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ASIAN INTERNATIONAL ARBITRATION CENTRE

SEATED AT: KINGDOM OF CAMBODIA

-PARTIES TO DISPUTE-

Chuizi Leishen's LLC

(Claimant)

And

Robustesse Espacial Solucion Corp

(Respondent)

MEMORANDUM FOR CLAIMANT

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LIST OF ABBREVIATIONS

&	And
Sec.	Section
p./pp.	Page(s)
Para	Paragraph
AC	Appeal Cases
AIAC	Asian International Arbitration Centre
All ER	All England Law Reporter
App.	Appeal
Arb.	Arbitration
ASA	Swiss Arbitration Association
BCLC	Butterworths Company Law Cases
BGH	Bundesgerichtshof
Bull.	Bulletin
Bus LR	Business Law Reports
CISG	Convention on the International Sale of Goods
CA	Court of Appeals
Cl.	Clause

CL	Chuizi Leishen's LLC
CLOUT	Case Law on UNCITRAL Texts
CLY	Current Law Year Book
Contract/Agreement	Development and Sales Agreement
Corp.	Corporation
ed.	Edition
F. Supp.	Federal Supplement
I.L.R.	International Law Reports
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
Int'l	International
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
KLRCA	Kuala Lampur Regional Centre for Arbitration
L.M.C.L.Q	Lloyd's Maritime and Commercial Law Quarterly
Lloyd's Rep.	Lloyd's List Reports
Ltd.	Limited
NAI	Netherlands Arbitration Institute

No.	Number
Off. Cmt.	Official Commentary
PECL	Principles of European Contract Law
PICC	Principles of International Commercial Contract
QB	Queen's Bench
Rev.	Review
RES	Robustesse Espacial Solucion Corp
Spec.	Special
U. S.	United States of America
UK	United Kingdom
UNCITRAL	United Nations Conventions on Trade Laws
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus
vol.	Volume
WLR	Weekly Law Reports

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14. Rawding, N. (1997), Costs, Fees, and Security for Costs in International Arbitrations. International Trade Law & Regulation, 3(3), 70-75 25

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1. Georg von Segesser, Inoperability of Arbitration Agreements due to Lack of Funds? Revisiting Legal Aid in International Arbitration, Kluwer Arbitration Blog, <http://arbitrationblog.kluwerarbitration.com/2015/01/17/inoperability-of-arbitration-agreements-due-to-lack-of-funds-revisiting-legal-aid-in-international-arbitration/>

2. Andrey, No money: no arbitration? Reflections on recent Russian cases, Thomson Reuters, <http://arbitrationblog.practicallaw.com/no-money-no-arbitration-reflections-on-recent-russian-cases/>

STATEMENT OF JURISDICTION

Chuizi Leishen's LLC has the honor to submit the present dispute and its memorandum before the Asian International Arbitration Centre seated in Kingdom of Cambodia under Rule 1 of the KLRCA

i. Arbitration Rules which states that: Where parties have agreed in writing to arbitrate their disputes in accordance with the Rules, then:
    a. Such disputes shall be settled or resolved by arbitration in accordance with the Rules; and
    b. The arbitration shall be conducted and administered by the KLRCA in accordance with the KLRCA Arbitration Rules

QUESTIONS PRESENTED

For the Hearing, following questions are presented before Tribunal:

1. Is the agreement to arbitrate incapable of being performed due to impecuniosity of the Respondent?
2. May the request of the Claimant to join Vader as a party to the Arbitration be granted by the Tribunal?
3. Was there a valid acceptance of the offer?
4. What relief may the Tribunal grant?

STATEMENT OF FACTS

-Parties to the Arbitration-

Chuizi Leishen's LLC is a commercial company duly incorporated under the laws of the People's Republic of China ("China") in 2000. Vader Ltd ("Vader") is a commercial company duly incorporated under the laws of the United Kingdom (the "UK") in 1950. Robustesse Espacial Solucion Corp (hereinafter referred to as "RES", "Respondent" or "Seller") is a Limited Company duly incorporated under the laws of Cambodia in January 2013. RES is a wholly owned subsidiary of Vader. Both companies' main business activity is the production and selling of bricks.

-The Contract between RES and CL-

In February 2013, both the arranged for Mr. Chap, CEO of Vader and Ms. Lee of CL to meet to discuss business. By September 2013, Mr. Paredes and Mr. Deewarvala (collectively, the "Representatives") had successfully drafted, revised and signed a contract (the "Contract"). The contract also had an Arbitration Agreement. Acting upon the contract the first three deliveries of bricks and corresponding payments were performed successfully. The Buyer was satisfied with the quality and quantity of the goods delivered. The Seller was satisfied with the paid consideration.

-First Incentive-

The Buyer offered to pay a 15% price increase (the "First Incentive") if the Seller committed to perform 4 more deliveries during 2015. Mr. Paredes accepted Mr. Deewarvala's offer and the two gentlemen shook hands. The fourth delivery of 2014 and the 4 deliveries of 2015 (at the 15% price increase) were performed according to the terms agreed by the Representatives in Paris.

-Brexit and Independence to RES-

In England, Mr. Chap's suspicions became true: Brexit annihilated the business of Vader in the EU. As a consequence, Vader's Board of Directors passed a motion such that no further financing, compliance monitoring, or directives would be given by Vader to RES. This meant that Mr. Paredes had full control over RES's activities.

-The Second Incentive-

The Parties started to communicate and to seek a new round of negotiations since July 2016. Mr. Paredes demanded to increase the price substantially before committing to further deliveries. Mr. Paredes made an offer for being paid 35% bonus every December to deliver 8 more times – 4 times in 2017 and another 4 times in 2018 and asked for a concrete answer to this offer. Mr. Deewarvala responded by doing an Indian head nod, a side-ways nod. Mr. Paredes interpreted the side-ways nod as a refusal to his proposal. Mr Deewarvala believed that his nod communicated his acceptance of Mr. Paredes' pro-posal.

-The Arbitration-

On 15 August 2017, the Buyer served the Seller with a Notice of Arbitration. The Respondent's position was that the contract between the parties had terminated on 23 November 2016. The Respondent is of the view that the agreement to arbitrate had become null because Respondent is now incapable to perform it. Ms. Fineang (Respondent's In-house Counsel) explained that the Respondent has many counter-claims but is unable to raise them in arbitration due to the costs of Arbitration. The Claimant denied the Respondent's counter-claims and expressed its intention of filing a request for the Respondent's parent company, Vader, to join this arbitration under Rule 9 of the KLRCA Rules 2017. From the Claimant's point of view, Vader would be able to support the costs of the arbitration, to which the Respondent says that a Joinder request has to be resolved by the Tribunal and that implies moving ahead which seems impossible at this stage. Notwithstanding the Respondent's funding issues, Preliminary Meeting Minutes

were circulated between the Arbitral Tribunal and the Parties setting out how the matter would now proceed. A Hearing will be held on the issues raised at the preliminary meeting on the 2-5 November 2018 and the Tribunal will hear the arguments on the procedure and the merits.

