counter-offer if they replied to other's offer and materially altered the offer.

67. In this present case, RESPONDENT agreed with all terms of the offer except for the price, the delivery and incentive of the brick. RESPONDENT agreed to the goods, which is brick, through his proposal *"However, the price has to go up... We need more money... a lot more ... and the bricks are much more expensive now."* [66]RESPONDENT changed the quantity

[60] Art 2.1.2 PICC; see also Official Comments on Art. 2.1.2 of PICC, available at <http://cisgw3.law.pace.edu/cisg/principles/uni14.html#official>; See also Supreme Court of 10 November 1994 (CLOUT Abstract No.106) [1994] [hereinafter Chinchilla furs Case], available at: http://www.uncitral.org/clout/clout/data/aut/ clout_case_106_leg-1309; U.S Federal District Court for the Northern District of Illinois of 7 December 1999 (Magellan International v. Salzgitter Handel) [1980] CLOUT Abstract No. 417 [hereinafter Magellan International v. Salzgitter Handel], available at: http://www .uncitral.org/clout/clout/data/ usa/clout_case_417_leg-1641.html

[61]Moot problem, para. 31

[62]Moot problem, para. 15 and para. 21

[63]Moot problem, para. 31

[64]Moot problem, para. 31

[65]Article 2.1.11(1), PICC;

[66]Moot problem, para. 34.

of the goods. RESPONDENT said that "we will commit to 4 more deliveries... Actually, Kalai, we will commit to 8 if you meet those terms".[67] In the first contract, both parties agreed that each delivery consisted of 300,000,000 bricks.[68] Reading in connection with the previous transition, while saying that "we will commit 8 if you meet those terms", RESPONDENT impliedly indicated the quantity of the bricks, which is 2,400,000,000 bricks. Most importantly, the counter-offer, sent by the RESPONDENT, expressly altered the condition of the brick price, which is "increase the brick price in 15% for 2017"[69] and "a 35% bonus at the end of each year".[70]

68. To conclude, by submitting a counter-offer, RESPONDENT communicate with CLAIMANT the agreement to continue the contract in accordance with Article 2.1.11.

II. The counter - offer including the second incentive is accepted by CLAIMANT

69. The disputed issue in this case is whether CLAIMANT made an acceptance to RESPONDENT's counter-offer or not, which is governed by Article 2.1.6 PICC. Contrary to RESPONDENT's allegation, CLAIMANT clearly expressed the intention to conclude the Contract according to Article 2.1.6 PICC. Pursuant to Art. 2.1.6 (1) PICC, an acceptant shall be indicated through the statement or conduct of the offeree. CLAIMANT demonstrated his acceptance through his statement and the side-way nod in the skype call on the 23 November of 2016. CLAIMANT show the agreement through his statement and conduct in the final negotiation on 23 November 2016 **[A]**, and CLAIMANT's conduct, the side-way nod, shall be considered as an international usage in the market **[B].**

A. The intention of CL is presented through statement and conduct in the skype call on 23 November 2016

70. During the skype call between CLAIMANT and RESPONDENT, CLAIMANT clearly show his acceptance of RESPONDENT's offer through his reply as well as through his conduct, which shall be interpreted in accordance with Article 4.2.2 PICC. According to

[67] Moot problem, para. 34
[68] Moot problem, para. 15
[69] Moot problem, para. 34
[70] Moot problem, para. 34

Article 4.2.2 PICC *"if the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances."*[71] The language and conduct of parties during the negotiation shall be interpreted in accordance with the understanding of a reasonable person. Here, it appears that CLAIMANT accepted the offer and any reasonable person at the same circumstance would understand the same.

71. Firstly, the wording of CLAIMANT's reply clearly proves that CLAIMANT understood the offer. In particular, in RESPONDENT's offer, RESPONDENT indicated that '*I mean, we increase the brick price in 15% for 2017 – and if you give us a 35% bonus at the end of each year from now on... we will commit to 4 more deliveries... Actually, Kalai, we will commit to 8 if you meet those terms..."*[72] In reply, CLAIMANT clearly rephrased the meaning of the offer, which was *'in the condition that CLAIMANT paid RESPONDENT a 35% bonus of the total amount of the contract per year at the end of the year, RESPONDENT would commit to 8 deliveries'*.[73] Therefore, it can be seen that CLAIMANT was cognizant of RESPONDENT's offer and RESPONDENT was aware of that since RESPONDENT replied CLAIMANT *"yes, Kalai"*[74]. Additionally, CLAIMANT's conduct impliedly indicated that CLAIMANT accepted RESPONDENT's offer. As responding to RESPONDENT's question, "yes or no", CLAIMANT expressed the agreement with a side-way nod. Any reasonable person would understand that CLAIMANT had the intention to conclude the contract.

72. In conclusion, CLAIMAT impliedly communicated the agreement through his statement.

B. The side-way nod established an international usage by which CLAIMANT and RESPONDENR be bound

73. The main disputed issue in the case is whether CLAIMANT demonstrated the acceptance through the side-way nod and thus it successfully established the acceptance under PICC.

