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 RESPONDENT

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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 the decisions rendered by courts in different countries are in line with the view that the arbitration agreement is inoperable due to impecuniosity.

II. Whether there are solutions, especially regarding the financial aspects, that can be applied to guarantee the capability of the arbitration.

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

I. Whether all parties to the arbitration and the Additional Party never give their consent in writing to the joinder

II. Whether Vader is prima facie be bound by the arbitration agreement

Issue 3: whether there was a valid acceptance of respondent's offer

I. Whether CLAIMANT showed the acceptance to RESPONDENT's offer

II. Whether the side-way nod shall be considered as trade usage by which established the acceptance under the UNIDROIT Principles of International Commercial Contracts (PICC)

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 RES, Mr. Armando Paredes, was the Managing Director of RES, having the power to execute all agreements on behalf of RES 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 RES will deliver 1,200,000,000 bricks in four deliveries in each quarter of the year, the price of each bricks is $0,5. The arbitration clause was also agreed that dispute shall be settled by KLRCA arbitration clause, and the law applicable to the contract shall be the UNIDROIT Principlesof International Commercial Contracts. 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 RES should be independent.
5. In **November 2014**, the First Incentive was agreed between parties. CL offered to increase the number of deliveries with an increase of 15% payment if RES agree to perform four (04) more deliveries in 2015. RES 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 RES, which means that Mr. Paredes had full control over RES's activities.
8. On **23 November 2016**, the Representatives had a final Skype call to negotiate the Second Incentive. RES 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 conduct a side-way nod at the end of the negotiation. RESPONDENT understands 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 RE 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 US $25,000, RESPONDENT refused to pay its share whilst CLAIMANT paid 50$ 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 INCAPABLE OF BEING PERFORMED AS RESPONDENTDONDENT IS IMPECUNIOUS

12. The impecuniosity of a Party is sufficient for the arbitration agreement to be incapable of being performed because **[I]** many decisions adopted the such view by courts in many jurisdictions, including Germany and Canada. Moreover, **[II]** there is no available mechanisms that allows the arbitration agreement to continue, therefore, the arbitration is operable.

ISSUE 2: TRIBUNAL SHOULD NOT GRANT THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION

13. The Tribunal should not grant the request of the Claimant to join Vader as a party to the Arbitration because the requirements in Rule 9 of the KLRCA Arbitration Rules are not satisfied for two arguments: First, all parties to the arbitration and the Additional Party never give their consent in writing to the joinder. Second, Vader is not prima facie be bound by the arbitration agreement due to Vader never signs the Contract **[A]** and Vader is not bound by the arbitration agreement by virtue of the group of company doctrine **[B].**

ISSUE 3: THERE WAS NOT A VALID ACCEPTANCE OF RESPONDENTPONDENT'S PROPOSAL

14. Despite the CLAIMANT's allegation in its Notice of Arbitration, RESPONDENTPONDENT asserted that RESPONDENT did not enter into the contract including the second incentive with CLAIMANT. Since CLAIMANT did not clearly show the acceptance to RESPONDENT's offer **[I],** and, the side-way nod shall not be considered as trade usage by which established the acceptance under the UNIDROIT Principles of International Commercial Contracts (PICC) **[II]**.

I. CLAIMANT did not clearly show the acceptance to RESPONDENT's offer

15. In its submission, CLAIMANT asserts that RESPONDENT clearly made an offer and

CLAIMANT showed the acceptance to RESPONDENT's offer. RESPONDENT kindly submits the contrary. Even it is assumed that RESPONDENT made an offer, CLAIMANT never accepted that offer. As CLAIMANT did not evince the acceptance through the negotiation **[A].** In unlikely circumstance that the tribunal assumes that CLAIMANT expressed the acceptance, the tribunal shall find, in accordance with the principle good faith under Article 1.7 PICC, CLAIMANT fail to notice RESPONDENT about the meaning CLAIMANT's conduct **[B].**

II. There are not any trade usages between parties or international trades usage established under PICC

16. CLAIMANT submits that through the side-way nod that CLAIMANT took at the end of the negotiation, CLAIMANT expressed its acceptance and the side way nod itself established an international usage between parties. Whereas, RESPONDENT kindly argues the opposite. For the reason that there was not any usage between parties regarding that the side-way nod would be understood as the acceptance **[A].** Additionally, the side-way nod is not recognized as international usage under brick trade **[B].**