SUMMARY OF PLEADINGS

1. THAT THE AGREEMENT TO ARBITRATE IS CAPABLE OF BEING PERFORMED

It is submitted that the ground of impecuniosity raised by the Respondent does not render the agreement of arbitration incapable of being performed. Further it is presented that RES must have the knowledge of the potential cost of arbitration and that RES cannot escape the agreement to arbitrate on the plea of impecuniosity. Also it is pleaded to the Tribunal that performing the agreement to arbitrate in the present case would not lead to denial of justice to the Respondent. Hence in the view of the above contentions, it has been established that the agreement to arbitrate is still capable of being performed.

2. THE REQUEST OF THE Claimant TO JOIN VADER AS A PARTY TO ARBITRATION MAY BE GRANTED BY THE TRIBUNAL

The Tribunal may grant that Vader may be joined as a party to the arbitration according to Rule 9 of KLRCA Rules, 2017 which allows for Request for Joinder. Also, since Vader and RES are sufficiently integrated in its functioning and that RES is a 'wholly owned subsidiary' of Vader, Vader and RES form a group of Companies by virtue of which Vader may be bound to the Arbitration Agreement and to the obligations. Alternatively, it is pleaded that the Tribunal may use the Doctrine of Estoppel to bind the third party for the arbitration.

3. THERE A VALID ACCEPTANCE OF THE OFFER.

There was a presence of a valid acceptance on the part of the Claimant to the offer of the Respondent. It is submitted that the nod of the head of Mr. Deewarvala was a valid indication of the acceptance of the offer. Further, it is pleaded that the common intention of the Parties

needs to be taken into consideration and that the conduct of the Parties precedent and subsequent to the contract in question adequately indicates the acceptance of the offer.

4. THE TRIBUNAL MAY GRANT RELIEF IN FAVOUR OF CLAIMANT

As the essentials laid down by the UNIDROIT rules have been fulfilled, it can be said that the contract was existing and enforceable and being so the Respondent may be ordered to render performance of the first two deliveries of 2017. Further, the Tribunal may set the terms of the contract in writing. Further, it is also requested that the Tribunal may grant Security for Costs to the Claimant, since the Claimant fulfils the essentials for granting this interim measure under UNCITRAL Arbitration Rules, 2013.

PLEADINGS

[1.] THE AGREEMENT TO ARBITRATE IS CAPABLE OF BEING PERFORMED

1. It is contented that an Arbitration Agreement cannot be held incapable of being performed on the ground of impecuniosity of one of the parties (here the Respondent). The Claimant contends that RES must have been aware of the potential costs of arbitration while entering into an agreement to that effect continuing with the arbitration despite the impecuniosity of RES would not amount to denial of justice to the Respondent.

[1.1] IMPECUNIOSITY OF RESPONDENT DOES NOT RENDER THE AGREEMENT INCAPABLE OF BEING PERFORMED

2. The New York Convention provides that the Arbitration Agreement is enforceable unless it "is null and void, inoperative or incapable of being performed."[1] "Incapable of being performed" connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. There must be some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement.[2]

3. The views of courts of different countries show that such a situation is not sufficient to make a valid Arbitration Agreement incapable of being performed. In this regard English courts have adopted a view which got recognized by courts of other jurisdiction.[3] It was held that the lack of sufficient funding may never justify the rendering of arbitration agreements as "incapable of being performed" or "inoperative".

[1] Art. II(3), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
[2] M. Mustill & S. Boyd, Commercial Arbitration 464 (2d ed. 1989).
[3] Janos Paczy v. Haenlder & Natermann GmbH [1981] 1 Lloyd's Rep 302 (CA); Trunk Flooring Ltd v. HSBC Asset Finance (UK) Ltd and Costa Rica SRL, [2015] NIQB 23.

4. The agreement only becomes incapable of performance if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it. Impecuniosity is not, a circumstance of that kind. The court of appeal considered held that one party cannot rely on his own inability to carry out his part of the Arbitration Agreement as a means of securing a release from the Arbitration Agreement.

5. One view regarding the impecuniosity also suggests that sufficient funding may only justify the rendering of arbitration agreements as "incapable of being performed" or "inoperative", if the lack of funding is due to the same breach of contract which is the issue in dispute.[4]

6. It has been mentioned that even when the company was facing financial issues and it had enormous sunken costs, Mr. Armando Paredes hired a team of In-House Counsels from a leading Cambodian law firm.[5] It is also submitted that due to contract which was entered into between the Claimant and Respondent, the Respondent was generating steady profits hence it cannot be said that the Respondent is impecunious due to the contract and thus the Arbitration Agreement is valid as the financially weak condition of Respondent is not due to the contract.

[1.2] RES MUST HAVE BEEN AWARE OF POTENTIAL COSTS OF ARBITRATION

7. When parties sign an Arbitration Agreement, then it can be very genuinely assumed that the parties are aware of all procedural norms to be followed. Impecuniosity of the Respondent has also been talked about In two landmark cases of *International Commercial*

[4] Georg von Segesser, Inoperability of Arbitration Agreements due to Lack of Funds? Revisiting Legal Aid in International Arbitration, Kluwer Arbitration Blog.
<http://arbitrationblog.kluwerarbitration.com/2015/01/17/inoperability-of-arbitration-agreements-due-to-lack-of-funds-revisiting-legal-aid-in-international-arbitration/> (Last accessed 10.08.2018)
[5] *Moot Problem 2018*, Para 26.

Arbitration Court (ICAC) at the Russian Chamber of Commerce and Industry; and the *Stockholm Chamber of Commerce (SCC)*.[6]

8. The courts considered that the lack of funds could not be considered as grounds for the inoperability of an arbitration clause, because this was the normal commercial risk of a commercial company. The courts also noted that the Claimant may have been aware of the potential costs implications when they agreed to the arbitration clauses.