[71] Article 4.2.2 PICC
[72] Moot problem, para. 34
[73] Moot problem, para. 34
[74] Moot problem, para. 34

According to Article 2.1.6(3) PICC, the offeree's conduct shall be *"effective as an acceptance"*[75] in such situation that there are *"established practices or usages"* between parties permitting the contract be concluded.[76] However, in compliance with Article 1.9 PICC, parties to the Contract is not only be bound by the usage agreed by both sides or established between themselves but also by the usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.[77] In this case, despite of the fact that there exist no particular usage between both parties, RESPONDENT could not have been unaware of CLAIMANT's intent because the side-way nod is widely recognized under international trade **[1]** and it is reasonable for RESPONDENT to be aware of **[2].**

1. The side-way nod is widely recognized under international business

74. An international usage is widely known and regularly observed if the majority of businessmen in a trade branch acknowledge it.[78] The trade usage shall be familiar to those who are resident in the area in which these usages are common or who conduct business of the same area.[79]Therefore, an usage widely known to and regularly observed by parties in the trade concerned shall prevail.[80] In the circumstance that the trade usage is not international, however, the fact that it is well known in international trade shows that it shall be incorporated.[81]

75. In this case, the side-way nod shall be understood as agreement,[82] which is general accepted in international business since it is widely know when doing business with Indiana. Thus,

[75]Stefan Vogenauer, "Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)", Oxford University Press, 2015, p. 297

[76]Vogenauer, Commentary on PICC, p. 297

[77]Austria Supreme Court of 21 March 2000 (*Wood case*) [2000] , available at http://cisgw3.law.pace.edu/cases/000321a3.html

[78]Vogenauer, Commentary on PICC, p. 235-240; Austria Supreme Court of 15 October 1998 (*Timber case*) [1998], available at http://cisgw3.law.pace.edu/cases/981015a3.html

[79] United States Federal Appellate Court of 11 June 2003 (*BP Oil International v. Empresa Estatal Petroleos de Ecuador*) [2003], [hereinafter *BP Oil International v. Empresa Estatal Petroleos de Ecuador* case], available at http://cisgw3.law.pace.edu/cases/030611u1.html

[80] United States Federal District Court of 10 May 2002 (*Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc*) [2002] available at http://cisgw3.law.pace.edu/cases/020510u1.html

[81] Ibid, See *BP Oil International v. Empresa Estatal Petroleos de Ecuador* case

[82] Ramesh N. Rao & Avinash Thombre, 'Intercultural Communication: The Indian Context', SAGE Publications India, 2015

that CLAIMANT replied RESPONDENT's offer with a side-nod way indicated that CLAIMANT agreed with the offer and accept to be involved in the Contract with RESPONDENT

2. It is reasonable for RESPONDENT to have been aware of CLAIMANT's intention

76. Under Article 1.9 PICC the application of a usage shall be reasonable.[83] During negotiation period, CLAIMANT expressly notified RESPONDENT that CLAIMANT agreed with the condition of RESPONDENT's counter-offer. Moreover, in such an international trade, if parties have any unclear or disagreement, RESPONDENT shall object or indicate it during the negotiation.[84]

77. In the current case, CLAIMANT reasonably believed that RESPONDENT would easily become cognizant of CLAIMANT's intentionthough the side-way nod, by which CLAIMANT expressly show his agreement. Firstly, it has been 4 years since both parties starts to involve in the contract**.** In 2013, they first sign the Contract.[85] Both parties involved in other negotiation round, thus, the Contract is continued until 2016,[86] in which CLAIMANT "offered to pay a 15% price increase if RESPONDENT committee to perform 4 more delivers". Also, as a business partner, RESPONDENT would have understood the custom and culture manner of CLAIMANT. Therefore, RESPONDENT's representative, Mr. Parade could not have been unaware of the meaning of the side-way nod. Due to the fact that RESPONDENT and CLAIMANT worked with each other for about 4 years. Therefore, RESPONDENT shall be conscious of CLAIMANT's traditional manners. In such an international trade, RESPONDENT must have notified CLAIMANT if RESPONDENT could not be able to understand CLAIMANT's intention.

78. Thus, RESPONDENT or any reasonable person at the same his position would understand that CLAIMANT agree with the offer. Thus, it is unreasonable for RESPONDENT to

[83]Vogenauer, Commentary on PICC, p. 235-240; Official Comments on Article 1.9 PICC, available at http://www.cisg.law.pace.edu/cisg/principles/uni9.html

[84] Austria Supreme Court of 17 December 2003 (Tantalum powder case) [2003], available at *http://cisgw3.law.pace.edu/cases/031217a3.html*

[85] Moot problem, para. 15

[86] Moot problem, para. 24

misunderstand the meaning of the side-way nod.

PRAYER FOR RELIEF

For the foregoing reasons, the Claimant respectfully requests the Tribunal declare that:

1. The agreement to arbitrate is not incapable of being performed despite Respondent's impecuniosity. As a result, Claimant request this Tribunal to ensure Claimant's right to access to justice in this arbitration.

2. The request to join Vader as a party to the Arbitration should be granted by the Tribunal

3. The acceptance of the Respondent's counter-offer was valid