PLEADINGS

ISSUE 1: THE ARBITRATION AGREEMENT IS INCAPABLE OF BEING PERFORMED AS RESDONDENT IS IMPECUNIOUS

17. Affected by the tense financial situation, Respondent was unable to pay the initial security deposit,[1] now it is unable to pay the advanced payment on costs or any further costs that might incur in any moves ahead of the proceedings,[2] which will prevent Claimant from submitting its counter- claims. Respondent submits that the arbitration proceeding must be suspended or terminated because the impecuniosity of Respondent makes an arbitration agreement incapable of being performed pursuant to the law of the seat of arbitration and case law.
18. Parties in this case did not explicitly choose the procedural law, however, they did choose the place of arbitration as Cambodia.[3] In such case of silence, the procedural law will be that of the seat of arbitration.[4] 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. Under Art. 8 Cambodia Arbitration Law, a court can claim its jurisdiction on a matter which is the subject of an arbitration agreement when an action is brought before if it finds that the agreement is null and void, inoperative or incapable of being performed.[5] The Cambodia Arbitration Law has not specified any rules associates the impecuniosity of a party or the incapability of arbitration agreement, therefore, Respondent has to base on the legal practice that has previously addressed such situation. In particular, Respondent will prove that the

[1] Moot Problem, para. 57.
[2] Moot Problem, para. 59.
[3] Moot Problem, para 15f).
[4] 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.
[5] *Cambodia Arbitration Law*, Art. 8

arbitration agreement is incapable of being performed due to the impecuniosity of a party because **[I]** the practice of different jurisprudences has supported so, and **[II]** there is no financial solutions to ensure the continuation of this arbitration. This will entail the jurisdiction of the court, which will be able to provide legal aid for Respondent whilst arbitration could not.[6]

I. The practice in different jurisdictions supported that impecuniosity is sufficient to make an arbitration agreement incapable of being performed.

20. Previously in the world, many jurisprudence of different countries has dealt with the matter of the impecuniosity of a party. One of the examples is a decision in Germany rendered by the Bundesgerichtshof (Germany's Federal Court of Justice) that a reluctant party may only be compelled to arbitrate under an arbitration agreement if it is able to afford the costs of the tribunal.[7] In an award rendered in 2000,[8] the Bundesgerichtshof was in favor of the *ipso iure* theory, arguing that the arbitration agreement becomes "incapable of being performed" in accordance with Section. 1032 (1) of the German Code of Civil Procedure[9] if a party lacks financial means to go to arbitration, as a result, the arbitration agreement becomes unenforceable.[10]

21. In Canada, another example the case *Resin Systems Inc. v. Industrial Service & Machine Inc.*., the Court of Appeal of Alberta invalidated the arbitration agreement based on breach of contract arguments.[11] The issue dealt by the court related to an arbitration in which the respondent refused to pay its share by arguing that the claim was so disproportionate that

[6] Additional Clarification to the Moot Problem, para. 3.
[7] 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. 103 [hereinafter **Klaus Sachs**]
[8] BGH, decision of 14 September 2000, NJW 2000, 3720.
[9] *2013 German Code of Civil Procedure*, Section 1032(1): "Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court is to dismiss the complaint as inadmissible [...] unless the court determines the arbitration agreement to be null and void, invalid or impossible to implement."
[10] Klaus Sachs, p. 103.
[11] 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. [hereinafter **Moyano**]

cause the costs to be exceedingly high. The court refused to grant a stay in favor of arbitration; in its view the failure to pay an advance on costs was a breach of the applicable rules which rendered the arbitration agreement inoperative.[12]

22. It can be seen from similar cases law of different countries that are in line with the view that impecuniosity is the sufficient reason that makes an arbitration inoperable. In this case at hand, Respondent recommend that this arbitration cannot be operable in accordance with the approach taken by Courts decision in many cases.

II. There is no mechanism that ensures the continuation of the arbitration.

23. As previously mentioned, the impecuniosity of Respondent makes the arbitration agreement inoperable. Claimant might base on the decision raised in a similar and typical case known as *BDMS Limited v Rafael Advanced Defence Systems*[13][hereinafter **BDMS case**] to prove that the arbitration agreement is operable. In this BDMS case, the English Commercial Court dealt with the situation when Respondent refused to pay its share of the advanced on costs required under the applicable institutional rules,[14] arguing that the claimant had first to provide appropriate security for costs. The Court concluded that the arbitration agreement was valid as the respondent's failure to pay its share did not amount to a repudiatory breach (which might make the agreement be terminated)[15] because: first, the defendant was not refusing to participate in the arbitration, only to pay; second, the claimant had not been deprived of its right to post a bank guarantee and then request an interim or final award for the costs; third, the applicable institutional rules contained various procedural mechanisms to prevent the withdrawal of the claims.[16] Respondent will base on the BDMS case's reasoning and compare to the case in question, answering the similar issues raised in BMDS