9. In the case before us, applying the principles laid down by International Commercial Arbitration court which presumes that parties may have been aware about costs implications at the time of agreeing for arbitration, the Respondent who agreed to the Rules of KLRCA cannot avoid the arbitration on the ground of impecuniosity.[7]

[1.2.A] *Continuing with the Arbitration will not amount denial of justice to the Respondent*

10. It is a well settled principle that anything which is against the public policy cannot be arbitrated. In one case before Portugal Supreme Court the Respondent in arbitration challenged the enforcement of the award on the ground that it was in violation of public policy under the New York Convention, as they were impecunious at the time of arbitration and consequently their counterclaims were not heard by the Arbitral Tribunal.[8]

11. The decision of the Portuguese Supreme Court is in the lines of Nasharty decision[9], where the court also emphasized the parties' awareness of the cost schedules to which they were

[6] No. A56-50929/2015; No. A56-13914/2016; Andrey, No money: no arbitration? Reflections on recent Russian cases, Thomson Reuters, <http://arbitrationblog.practicallaw.com/no-money-no-arbitration-reflections-on-recent-russian-cases/>, (Last accessed 5.07.2018); *Supra Note* 3.
[7] *Moot Problem 2018*, Para 15.
[8] Portugal No. 1, A (Netherlands) v. B & Cia. Ltda., C and others, Volume XXXII Yearbook Commercial Arbitration 2007, Kluwer Law International 474 (Supremo Tribunal de Justiça [Supreme Court of Justice] 2003).
[9] Amr Amin Hamza El Nasharty v. J Sainsbury Plc, [2007] EWHC 2618 (Comm) 2007 WL 3389508.

agreeing. According to the Portuguese Supreme Court, international public policy was not violated and the award was enforced.[10]

12. In the case before us, it is submitted that the Respondent cannot claim that continuing with the arbitration would lead to denial of justice, as it has submitted itself to arbitration and bound by the agreement.

[2.] THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION MAY BE GRANTED BY THE TRIBUNAL

13. It is humbly submitted that Vader may be joined to the arbitration by applying the Group of Companies Doctrine as Vader and RES form a Group of Companies and Vader was aware of the Arbitration Agreement and had an active role in the contract. Further, as RES was established by Vader for its own profits, the Doctrine of Estoppel may bind Vader to the arbitration. Hence, the Tribunal may grant the request of the Claimant to join Vader as a party to the arbitration in accordance of Rule 9 of KLRCA.

[2.1] TRIBUNAL MAY USE RULE 9 OF KUALA LAMPUR REGIONAL CENTRE OF ARBITRATION RULES, 2017

14. Rule 9 of KLRCA provides that any Party to an arbitration or any third party (the "Additional Party") may request one or more Additional Parties to be joined as a party to the arbitration (the "Request for Joinder"), provided that all parties to the arbitration and the Additional Party give their consent in writing to the joinder.[11]

15. What is required under Rule 9 is that the additional party and the two signatories consent for such a joinder. It is humbly submitted to the Tribunal to grant the permission of joiner by invoking Rule 9 of KLRCA.

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[10] *Ibid.*
[11] Rule 9, KLRCA Rules 2017.

[2.1.A] *Joinder request may be granted even after the formation of Arbitral Tribunal*

16. Rule 9 of KLRCA provides for Request for Joinder to be granted. The Request for Joinder shall be submitted to the Arbitral Tribunal or, prior to the constitution of the arbitral Tribunal, to the Director. The Rules of this institution are lenient enough to consider a request for joinder even after the Tribunal is formed. Only thing which is required is consent of the parties and the additional parties and the consent must be communicated within 15 days of receipt of request. Thus it is humbly submitted that even though the Arbitral Tribunal has been constituted it does not bar the Claimant from making a request.

[2.2] THE TRIBUNAL MAY USE THE GROUP OF COMPANIES DOCTRINE TO BIND VADER TO THE ARBITRATION AGREEMENT AND TO COMPLETE THE OBLIGATIONS

17. The Tribunal may use the 'Group of Companies' doctrine because it is a consistent transnational principle.[12] It goes beyond the artificial distinctions between related legal entities and adapts legal reasoning to modern commercial reality. In these situations, arbitrators may use *de facto* control to establish the controlling company's consent to arbitration.

18. When considering whether a non-signatory may be bound by an Arbitration Agreement, arbitral tribunals have adopted the test of implied consent.[13] If the companies are in a group, are aware of the Arbitration Agreement and implicate themselves in the conclusion, performance or termination of the contract, then they are presumed to have consented to the agreement.[14]

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[12] 'That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine' (2013) 3(1) Arbitration Brief, Art. 3.

[13]Bernard Hanotiau, Complex Arbitrations. Multiparty, Multicontract, Multiissue and Class Actions (The Hague: Kluwer Law International, 2005), p. 343.

[14] *Ibid*; Dow Chemical v. Isover Saint Gobain, ICC Case No. 4131, Y. Comm. Arb. 1984, 131 et seq; ICC Case No 6519 of 1991, 2 ICC Arb. Bull 34; ICC 11209 of 2002 16:2 ICC Arb. Bull 102; 7604 J.D.I 1998,1027; ICC 7610

19. The doctrine has been widely accepted amongst arbitrators. In Dow Chemical, the Tribunal held that a group of companies constituted a single economic reality capable of binding non-signatories to an Arbitration Agreement.[15] This reasoning has been acknowledged in "many awards and been discussed in scholarly articles"[16] and has become so widely accepted that Boisséson comments (on the topic of the group of companies doctrine): "Can a party that has signed an arbitration agreement and is a Claimant in arbitration proceedings based on that agreement name as a Respondent a party that has not signed the arbitration agreement? There again, the answer is obviously yes"[17]

20. Group of Companies doctrine has also been adopted by courts in upholding arbitral awards. In France, Dow Chemical has been so widely adopted that the Court of Appeal for Pau has characterized it as "admitted law".[18] The United States has also embraced the doctrine, in part because of the federal rules favouring arbitration.[19] Most importantly, United States courts have considered "economic integration" of corporations in establishing their jurisdiction over foreign corporations whose subsidiaries were active in the United States.[20] In Canada, courts have upheld arbitral awards that applied the group of companies' doctrine.[21] The Spanish Supreme Court has accepted the doctrine in ITSA v. Satcan &

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of 1995, J Arnaldez, Y Derains, and D Hascher (eds), ICC Collection of Arbitral Award 1991-1995(Kluwer, 1997); ICC 9517 & ICC 9719 of 1999 16:2 ICC Arb. Bull 83.

[15] The New York Arbitration Convention of 1958: towards a uniform judicial interpretation (Boston: Kluwer Law and Taxation, 1981), p. 343.

[16] ICC 10758 (2000) J.D.I 1171, Para 17.

[17] "Joinder of Parties to Arbitral Proceedings: Two Contrasting Decisions", in Complex Arbitrations. Perspectives on their Procedural Implications, Special Supplement to the ICC International Court of Arbitration Bulletin, (Paris: ICC Publishing, 2003) p. 19.

[18] Société Sponsor A.B. v. Ferdinand Louis Lestrade C.A.Pau, 26 Nov. 1986, 1998 Rev. Arb. 153.

[19] "Non-Signatories in International Arbitration: An American Perspective", in Albert Jan van den Berg, International Arbitration 2006: Back to Basics? (Alphen aan den Rijn (The Netherlands): Kluwer Law International, 2007) p. 359.

[20] The Law of Corporate Groups (Boston: Little, Brown and Company, 1983), p. 67.

[21] Xerox Canada Ltd. v. MPI Technologies Inc., 2006 OJ ,4895 153 A.C.W.S. (3d) 1029, Para 51.

BBVA.[22] Finally, the Swiss Federal Court has recently "considerably relaxed its jurisprudence" on the topic.[23]

[2.2.A] *Vader and RES formed a 'Group of Companies'*

21. To determine whether Vader and RES are sufficiently integrated so as to form a group of companies, the Tribunal may consider the exercise of control by one company over another. The Tribunal will require the signatory and non-signatory to have established a tight group structure and strong organizational and financial link.

22. In *ICC Case no. 6000 of 1988,* the Tribunal assumed jurisdiction over the non-signatory affiliate of the signatory company after taking into consideration shareholding of companies.[24] It is to be considered that RES is a wholly-owned subsidiary of Vader.[25] A 'wholly-owned subsidiary' is a company which has the whole of its common stock owned by another company. This means that there are no individual shareholders and that the common stock is not publicly traded. Being RES' parent company Vader exercised control over its wholly owned subsidiary which can be established by the fact that Vader used to finance, monitor the compliance, and issue directives to RES.[26]

23. In the *ICC case no. 1434 of 1975* the Tribunal exercised jurisdiction over a non-signatory and held that "The subsidiaries were operating to carry out business under close control and following the instructions of parent company which made all the decisions commercial as well as financial either unilaterally or jointly".[27]

24. In the case before us, the fact that the Respondent were under the control of their parent company is an established fact.[28] The parent company stopped exercising control over the

[22] Hanotiau, *Supra Note* 13 at 352.
[23] *Ibid* at 351.
[24] (1991) 2(2) ICC Bull 31.
[25] *Moot Problem 2018*, Para 8.
[26] *Moot Problem 2018*, Para 27.
[27] ICC Case No. 1434 of 1975, ICC Arbitral Awards 1974-85 (Kluwer, 1990) 934.
[28] *Clarification*, Question 7.

subsidiary when Brexit affected Vader's operations in Europe. Which implies that there was sufficient control over the Respondent Company before that. Since there was an active link between both the entities, it can be said without much hesitation that there existed a close relationship between both the entities, in which the Vader had sufficient control over RES.

[2.2.B] *Vader was aware of the arbitration agreement and it played an active role in the contract.*

25. It is a well settled principle in arbitration regime that being actively involved in the negotiation of a contract allows for extension to a non-signatory.[29] For application of this doctrine it is required to be shown the role of non-signatory company in negotiations, performance or termination of contract containing arbitration clause. Having said that in some cases the tribunals have focused on the involvement of the non-signatory at the early stage of the contract and in particular at the stage of negotiations, as the most relevant factor to be taken into account for the non-signatory to be bound by the arbitration clause.[30]

26. It has to be noted that Vader was involved in the execution of contract. In February 2013, both the Seller and the Buyer contacted a business agent to set up a meeting with potential commercial partners. A Russian national, Ms. Zolushka Pupkina arranged for Mr. Chap who is the CEO of Vader and Ms. Lee to meet to discuss business.[31] During the course of their discussions, the CEOs found a mutual business opportunity and they came to an accord on most of the terms of their future venture and the CEOs concluded their discussions.[32]

[29] ICC Case No. 6519, *Supra Note* 14.
[30] Stavros Brekoulakis, Third Parties in International Commercial Arbitration (Oxford 2010), p. 161; ICC 7604 of 1995 and 7610 of 1995, *Supra Note* 14.
[31] *Moot Problem 2018*, Para 9.
[32] *Moot Problem 2018*, Para 10.

27. The CEOs also met at the "Privacy and Confidentiality in Arbitration" talk on 29 May 2013 at KLRCA. These preliminary discussions show very clearly that the CEO of Vader decided the terms of the whole of the contract and Arbitration Agreement in it.[33] It can be very clearly said the parent company Vader is was fully aware of the arbitration agreement, hence it can also be established that there was a common intention to arbitrate the matter.[34]

28. Due to the highly integrated relationship between Respondent and Vader, and active involvement of Vader in these negotiations of the contract the Tribunal may find that Vader implicitly consented to the Arbitration Agreement and exercised sufficient control over RES's affairs to bear liability for Claimant's loss.

[2.3] ALTERNATIVELY, DOCTRINE OF ESTOPPEL CAN BE USED BY THE TRIBUNAL TO BIND THIRD PARTY FOR THE ARBITRATION.

29. This theory has become one of the most used by arbitral tribunals when it comes to making a decision about the joinder of third non-signatory parties to arbitration proceedings.[35] It is based on the premise that a non-signatory may not claim the benefit of a contract and at the same time may avoid its burden, which would be the arbitration clause in this matter.[36] A party cannot seek and receive benefits of a contractual relationship while simultaneously

[33] *Moot Problem 2018*, Para 9.
[34] Stavros, *Supra Note* 30 at 162; ICC Partial Award Case No. 5894 (1991) 2(2) ICC Ct. Bulletin 25.
[35] Chitty on Contracts (Sweet & Maxwell, 2015, 32nd ed.) at Para 4-090; Bamforth Richard, Tymczyszyn Irina, Van Fleet, Alan and Correro, Mark, "Joining non-signatories to an arbitration: recent developments." The In-House Perspective 3, no. 3 (2007): p. 17-24 (Hereinafter Bamforth); Park, William, "Non-Signatories and International Contracts: An Arbitrator´s Dilemma." In Multiple Party Actions in International Arbitration, edited by Belinda Macmahon, Oxford University Press, 2009, 1-31; Hosking, J. "The Third Party Non-Signatory´s Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent." Pepperdine Dispute Resolution Law Journal 4, no. 3 (2004): 469-587; MacHarg, Jeffrey and Bates, Albert, "Non-Signatories and International Arbitration: Understanding the Paradox." Comparative Law Yearbook of International Business 29 (2007): 3-22; Sentner, James, "Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories." Business Law International 6, no. 1 (January 2005) p. 55-75.
[36] Boza, Rafael, "Caveat Arbiter: The U.S.-Peru Trade Promotion Agreement, Peruvian Arbitration Law, and the Extension of the Arbitration Agreement to Non-Signatories. Has Peru Gone Too Far?" Currents International Trade Law Journal 17 (2009): p. 73.

ignoring other contractual obligations that it finds inconvenient.[37] Estoppel prevents a party who knowingly accepted the benefits of a contract containing an arbitration agreement from avoiding the obligation to arbitrate contained in it.[38]

[2.3.A] *Vader cannot deny joining Arbitration as it has established RES for its own profits*

30. In the Mississippi Fleet Card, LLC v. Bilstat, Inc. case[39] and the Astra Oil case[40] the court noted that the objecting non-signatories sought the benefit of the underlying contract as third-party beneficiaries and were therefore estopped from avoiding arbitration under the contract. While applying this doctrine, the tribunals at many instances have noted the close commercial links of the non-signatory and the party to arbitration to establish commercial interests.[41] This according to the US court justifies the application of this doctrine.[42]