[12] *Resin Systems Inc. v. Industrial Service & Machine Inc.* [2008] A.B.C.A. 104, at 106 ('The refusal to pay the costs makes the arbitration unworkable, and thereby inoperative, as there is no obligation on the other party to fund the defaulting party's share').
[13] *BDMS Limited v Rafael Advanced Defence Systems* [2014] EWHC 451 (Comm) (Hamblen J).
[14] *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. 862.
[15] Ibid., p. 867.
[16] Moyano, p. 640.

case as the arbitration agreement is inoperative as there is no possible solutions can be applied.

24. Respondent asserts that the options set forth in BDMS case are inapplicable. First of all, it is true that Claimant is can post a bank guarantee and then request an interim or final award for the cost. However, it is impossible to apply in this case as Respondent does not have any available assets as they are tied up as collateral for investments, which are not freely disposable assets.[17]

25. Secondly, Respondent admits that the KLRCA Arbitration rules which are the applicable institutional rules, provides procedural mechanisms that allow Claimant to pay for both parties' shares. Despite the fact that Claimant already paid the initial security deposit for both parties[18] in accordance with Rule 14(3) of the KLRCA rules,[19] nothing can assure that Claimant will agree to pay this time on Respondent's share on the advanced on cost in accordance with Rule 14(7) KLRCA Arbitration Rules,[20] as it is undesirable for Claimant to carry such burden on the financial obligation. Such absence of payment will make the arbitral proceedings impossible to move on, especially hard for Respondent to submit its counter-claims.[21]

26. In short, it is supported by legal practice that impecuniosity of a party makes an arbitration incapable of being performed. As no possible financial can be applied, the arbitration agreement therefore found inoperable.

ISSUE 2: Tribunal should not grant the request of the Claimant to join Vader as a party to the Arbitration

[17] Clarifications to the Moot Problem, para. 11.
[18] Additional Clarifications to the Moot Problem, para. 2 and 4.
[19] *KLRCA Arbitration rules*, Rule 14(3)
[20] Ibid., Rule 14(7)
[21] Moot Problem, para. 59.

27. The Tribunal should not grant the request of the Claimant to join Vader as a party to the Arbitration because the requirements in Rule 9 of the KLRCA Arbitration Rules[22] are not satisfied for two arguments: First, [**I**] all parties to the arbitration and the Additional Party never give their consent in writing to the joinder. Second, [**II**] Vader is not prima facie be bound by the arbitration agreement.

I. ALL PARTIES TO THE ARBITRATION AND THE ADDITIONAL PARTY NEVER GIVE THEIR CONSENT IN WRITING TO THE JOINDER

28. The joinder of Vader may be allowed when a mutual intention to arbitrate exists among parties and especially in writing form. However, both parties make no written consent indication in arbitration clause to bound Vader to the Contract.
29. Under article 7 of The Commercial Arbitration Law of the Kingdom of Cambodia: "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters…" It can be inferred that all parties to the contract, in order to make the arbitration agreement valid and binding upon the parties, must sign a contract containing an arbitration agreement. Furthermore, the lack of a party's signature upon the contract would be strong evidence as to the lack of the party's consent to the agreement and consequently to an arbitration clause contained therein.[23]
30. In this case, Claimant had relied upon an arbitration agreement contained only two parties (Claimant and Respondent) and not in any written form exchanged with Vader. Therefore, as per the aforementioned requirements under article 7 of Cambodia Commercial Arbitration Law, the Contract should have been signed by all parties to the contract in order to deem it as a valid arbitration agreement.This requirement was not met as neither parties nor Vader wrote anything to bind the third party to the arbitration agreement, thus, resulting

[22] KLRCA Arbitration Rules, Rule 9(1)
[23] *Virgoz Oils and Fats Pte. Ltd. v National Agricultural Marketing Federation of India,* EX.P. 149/2015 & EA(OS) No. 66/2016

in the arbitration agreement becoming invalid and inoperative with respect to lack of consent in writing.

31. Therefore, the first requirement of Rule 9 of the KLRCA Arbitration Rules should be objected by the Tribunal because all parties to the arbitration and the additional party never give their consent in writing to the joinder.