31. In brief, the essence of equitable estoppel is that a party may not take advantage out of rights and relationships created by a contract while it avoids at the same time fulfilling the obligations of that same contract because it finds them inconvenient.[43]

32. In the case before us, Vader's CEO, Mr. Auld Chap, saw the possibility of the UK leaving the EU and decided to prepare for the off chance of a Brexit. Vader decided to go into the Asian market and quickly established a subsidiary in Cambodia to carry out its Asian business.[44]

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[37] MacHarg, Jeffrey and Bates, Albert. "Non-Signatories and International Arbitration: Understanding the Paradox." Comparative Law Yearbook of International Business 29 (2007), p. 19.
[38] Bamforth, *Supra Note* 35 at 18; Sentner, *Supra Note* 35 at 58.
[39] 175 F. Supp. 2d 894 (S.D. Miss. 2001).
[40] Sentner, *Supra Note* 35 at 58.
[41] Astra Oil v. Rover Navigation, 344 F 3d 276 (2d Cir 2004).
[42] Smith/Enron Congeneration v. Smith Congeneration Int'l 198 F 3d 88 (2d Cir 1999).
[43] Clint Corrie, Challenges in International Arbitration for Non-Signatories, in Comparative Law Yearbook Of Int'l Bus. 29, 59 (2007).
[44] *Moot Problem 2018*, Para 6.

33. This clearly shows that RES was established for the purpose of making profits in the Asian market. The fact that Vader was involved in negotiations of the contract entered into by RES and CL and decided the terms of the contract by discussing future business opportunities by using RES clearly establishes that Vader had direct beneficial interest in the contract.[45] Applying the doctrine of estoppel Vader cannot avoid the arbitration as it cannot reap the benefits and avoid the arbitration at the same time.

[3.] THERE WAS A VALID ACCEPTANCE OF THE OFFER

34. It is humbly submitted that UNIDROIT Principles of International Commercial Contracts allow for the applicability of Principle of Informality applying which it may be held that the nod of the head by Mr. Deewarvala was a valid acceptance of the offer of Mr. Parades which was very specific. Further, even if the nod of the head was not a sufficient indication of the acceptance of Mr. Deewarvala the conduct of the parties, prior and subsequent shall be considered to determine the presence of common intents. Also, to determine the intents of the parties, standard of reasonableness may be applied. Applying the principles in entirety confirm the valid acceptance on the part of Mr. Deewarvala.

[3.1] THE PRINCIPLE OF INFORMALITY MAY BE APPLICABLE HERE

35. Art. 1.2, UNIDROIT Principles of International Commercial Contracts (hereinafter PICC) affirms the validity of the principle of freedom from form or 'principle of informality' and establishes that no contract, statement, or other act made under PICC requires particular formality in order to be valid and enforceable. It is sufficient if such are made orally or by mere conduct.[46]

[45] *Moot Problem 2018*, Para 10.
[46] Stefan Vogenauer, Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), Oxford University Press (2nd Ed., 159), (Hereinafter, Vogenauer).

36. Further, it is frequent at a later stage in the contractual relationship that parties may modify or terminate their original contract informally and there may not be a record of their dealings available for evidentiary purposes. It is in such circumstances that Art. 1.2 of PICC may be applicable.[47]

37. Practices which the parties have established between themselves or in the 'course of dealing' may be drawn upon for the purposes of interpretation.[48] Art 4.3(b), PICC deals with practices prior to the conclusion of the contract. The provision is particularly important in long-term contractual relationships, be it one contract of long duration or a series of similar or related contracts over a period of time.[49]

38. In the present case the initial contract was written and formally accepted by the parties[50] and subsequent agreements were informal in nature[51] which were honored by both the parties and held to be legally binding on them. This conduct of the parties to informally enter into negotiations and subsequently into agreements after the initial formal contract is valid under the PICC and hence, the same command legitimacy. This is further evident in the conduct of the both the parties who have acknowledged the agreements, despite their informal nature, to be legally binding on them.

39. Therefore, it is humbly submitted that the negotiation in question through the Skype call[52] and the acceptance of the Respondent's offer by a nod on the part of the Claimant[53] is similar to the previous instances of informal agreement and hence, on similar paradigm is a valid act and thus, is enforceable.

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[47] *Ibid*, p. 161, Para 6; Off. Cmt. 1 to Art. 1.2, UNIDROIT PICC, (Hereinafter, Off. Cmt.) p. 9.
[48] Calzados Magnanni v. Shoes General International, France 21 October 1999 Cour d'appel [Appellate Court] Grenoble, http://cisgw3.law.pace.edu/cases/991021f1.html.
[49] Vogenauer, *Supra Note* 46, p. 590, Para 8
[50] *Moot Problem 2018*, Para 13.
[51] *Moot Problem 2018*, Para 21, 22, 24.
[52] *Moot Problem 2018*, Para 30.
[53] *Moot Problem 2018*, Para 35.

[3.2] THE NOD OF THE HEAD WAS A VALID INDICATION OF ACCEPTANCE

40. Art. 2.1.6, PICC defines acceptance and provides that the acceptance must contain an 'indication to assent' to an offer. No other specification is contained in the article. Assuming that the offer is sufficiently specific, the offer may be accepted at the broadest level of generality. In face-to-face communications, words may be unnecessary: acceptance may be indicated by a nod of the head, shaking of hands, taking tea, or handing-over of hard currency.[54] In the absence of an express stipulation, the acceptance need not be made in the same form, or by the same means of communication, as the offer.[55]

41. Further, Art 4.2, PICC deals with interpretation of statements and other conduct of the parties. Other conduct, as inscribed in the article, include active behavior, such as a motion of the head or raising a hand, as well as passive conduct, such as silence or simple acceptance of delivery.[56]

42. It is accepted that meaning given to particular expressions can vary between different parts of the world. It is admitted that the parties to a contract usually have different native languages and further, that even if they come from places where the same language is spoken, they do not necessarily share same linguistic assumption. Adopting the principle established in Art 9(3) of ULIS, PICC rejects the rule of preference and clarifies that 'preference is to be given to the intention common to the parties.'[57] Therefore, divergence between different local meanings must be resolved according to the circumstances of the case.[58]

[54] Vogenauer, *Supra Note* 46, p. 286, Para 2.
[55] Vogenauer, *Supra Note* 46, p. 287, Para 7.
[56] Vogenauer, *Supra Note* 46, p. 583, Para 2.
[57] Off. Cmt. 1 to Art 4.1, p. 137.
[58] Vogenauer, *Supra Note* 46, p. 593, Para 16.

43. Hence, it is humbly submitted here that the nod of the head on the part of the Claimant[59] which indicated his acceptance of the offer of the Respondent[60] was a sufficient indication of the Claimant's assent to the offer of the Respondent which was expressly specific.[61]

[3.3] THE CONDUCT OF THE PARTIES WAS A SUFFICIENT INDICATION OF ACCEPTANCE OF THE OFFER

44. It is humbly submitted that even if the head nod on the part of the Claimant[62] was not a comprehensible indication of acceptance on the part of Respondent[63], the conduct of the Parties both precedent and subsequent to the negotiations of the terms of the contract on 23rd November 2016[64] was sufficiently indicative of the acceptance of the offer.

[3.3.A] *The preliminary negotiations may be considered to establish the presence of acceptance*

45. It is usually accepted that in long-term, multipartite, or otherwise complex deals, contract formation arises during the 'closing' of negotiations. Agreement is typically reached by the parties after extensive face-to-face negotiations and drafting sessions including a final 'execution in counterpart' or 'virtual closing'.[65] The overall agreement of the parties on the shared terms may be obvious from the 'closing', and may therefore be enforced under Art. 2.1.1, PICC.[66]

46. Art 4.3(a), PICC expressly states that the preliminary negotiations are amongst the circumstances to be taken into account in interpreting a contract. Oral evidence of the

[59] *Moot Problem 2018*, Para 35.
[60] *Moot Problem 2018*, Para 37.
[61] *Moot Problem 2018*, Para 34.
[62] *Moot Problem 2018*, Para 35.
[63] *Moot Problem 2018*, Para 36.
[64] *Moot Problem 2018*, Para 30.
[65] EA Farnsworth, Farnsworth on Contracts (3rd ed., 2004) Para 3.5; Vogenauer, *Supra Note* 47 p. 264, Para 7.
[66] Off. Cmt. 1 to Art. 2.1.1, p. 34.

negotiations is also admissible. The provision therefore implicitly rejects the notion that recourse to preliminary negotiations may be excluded from the interpretation of contracts.[67]

47. In the case in consideration, both the parties entered into round of discussion since July 2016 and lasted for 4 (four) months[68] during which time the first three deliveries of 2016 (in March 2016, June 2016 and September 2016) were successfully completed according to the agreement of the Representatives in November 2015.[69]

48. Further, it has been held that request for information in response or clarification to an offer is not necessarily a rejection or a counter-offer. Some latitude has been permitted by the courts in enquiring about the terms of the offer and the extent to which they are negotiable and hence, the offeree may request the offeror for further information including as to the essential terms of the bargain.[70]

49. Therefore, it is humbly submitted that the clarification asked by Mr. Deewarvala over the terms of the offer laid down by Mr. Paredes[71] does not amount to rejection of the offer and hence, the same may not conclusively proof the absence of acceptance.

[3.3.B] *The conduct of the Claimant subsequent to the conclusion of contract may be considered as sufficient indication of assent*

50. Art. 2.1.1, PICC provides that a conduct is sufficient to show agreement when it is impossible to prove any agreement based on statements made during negotiations, but the parties otherwise act as if a contract has been concluded.[72]

51. Under Art 4.3(c), PICC, the conduct of the parties subsequent to the conclusion of the contract is also a relevant circumstance in the interpretation of the agreement.[73] Hence,

[67] Vogenauer, *Supra Note* 46, p. 588, Para 5.
[68] *Moot Problem 2018*, Para 28.
[69] *Moot Problem 2018*, Para 29.
[70] Jaques & Co. v. McLean, (1880) 5 QBD 346.
[71] *Moot Problem 2018*, Para 34.
[72] Vogenauer, *Supra Note* 46, p. 264, Para 8; Off. Cmt. 2 to Art. 2.1.1, p. 34.
[73] Vogenauer, *Supra Note* 46, p. 590, Para 9.

where the offer for supply of goods is on the basis of certain General Conditions and there after an order is placed requesting the dispatch of the same, it was held to be an acceptance of the General Conditions.[74] Further, holding on to seller's confirmation of the order and continuously requesting the seller to affect an expeditious delivery was also considered to be a sufficient indication of assent.[75]

52. In the present case, the Buyer contacted the Seller in mid-March of 2017 to confirm the date of next delivery.[76] It is also submitted that prior to this incident, neither of the parties had a reason to revisit the negotiations and further, the last delivery of 2016 was carried out without any mishap.[77]

53. Therefore, the confirmation of delivery asked upon by the Claimant in mid-March of 2017[78] may be considered as act sufficient enough to prove the presence of acceptance on the part of the Claimant as since, there was no reason for the Parties to contact each other subsequent to the negotiation in question, the sole act of the Claimant to contact the Respondent for confirmation of the date of delivery can be taken in its entirety to indicate the presence of acceptance on the part of the Claimant.

[3.3.C] *The presence of common intent is adequately evident in the conduct of the parties*

54. Under Art 4.1(1), PICC the interpretation of a contract must be determined according to the common intention of the parties. Common Intention envisaged herein is the state of mind of the parties at the time of the conclusion of the contract. It is amply emphasized that

[74] Golden Valley Grape Juice and Wine LLC v. Centrisys Corp, 21 January 2010 (ED Cal), Unilex no 1510.
[75]Germany 6 April 2000 District Court München (Furniture case), <http://cisgw3.law.pace.edu/cases/000406g1.html>.
[76] *Moot Problem 2018*, Para 43.
[77] *Moot Problem 2018*, Para 42.
[78] *Moot Problem 2018*, Para 43.

the intention has to be 'common', i.e. both the parties must have shared the same intention at the time of making the contract.[79]

55. Whether there is a binding contract between the parties and, if so, upon what terms depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.[80]

56. Under Art 4.2 and 4.3 of PICC statements made by either party are to be interpreted according to the intention of the party making the statement, providing the other party knew, or could not reasonably have been unaware, of that intention.[81]

57. It has been principally opined by Lord Denning that it is a mistake to analyse every contract in the form of offer and acceptance. It is a necessity to look at the correspondence as a whole as well as the conduct of the parties and subsequently analyse whether the parties have reached an agreement on all material terms.[82]

58. To establish that the parties had a common intention, regard must be had to all the relevant circumstances of the case.[83]

59. In the present case, it is significant to note that the presence of common intent on the part of both the parties is amply evident. In the meeting between the Representatives of both the Parties in Paris in November 2014, Mr. Deewarvala had made it abundantly clear that the operation with the Seller is very important to their company and they intend to extend the number of deliveries.[84] On the other hand, despite the knowledge of better and more-