II. VADER IS NOT PRIMA FACIE BOUND BY THE ARBITRATION AGREEMENT

32. The term "additional party prima facie be bound by the arbitration agreement" in Rule 9 of KLRCA may join non-signatories. Such as a parent company to a party in proceedings in appropriate cases[24], or requires a signature of the joinder.[25] However, both elements set above are dissatisfied because **[A]** Vader never signs the Contract and **[B]** Group of Company Doctrine (hereinafter GoC) is inapplicable in this case.

A. Vader Never Signs The Contract To Be A Party To The Arbitration Agreement

33. VADER did not sign the Contract in a way that was deliberately different to the Parties. CLAIMANT signed "for the buyer" and RESPONDENT signed "for the seller".

34. First, a prima facie consent to be bound by the arbitration clause can be evidenced from the signature of a party.[26] Signature of an additional party to the Contract constitutes its consent to be bound by the arbitration clause of the Contract.[27] Moreover, the ICC Court, as confirmed by Whitesell and Silva Romero, accepted joinder of parties in arbitrations upon the instance of respondents, upon the satisfaction of both two cumulative criteria: first the third party must have signed the arbitration agreement; and secondly, the respondent must actually have made claims against the new party

[24] Gary Born, Jonathan Lim, Dharshini Prasad, International Arbitration Alert 2016 SIAC Rules, 29 July 2016
[25] Extending the Scope of the Arbitration Agreement to Non-Signatories, in The Arbitration AgreementIts Multifold Critical Aspects, ASA Special Series No. 8 (1999), p.167
[26] Id
[27] ICC, Svenska Petroleum v. Lithuania, [2006] APP.L.R. 11/13, para 73

35. In this case, Mr *Paredes* and Mr Deewarvala signed the Contract for the seller and the buyer respectively,[28] whereas Mr Chap had nothing in reaction as a representative of VADER to sign the Contract. Consequently, VADER cannot be considered a party to the Contract.

36. Second, the general nature of a sales contract pursuant to which the seller is bound to deliver the goods while the buyer is obliged to pay the price.[29] Both the New York Convention and the Model Law clearly states that the arbitration agreement is an agreement between the parties.[30] There is no room in that definition to bind other than the parties.[31] Thus, the arbitral tribunal does not have the right to make an award in favor of or against non-signatories, irrespective of whether such third party is a company or an individual as both have their own distinct identities.[32] The jurisdiction of the arbitral tribunal is restricted to the signatories to the arbitration agreement.[33]

37. The list of parties only involves Respondent and Claimant, VADER, however, is not mentioned as a third party or joinder of the Contract. Hence, without being enlisted as a party, Vader cannot form a valid basis for the joinder of the ADDITIONAL PARTY.

B. Vader Is Not Bound By The Arbitration Agreement By Virtue Of The Group Of Companies Doctrine

38. Claimant may assert that 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.[34] However, VADER is not be bound by the arbitration agreement by virtue of the group of companies doctrine for two reasons: [**1**] Respondent requests the Tribunal not to apply the group of companies doctrine. [**2**] Even if the Tribunal should

[28]MP, para 13
[29] Lew, Juliam /Mistelis, Loukas/ Kröll, Stefan, "Comparative International Commercial Arbitration" (2003), para 3
[30] Article II of the New York Convention and Article II of the Model Law
[31] Id
[32] Gary B. Born, International Commercial Arbitration 2nd edition, Kluwer Law International 2014, para 1405 [hereinafter Born]
[33] Fouchard, Gaillard, Goldman on International Arbitration PARA. 44 [hereinafter Fouchard]
[34]Rajasthan High Court, Jitender Singh And Others vs Viyom Networks Ltd on 17 January, 2014, para 66,67

choose to apply the group of companies doctrine [hereinafter GoC], its requirements are not met invalid.

1. The Tribunal should not apply the group of companies doctrine

39. The Tribunal should not apply the group of companies doctrine. The doctrine contradicts general principles of law. The GoC doctrine contradicts general principles of law. It is generally recognised that only the intent of the parties can bind additional parties to an arbitration agreement.[35] Furthermore, the GoC doctrine disregards the basic principles of separateness and limited liability of legally separate entities. The GoC doctrine neglects the required written form of an arbitration agreement and its substantive validity.[36] In light of the fact that the GoC doctrine raises concerns, it comes as no surprise that most jurisdictions reject its application. It has been expressly rejected in the USA, Switzerland[37] and has been inconsistently applied in jurisdictions such as France and India.[38] American courts have denied the application of the doctrine.[39] Likewise, the doctrine has no standing under German law[40] and even faces harsh criticism in France, the country in which it was originally established. It can therefore be concluded that the GoC doctrine contradicts general principles of law.