[79] Off. Cmt. 1 to Art. 4.1, p. 137.
[80] RTS Flexible Systems Ltd v. Molkerei Alois Müller Gmbh 2010] UKSC 14, [2010] 1 WLR 753, Para 45.
[81] Vogenauer, *Supra Note* 46 p. 287, Para 5.
[82] Gibson v. Manchester City Council, [1978] 1 WLR 520; Port Sudan Cotton Co v. Chettiar, [1977] Lloyd's Rep 5; Butler Machine Tool Co Ltd v. Ex-Cell-O Corp, [1979] 1 WLR 401, p. 404.
[83] Off. Cmt. 3 to Art. 4.1, p. 138; Off. Cmt. 1 to Art 4.3, p. 140.
[84] *Moot Problem 2018*, Para 20.

profitable business opportunities, the Respondent chose to rely on the strength of its relationship with the Claimant to continue generating a steady income.[85]

60. Further, it is submitted that the Respondent was very well aware of the intent of the Claimant to extend the contract, a knowledge upon which Mr. Paredes demanded to increase the price substantially before committing to further deliveries.[86]

61. Therefore, there was a presence of common intent on the part of the Parties which is amply evident. Further, it is reiterated that the Respondent knew of the willingness of the Claimant to enter into contractual relationship with the Respondent for further deliveries and hence, the same cannot be subjected to the defense of misinterpretation of the mode of acceptance by the Respondent.

[3.4] IN CASE OF UNAWARENESS OF THE INTENTION OF THE CLAIMANT BY THE RESPONDENT, STANDARD OF REASONABLENESS MAY BE APPLIED

62. If the addressee of the statement or other conduct did not know or could have been unaware of the intention of the party making the statement or engaging in the conduct, the meaning of the statement or the conduct must be determined with reference to a standard of reasonableness. It refers to 'reasonable persons of the same kind as the other party… in the same circumstances'.[87]

63. The approach to the issue of contract formation is 'objective', and hence does not take account of the subjective expectations and unexpressed mental reservations of the parties. The relevant yardstick here is the reasonable expectations of sensible businessmen.[88]

[85] *Moot Problem 2018*, Para 25.
[86] *Moot Problem 2018*, Para 32.
[87] Vogenauer, *Supra Note* 47, p. 585, Para 6.
[88] G Percy Trentham Ltd v. Archital Luxfer Ltd, [1993] 1 Lloyd's Rep 25.

64. Also, in order to establish the understanding of a reasonable person of the same kind as the other party, regard must be had to all circumstances of the case.[89]

65. Emphasis needs to be not on the meaning of 'reasonable' as such but rather on what reasonable professionals in the relevant sector with similar vocation and general business experience as the parties would reasonably interpret the contract.[90]

66. Hence, even if it is argued on the part of Respondent that there was unawareness on their part of the intention of the Claimant, the test of reasonableness may be applicable. Therefore, the case in its entirety needs to be scrutinized from the perspective of a reasonable person.

67. It is humbly pleaded that considering the explanation by the Claimant to the Respondent enunciating the importance of the operation with the Seller to their company and their eagerness to increase the number of deliveries[91] is a fact substantial enough to establish the intent of the Claimant to accept the Contract.

68. In relation to the same intent, it is further necessary to notice that the Claimant had proposed the First Incentive to pay a 15% price increase if the Seller committed to perform four more deliveries during 2015[92] and subsequently maintained the same incentive and added a Second Incentive of a bonus to the Seller after four compliant and timely new deliveries.[93]Therefore, considering the perspective of a reasonable person, it could be well established that the acceptance on the part of the Claimant cannot be questioned.

[89] Off. Cmt. 2 to Art 4.2, p. 139; Off. Cmt. 1 to Art 4.3, p. 140.
[90] Off. Cmt. 1 to Art 4.1, p. 137.
[91] *Moot Problem 2018*, Para 20.
[92] *Moot Problem 2018*, Para 21.
[93] *Moot Problem 2018*, Para 31.

[4] THE TRIBUNAL MAY GRANT RELIEF IN THE FAVOR OF THE CLAIMANT

69. It is humbly submitted that in the light of previous arguments it may be held that the contract was existing and enforceable and being so the Respondent may be ordered to render performance of the first two deliveries of 2017. Further, the Tribunal may set the terms of the contract in writing. Further, it is requested that the Tribunal may grant Security for Claims to the Claimant.

[4.1] THE CONTRACT IS EXISTENT AND ENFORCEABLE

70. It is humbly pleaded that there was a valid Contract and the same may be enforced by the Tribunal. The contract in question fulfills all the requirement to be valid as expounded here.

71. Art. 2.1.2, PICC defines Offer as 'A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in the case of acceptance'. It is humbly submitted that the Offer was definite and sufficiently indicated the intention of the Respondent.

72. It is humbly submitted that sufficient definiteness is merely accessory to the parties' intention to be bound and the intention may be sought only when indefiniteness reaches 'the point where construction becomes impossible'.[94]

73. It is further established that the even essential terms, may be left undetermined in the offer without making it insufficiently definite. Further, indefiniteness may be overcome by reference to practices established between the parties.[95]

74. In the present case, the offer on the part of the Respondent is sufficiently definite in the sense that it was definite on all material or essential terms- the quantity, quality, consideration, time and frequency of delivery and that of payment. The offer in

[94] Vogenauer, *Supra Note* 46, p. 266, Para 2.
[95] Off. Cmt. 2 to Art 2.1.2, p. 36.

consideration[96] is for the extension of the number of deliveries in accordance to the terms of the initial contract agreed upon between both the Parties[97].

75. The said initial contract specified all the essential terms that were agreed upon by the parties as enumerated above and the offer in question, by extension, also specified all these terms sufficiently. Hence, it could be validly propounded that the offer in consideration was definite enough and consequently, the intention of the offeror to enter into a binding legal relationship is amply evident.

76. It has also been amply established earlier that there was sufficient indication on the part of the Claimant as to the acceptance of the offer. The intent of the Parties to enter into a legal relationship need to be taken into consideration and as has been propounded earlier such intention on the part of both the Parties is evident. Summarily, it could be established that there was a valid acceptance of the offer of the Respondent by the Claimant.

[4.2] THE RESPONDENT MAY BE ORDERED TO RENDER PERFORMANCE OF THE FIRST TWO DELIVERIES OF 2017

77. Art 7.2.2, PICC confers the right on an aggrieved party to the performance of non-monetary obligations. The right to performance stems directly from the principle of *pacta sunt servanda*. It is submitted that it is considered very important that the contract stay alive as long as possible and that the parties just perform upon their promises.[98]

78. Further, Art 7.2.4, PICC reinforces the right of specific performance by providing a strong enforcement mechanism: the aggrieved party can apply for a court order and the court even has the discretion to impose a judicial penalty if the non-performing party fails to comply.[99]

[96] *Moot Problem 2018*, Para 34.
[97] *Moot Problem 2018*, Para 15.
[98] Vogenauer, *Supra Note* 46, p. 888, Para 3.
[99] *Ibid.*

79. Hence, invoking the remedy enshrined in PICC under the above mentioned articles, the Claimant humbly pleads that the Respondent may be ordered to fulfill the first two deliveries of 2017 which were due in March and June 2017. Further, the Tribunal may also, in its discretion, impose judicial penalty on the Respondent in case of non-performance by the Respondent of such order.