40. Moreover, the doctrine is not part of international trade usages because it is highly controversial and not commonly used.[41]In consequence, the Tribunal should not apply the doctrine on this basis.[42]

[35] Fouchard, PARA. 5.00
[36]Ferrario, The Group of Companies Doctrine in International Commercial Arbitration: Is These any Reason for this Doctrine to Exist 26.5 Journal of International Arbitration 647 (2009), P. 652. [hereinafter Ferrario]
[37] Thomson-CSF; Peterson Farms; Alpha; ICC 4504
[38] Born p. 1447
[39] United States Court of Appeal, Sarhank Group v. Oracle, 2nd Circuit, 404 F.3d 657
[40]MÜLLER/KEILMANN, Beteiligung am Schiedsverfahren wider WillenIn: German Arbitration Journal (2007), P. 118
[41] Redfern and Hunter on International Arbitration 5 th ed. Oxford University Press, 2009 p. 102; Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions Kluwer Law International, 2006 p. 95
[42] Brekoulakis, Third Parties in International Commercial Arbitration Oxford University Press 2010, p. 167 [hereinafter BREKOULAKIS]; High Court of Justice of England and Wales 4 February 2004, Peterson Farms Inc. v C & M Farming Ltd, [2004] 1 Lloyd's Reports 603; ICC Case No.4504

2. Even if the Tribunal should choose to apply the group of companies doctrine, its requirements are not met

41. Even if the Tribunal should choose to apply the group of companies doctrine, its requirements are not met. The mere fact that Respondent is a subsidiary of VADER does not suffice to justify a joinder in application of the group of companies doctrine.[43]

42. 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 operated and managed closely by the parent company **[a]**. The subjective one is represented by the implied acquiescence of the parent company to the contracts entered by the subsidiary and the participation of the parent company in the formation, performance or termination of the contract **[b]**.[44] Last, the parties never intends for VADER to become bound by the arbitration agreement [**c]**.[45]

a. VADER and Respondent Do Not Constitute a Single Economic Reality

43. The relationship between VADER and CLAIMANT is not sufficient to warrant an application of the doctrine as the companies do not form "one and the same economic reality".[46] More particularly, the mere fact that Respondent is a 100% subsidiary of VADER does not cause this requirement to be fulfilled.

44. Two companies of a group form one and the same economic reality cannot solely be determined by the percentage of stock the one party owns of the other.[47] The tribunal in ICC case No. 7155 (1993) did not join the non-signatory subsidiary to the arbitration although the parent company owned 90.99% of stock. The percentage of stock ownership can thus not serve as the decisive indicator for the assumption of "one and the same economic

[43]ICC CaseNo. 10758; Born, P. 1447; Ferrario, P. 651
[44] Rodler I, When are Non-Signatories Bound by the Arbitration Agreement in International Commercial Arbitration? (University of Chile and University of Heidelberg 2012), page 44-45
[45] Yaraslau Kryvoi, 'Piercing the Corporate Veil in International Arbitration' (2011)177 Global Business Law Review 1; Dow Chemical
[46] cf. Dow Chemical (ICC)
[47] LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN 13 59 ICC case

reality". Instead, a single economic reality can be assumed when the companies share assets and financial or human resources, e.g. corporate names, offices and premises, officers, bank account and trademarks.[48]

45. However, Respondent became independent as VADER stopped exercising any control over Respondent.[49] Respondent has its own assets,[50] and their offices are located in different countries.[51] Mr Storm, the CEO of VADER, has no official function in Respondent's business and Mr. Parades has overall control of the company.[52]

46. Taking this perceivable separation into account, Respondent and VADER cannot be considered "one and the same economic reality".

b. VADER did not play an active role in the conclusion, performance and termination of the contract

47. If a party can ever be held to arbitration due to its participation in the conclusion, performance and termination of the contract, then only if its involvement was significant.[53]

48. VADER's only involvement in the negotiations was to assist RESPONDENT in establishing a positive commercial relationship with CLAIMANT. Most importantly, VADER did not conclude any arbitration agreement or expressed its consent to be parties of the Contract. In the factually similar case of ICC 10758, the parent was present and participated in pre-contractual negotiations. This was not enough to satisfy the test. Additionally in this case, VADER had no act relating to the performance or termination of the Contract to satisfy the criteria set out of this part.

49. Consequently, while a certain involvement by VADER is undisputed, it did not meet the second requirements of the GoC doctrines.

[48] BREKOULAKIS p. 155
[49] MP, para 19,27
[50] Clarification to the Moot Problem, para 11
[51] General facts
[52] MP, para 19,27
[53] BREKOULAKIS p. 159; cf. Meyniel, That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine No. 1 The Arbitration Brief 3 18 (2013) p. 30

c. It Was Not the Intention of the Parties to Bind VADER to the Arbitration Agreement

50. The joinder of parties may be allowed when a mutual intention to arbitrate exists. The intention can be inferred where the activities of the group were conducted in a way that led the contracting party to a confusion or a misunderstanding as to who the true parties to the agreement were.[54]

51. At the very inception, The Contract, however, was concluded between CLAIMANT and RESPONDENT under the very premise that VADER would not become a contracting party. At the conclusion of the negotiations, the implied understanding of the parties should be known as Vader just wanted to create an open and friendly environment between parties, which obviously should have not be made any misunderstandings.

52. This shows no intention of the Vader and a mutual intention of all the parties particularly to be bound by the Contract and consequently arbitrate the disputes arising out of it.

53. In summary, none of the three prerequisites for extending the personal scope of the arbitration agreement by virtue of the group of companies is fulfilled.

ISSUE 3: THERE WAS NOT A VALID ACCEPTANCE OF RESPONDENT'S PROPOSAL

54. Despite the CLAIMANT's allegation in its Notice of Arbitration, RESPONDENT asserted that RESPONDENT did not enter into the contract including the second incentive with CLAIMANT. Since CLAIMANT did not clearly show the acceptance to RESPONDENT's offer **[I],** and, the side-way nod shall not be considered as trade usage by which established the acceptance under the UNIDROIT Principles of International Commercial Contracts (PICC) **[II]**.

I. CLAIMANT did not clearly show the acceptance to RESPONDENT's offer

55. In its submission, CLAIMANT asserts that RESPONDENT clearly made an offer and

[54] Fouchard/Gaillard/Goldman, p.284; Born, p.1177; ICC Case No. 572

CLAIMANT showed the acceptance to RESPONDENT's offer. RESPONDENT kindly submits the contrary. Even it is assumed that RESPONDENT made an offer, CLAIMANT never accepted that offer. As CLAIMANT did not evince the acceptance through the negotiation **[A].** In unlikely circumstance that the tribunal assumes that CLAIMANT expressed the acceptance, the tribunal shall find, in accordance with the principle good faith under Article 1.7 PICC, that CLAIMANT fail to notice RESPONDENT about the meaning CLAIMANT's conduct **[B].**

A. CLAIMANT did not evince the acceptance through the negotiation

56. In pursuant to Art 2.1.6 (1) PICC , the acceptance of an offer is valid in the circumstance that the offeree explicitly or impliedly indicates the intention through his statement or conduct.[55] And the acceptance only becomes effective if the offeror receives that acceptance or such act of the offeree creates a reasonable understanding in offeror's mind according to Article 2.1.6(2) PICC.[56] The understanding of any reasonable person at the same situation shall also be taken into consider to decide the meaning of parties' conduct and statement.[57]

57. In this current case, CLAIMANT did not clearly show the acceptance of RESPONDENT's offer through his statement or his conduct. Firstly, after RESPONDENT made the proposal, CLAIMANT did not show any acceptance through his wording. Particularly, CLAIMANT just reply RESPONDENT by rephrasing the proposal *"Let me get this straight. You are telling me... that if I throw in a 35% bonus... 35% of the total amount of the contract per year... to be paid at the end of each year... you will commit not only to 4 but to 8 deliveries... this is, you would continue the supply for 2017 and 18? Is my understanding correct?"*. CLAIMANT did not evidently express any acceptance by saying "yes" or normally take any conduct to confirm the acceptance.

[55] See *Official Comments on Art. 2.1.6 of the UNIDROIT Principles* of International Commercial Contracts (PICC), available online at <http://cisgw3.law.pace.edu/cisg/principles/uni18.html#official>.
[56] Official Comments on Art. 2.1.6 PICC; See also Austria 17 December 2003 Supreme Court (***Tantalum powder case***)http://cisgw3.law.pace.edu/cases/031217a3.html
[57] Art 4.2.2 PICC