[4.3] THE TERMS OF THE CONTRACT MAY BE SET IN WRITING

80. The Claimant finally submits to the Tribunal that the terms of the Contract may be set in writing. It is humbly pleaded that though the earlier contention substantially proved the validity of the Contract even if the same is informal in nature, considering the current situation of misinterpretation of acceptance of the Claimant by the Respondent, the Claimant presents its apprehension of similar situation occurring in future transactions and hence, believes that it is dire necessity at the instance to formalize the terms of the contract in question in writing.

[4.4] THE TRIBUNAL MAY GRANT SECURITY FOR CLAIMS

81. Born defined provisional measures "…awards or orders issued for the purpose of protecting one or both parties to a dispute from damage during arbitral process" [100] The "security for costs" order make the right of a Claimant or counter-Claimant to proceed on the claim, conditional on the raising of a bank guarantee or other forms of surety to guarantee, in the

[100] Gary B. Born, International Arbitration Case And Materials, 2nd ed., Kluwer Law International, 2015, p. 816; Bank Mellat v. Helliniki Techniki S.A. [1984] Q.B. 291, S.A. Coppee Lavalin N.V. v. Ken-Ren Chemicals and Fertilizers [1994] 2 W.L.R. 631; Stephen R. Bond, The Nature of Conservatory and Provisional Measures, in Conservatory and Provisional Measures in International Arbitration 8, 11 (ICC Int'l Court of Arbitration ed., 1993). But cf. Gerhard Walter et al., Internationale Schiedsgerichtsbarkeit In Der Schweiz 135 (1991); Claude Reymond, 'Security for Costs in International Arbitration', (1994) 110 L.Q. REV. 501.

case of an unsuccessful claim, any eventual award of legal fees assessed against the Claimant or counter-Claimant by the Arbitral Tribunal.[101]

[4.4.A] *Tribunal has the power to grant Security for claims.*

82. Pursuant to Rule 8 of KLRCA 2017 which refers to Article 26 of the UNCITRAL Arbitration Rules for grant of interim measures, says that "it is a temporary order from the Tribunal which would be granted prior to the issuance of the final award to, in the present proceedings, prevent any action that could cause imminent harm to the Claimant, and to provide the means of preserving assets out of which a subsequent arbitral award may be satisfied…" Here, the Tribunal is granted wide discretion on the allocation of interim measures.[102] An order for security for Costs/Claims is an interim/provisional measure, thus therefore within the power of the Tribunal to grant and does not require express agreement or provision in the Terms of Reference to further expound this power.[103]

[4.4.B] *Requirements for Security for Costs have been satisfied*

83. UNCITRAL Arbitration Rules lay down two preconditions which have to be satisfied for claiming interim measures. Firstly Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and secondly, there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

[101] Jan Paulsson et al., International Chamber of Commerce Arbitration 467, Para 26.05 (3rd ed., 1999); see also Greg Reid, Security for Costs in International Arbitrations: Forget It?, New Law Journal, September 27, 2002 (Arbitration and ADR supplement) at 1426; Pierre A. Karrer & Marcus Desax, Security for Costs in International Arbitration: Why, When, and What If …, in Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel 339–40 (R. Briner et al. eds., 2001).

[102] Aaron Broches, Commentary on UNCITRAL Model Law on International Commercial Arbitration, (Kluwer Law and Taxation 1990).

[103] Noah Rubins, 'In God we trust, all others pay cash: Security for Costs in International Commercial Arbitration', (2000) 11 Am. Rev. Int'l Arb., p. 315.

84. The same requirements are settled in the international arbitration practice, also with specific reference to the power of granting Security for Costs.[104] In the following, Claimant submits that both requirements are satisfied in the present case.

[4.4.B.I] *Claimant is likely to succeed on the merits*

85. It has been already established that impecuniosity is not a reason for rendering an Arbitration Agreement inoperable hence the plea of the Respondent to render it inoperable is most likely to be dismissed by the Tribunal.

86. It has also been established by the Claimant that there was a valid contract as per the UNIDROIT principles and the obligations were not performed by the Respondent which caused loss to the Claimant.

87. As all the essentials of contract have been fulfilled by the Claimant, the Tribunal is most likely to award damages to the Claimant for non-performance of the same by the Respondent and hence Claimant is likely to succeed on merits.

[4.4.B.II] *Claimant is likely to suffer an irreparable harm if the measure is not granted*

88. The purpose of posting security is to guard against the possibility that Respondent cannot or will not pay an order of costs in favor of Claimant.[105]

89. The fact that the third parties did not agree to fund the Respondent is a strong indication towards their inability to pay the damages to the Claimant.[106] An ICC Tribunal granted a security for costs request against a Claimant that had entered into a funding agreement, on

[104] CIArb Guideline–Security for Costs, p. 3; CIArb Guideline–Interim Measures, pp. 5-7.
[105] Rawding, N. (1997), Costs, Fees, and Security for Costs in International Arbitrations. International Trade Law & Regulation, 3(3), 70-75, p.71; Stephen Colbran, 'Security for Costs Proceedings in England, New Zealand and Australia', (1993) Arb. Int'l 9(1) 85.
[106] *Moot Problem 2018*, Para 61.

the basis that, inter alia, the funding agreement did not cover adverse costs and allowed the funder to "terminate the Agreement at any time, entirely at its discretion".[107] Another fact which speaks in favour of Claimant is the inability of the Respondent to pay the non-specific advance deposit.[108] These facts are enough to suggest the fact that there exists "exceptional circumstances" for granting Security for costs. There is an apprehension of enforcement of the award hence there is necessity of the measure to protect a certain right, and urgency which leaves no room for waiting until the final award.[109]

90. Since Respondent's financial difficulties endanger the enforceability of the cost award, the Tribunal may order Respondent to grant security for costs.

[107] X v. Y and Z, ICC Case, Procedural Order of 3 August 2012.
[108] *Moot Problem 2018*, Para 48.
[109] RSM Production Corporation v. Saint Lucia ICSID Case No. ARB/12/10.

PRAYER FOR RELIEF

In the light of the facts stated, issues raised, authorities cited and arguments advanced the Counsels for the Claimant respectfully requests the Tribunal to hold that:

1. The agreement to arbitrate is capable of being performed;
2. The request of the Claimant to join Vader as a party to the Arbitration may be granted by the Tribunal;
3. There is a valid acceptance of the offer;
4. The Contract was existent and enforceable;
5. The Respondent is responsible for performance (the first two deliveries of 2017);
6. The terms of the Contract may be set in writing.
7. Security for Costs shall be granted to the Claimant.

All of which is respectfully affirmed and submitted.