58. Moreover, RESPONDENT did not receive the indication of acceptance from CLAIMANT. The mere acknowledgement of receipt of the offer, or an expression of interest in it, is not sufficient.[58] That CLAIMANT just expressed its understanding of the offer is not enough for RESPONDENT to be aware CLAIMANT's intention. Even in the circumstance that CLAIMANT understood the condition of the proposal, it shall not be sufficient for the Tribunal to declare that CLAIMANT expressed it acceptance just through the sentence "*that if I throw in a 35% bonus... 35% of the total amount of the contract per year... to be paid at the end of each year... you will commit not only to 4 but to 8 deliveries... this is, you would continue the supply for 2017 and 18? Is my understanding correct?* "[59], by which CLAIMANT just paraphrased RESPONDENT's proposal without expressing any acceptance. Therefore, in unlikely circumstance that CLAIMANT had the intent to continue the Contract, CLAIMANT shall clearly express it through its statement during the negotiation.

59. Additionally, CLAIMANT did not take any acts that constitutes acceptance. The Tribunal shall not find the side-way nod as an acceptance. Because the side-way nod is a traditional custom of Indian and person who never come to India or work in India could not be able to acknowledge of the side-way nod's meaning. RESPONDENT's Representative, Mr. Paredes, a normal foreign trade, never come to India or work at India.[60] Mr. Paredes could not be able to understand the meaning of the side-way nod. A normal trader at the same situation or any reasonable persons at the same circumstance could not understand that side-way nod as an acceptance as well.

60. In conclusion, the Tribunal shall not conclude that CLAIMANT's intention to communicate the acceptance through the negotiation is not apparent.

[58] Art 2.1.6 PICC; see also *Official Comments on Art. 2.1.6 of the UNIDROIT Principles*, available online at <http://cisgw3.law.pace.edu/cisg/principles/uni18.html#official>.
[59] Moot problem, para. 34
[60] Clarifications to the moot problem, para. 6

B. CLAIMANT failed to notice RESPONDENT about the meaning of the side-way nod according to the good faith principle

61. While CLAIMANT submits that CLAIMANT expressed the acceptance through the side-way nod, RESPONDENT kindly requests the Tribunal to find that CLAIMANT fail to notify RESPONDENT about the meaning of the side-way nod as the acceptance under Art. 1.7 PICC

62. According to Article 1.7 PICC, both parties to the contract shall act in accordance with the good faith and fair dealing principle during the negotiation process.[61] Under Art. 1.7 PICC the offeree's conduct shall establish an acceptance if the notice of performance reaches the offeror.[62]

63. In current case, CLAIMANT shall do every thing as possible to compliance with the good faith principle to notify RESPONDENT about the meaning of the side-way nod. In unlikely circumstance that CLAIMANT really want to continue the contract, in compliance with the good faith principle, CLAIMANT shall notify RESPONDENT about the meaning of side-way nod. RESPONDENT could not have been aware of the side-way nod unless CLAIMANT did clearly notice RESPONDENT about the meaning of the side-way nod. RESONDENT's Representative, Mr. Paredes could not himself be aware of that meaning without CLAIMANT's notification.

64. To conclude, the Tribunal shall find that CLAIMANT fail to comply with the good faith principle under PICC. As a result, RESPONDENT could not have been concious of the meaning of the side-way nod.

II. There are not any trade usages between parties or international trades usage established under PICC

[61] Oficial comments on Article 1.7 UNIDROIT princple, available athttps://www.cisg.law.pace.edu/cisg/principles/uni7.html#ed2;
[62] 27 May 2008 France Court of Appeals Rennes (*Brassiere cups case*), CISG-online 1746.

65. CLAIMANT submits that through the side-way nod that CLAIMANT took at the end of the negotiation, CLAIMANT expressed its acceptance and the side way nod itself established an international usage between parties. Whereas, RESPONDENT kindly argues the opposite. For the reason that there was not any usage between parties regarding that the side-way nod would be understood as the acceptance **[A].** Additionally, the side-way nod is not recognized as international usage under brick trade **[B].**

A. There was not any usage between partiesregarding that the side-way nod would be understood as the acceptance

66. In compliance with Article 1.9 (1) PICC, the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. "These are constituted as behaviors observed by people in their contracts or in the conduct of their own business in general".[63]

67. In the current case, the side-way node cannot be construed as a binding trade usage. Because firstly the side-way nod is never discussed between parties about its meaning. Secondly, when the previous Contract is signed, the CEOs of Vader and CLAIMANT decided to conclude a formal contract, in writing form before entering into the Contract.[64] Also in the first incentive, when both parties wanted to continue the Contract, even there was no formal contract to record, both Representatives crossed email before coming to the conclude of the Contract. Therefore, to conclude a contract between parties, it is necessary for the contract either to be in a written form. A reasonable person at the same shoe as RESPONDENT also understands that side-way nod is not represented for the acceptance

[63]Jorge Oviedo Albán, "Remarks on the Manner in which the UNIDROIT Principles May Be Used to 1nterpret or Supplement CISG Article 9", October 2004, available at https://cisgw3.law.pace.edu/cisg/principles/uni9.html#a5; see also ILLESCAS ORTIZ, R. and PERALES VISCASILLAS, M.del P., *Derecho Mercantil International, El derecho uniforme*, Universidad Carlos III de Madrid, Editorial Centro de Estudios Ramón Areces S.A., Madrid, 2003, p. 125. See: ICC Arbitration Award 8611/HV/JK of 23 January 1997 available at http://cisgw3.law.pace.edu/cases/978611i1.html.

[64]Moot problem, para. 10

B. The side-way nod is not recognized as international usage under brick trade

68. Contrary to CLAIMANT's submit, the side-way nod shall not be recognized as an international usage in brick trade. As the side-way nod is not "widely-known" in the brick trade **[1]**; likewise, the side-way nod is not reasonable for the Tribunal to apply in the current case **[2].**

1. The side-way nod is not "widely- known" in the brick trade

69. Under Article 1.9(2) PICC, "a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by parties" may bind the parties to a contract,[65] and there is no "trade usage indicating side-way nod as the acceptance in the industry".[66] To become a trade usage, standards must be "clear and unambiguous"[67], a traditional manner could not be sufficient enough for the traders coming from outsider that area to be aware of.

70. In the current case, the side-way nod is "widely known" or "regularly observed" by RESPONDENT. Firstly, because both parties did not mention the side-way nod or the meaning of it during the trade from 2013 to 2016. Additionally, there is no information evincing that side-way nod is the acceptance in the industry. And, the side-way nod is not sufficient enough for RESPONDENT's Representative, who comes from Mexico, to be conscious of the meaning of it as the side-way nod is a traditional custom of India.

71. Hence, the side-way nod shall not be assumed to be "widely known" in the brick trade.

2. The side-way nod is not reasonable for Tribunal to apply this in the current case

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[65] Article 1.9 PICC; see also *Jorge Oviedo Albán, "Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement CISG Article 9"*, October 2004; Russia Arbitration proceeding 105/2005 13 April 2006, [Bahamas v. Italy case]

[66] *Butler*, CISG—A Secret Weapon in Fight for a Fairer World 7 Victoria Uni. Wellington L. Research Papers 2 (2017), p.28-30.

[67] Stefan Vogenauer, "Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)", Oxford University Press, 2015, p. 233-235

72. In unlike circumstance that the tribunal find that the side-way nod is an international usage, it is unreasonable for Tribunal to apply it in the current case. The reasonable test shall also be taken into account to decide the applicant of the trade usage under Article 1.9 (2) PICC. Pursuant to Article 1.9 (2) PICC, traders shall not be bound by trade usages, which are only regularly observed in certain geographical area.[68] Since it is not reasonable for a trader, who come from foreign countries, to be bound by a trade usage from domestic area.[69] Moreover, the usage must be "widely known" enough for parties so that the traders from outside could not be able to have such knowledge about these trade usages.
73. In current case, the tribunal shall not consider the side-way nod as international usage. Firstly, the side-way nod is not regularly observed in international trade. RESPONDENT's representative, Mr. Paredes was born in Mexico.[70] Therefore, it is not reasonable for RESPONDENT, who come from foreign countries, to be bound by a trade usage from domestic area. Moreover, the side-way nod is not "widely known" enough for RESPONDENT so that Mr. Parades from outside India could be able to have such knowledge about these trade usages.
74. To conclude, RESPONDENT kindly requested the Tribunal to find that the side-way nod that CLAIMANT take at the end of the negotiation shall not establish an international usage and RESPONDENT shall not be bound by the side-way nod.

[68]Vogenauer, Article 1.9, p. 237
[69]K-H Bockstiegel, ' The Application of the Unidroit Principles to Contracts Involving States or Intergovernmental Organizations' [2002] ICC International Ct Arbitration Bull, Special suppl 51,55.
[70]Clarifications To The Moot Problem, para. 5

PRAYER FOR RELIEF

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

1. The agreement to arbitrate is incapable of being performed due to impecuniosity of the Respondent

2. The request to join Vader as a party to the Arbitration should not be granted by the Tribunal

3. The acceptance of the Respondent's offer was invalid