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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 RESPONDENT

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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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STATEMENT OF JURISDICTION

Robustesse Espacial Solucion Corp 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 the Tribunal:

1. Is the agreement to arbitrate incapable of being performed due to impecuniosity of the Respondent?
2. Should 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 Claimant's offer?
4. What relief should 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' proposal.

-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 INCAPABLE OF BEING PERFORMED

The agreement to arbitrate has become incapable of being performed as the Respondent is impecunious and hence, does not have funds to put forth the counter claims. Further, continuing with the arbitration would amount to denial of justice to the Respondent. The Principles of Natural Justice apply to the Arbitration too, and the tribunal may not continue with arbitration without giving a chance to the Respondent to present its counter claims.

2. THAT THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION SHOULD BE DENIED BY THE TRIBUNAL

Vader cannot be made party to the arbitration as though being the parent company of the Respondent; it is itself not in the position to support RES. Further, Rule 9 of KLCRA cannot be made applicable here as all the essentials are not fulfilled. Further, the theories of Group of Companies and of Estoppel are not applicable here and the same cannot be used to make Vader a party to the arbitration.

3. THAT THERE WAS NO VALID ACCEPTANCE TO THE OFFER

Firstly, the offer of the Respondent was valid as it was sufficiently definite and it sufficiently indicated the intention of the offeror to be bound upon acceptance. *Secondly*, the nod of the head was not a sufficient indication of Acceptance as it was insufficient to establish the common intention of the Claimant. Thirdly, the Respondent may take the defence of Mistake and is justified in avoiding the Contract.

4. THAT THE TRIBUNAL MAY GRANT RELIEF IN THE FAVOR OF THE RESPONDENT

The Respondent is justified to put forth counter claims against the Claimant. The Claimant may be obligated for payment of Second Incentive of 35% for the years 2016, 2017 and 2018. Further, the Tribunal may direct the Claimant for payment of consideration for the deliveries scheduled for 2017 and 2018. Finally, the Request for Security for Costs, if such a request is made by the Claimant, shall be denied by the Tribunal.

PLEADINGS

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

1. It is humbly submitted before this tribunal that the agreement to arbitrate has become incapable of being performed as the Respondent does not have funds to put forth the counter claims. Even though the Claimant wants the proceedings to take place, the same cannot happen due to this obstacle. It is also submitted that continuing with the arbitration would amount to denial of justice to the Respondent.

[1.1] IMPECUNIOSITY OF RESPONDENT RENDERS THE AGREEMENT INCAPABLE OF BEING PERFORMED

2. "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.[1] Arbitration agreements are considered to be "incapable of being performed" where the arbitration cannot effectively be set in motion.[2]

3. There have been many instances where an Arbitration Agreement is rendered incapable of being performed for the reason of impecuniosity.[3] The German Federal Court of Justice *("Bundesgerichtshof")* ruled that the impecuniosity of a party may render the Arbitration Agreement "*inoperative or incapable of being performed*", thus allowing the impecunious party to validly commence proceedings before state courts.[4]

[1] M. Mustill & S. Boyd, Commercial Arbitration 2nd ed. 1989, p. 465.
[2] Stefan Kroll in ch. 11 of E. Gaillard & D. Di Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards, (2008), p. 326.
[3] *Ibid* at p. 346.
[4]Bundesgerichtshof, 14 Sept 2000, III ZR 33/00 – Case 404, available in <https://www.uncitral.org/clout/clout/data/deu/clout_case_404leg-1628.html.> (Last accessed, 06.09.18); Georg von Segesser, Inoperability of Arbitration Agreements due to Lack of Funds? Revisiting Legal Aid in International Arbitration,

4. In the case before us, it has to be considered that both the parties are willing to arbitrate the matter, but due the Respondent's impecuniosity, the arbitration cannot proceed.[5] It is an accepted fact that Respondent's financial condition is very weak and even third parties have refused to fund the Respondent. In such a situation the Respondent cannot place the counter claims before this Tribunal and hence, even if the Respondent wants this arbitration to go on, impecuniosity does not allow the Respondent to go forth with this arbitration. Hence, the Arbitration Agreement becomes incapable of being performed.[6]

[1.2] CONTINUING WITH THIS ARBITRATION WOULD AMOUNT TO DENIAL OF JUSTICE TO THE RESPONDENT

5. The Swiss Federal Tribunal acknowledged the impecunious parties' right to free themselves of an Arbitration Agreement they have entered into for good cause. This is to ensure that they can exercise their right of access to justice as guaranteed particularly under Article 6(1) of the European Convention on Human Rights.[7]

6. A party cannot put forth the counter claims as it does not have sufficient funds.[8] RES started as an offshore company, had been operating with no profits since its incorporation.[9] Also, Vader stopped having any financial links with RES[10] after a certain period which corroborates to the fact that Respondent does not have funds to bring counter claims.[11] Any

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 09.09.2018).

[5] *Moot Problem 2018*, Para 59.

[6] *Moot Problem 2018*, Para 57; Clarifications, Question 11.

[7] Swiss Federal Tribunal ("DFT") of 11 June 2014, 4A_178/2014; Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, N 1043; Kaufmann-Kohler/Rigozzi, Arbitrage International, 2nd ed. 2010, N 280; Dasser, Oberhammer et al. (eds), Kurzkommentar ZPO, 2nd ed. 2013, Article 380 N 3.

[8] Xavier Boucobza & Yves-Marie Serinet, Les principes du procès équitable dans l'arbitrage international, 1 JDI 41, 27 (2012).

[9] *Moot Problem 2018*, Para 26.

[10] *Moot Problem 2018*, Para 19.

[11] Imran Benson, In search of justice, 162 N.L.J. (7519) 839 (2012).

decision by the tribunal without giving due consideration to the meritorious counterclaims would lead to denial of justice.[12]

7. Arbitration is underpinned by natural justice. Article 18 of the Model Law, enshrining the right of the parties to be treated with equality, and given a full opportunity to present their case, was described by UNCITRAL in 1985 as the "Magna Carta of Arbitral Procedure".[13]

8. It is also submitted that Article 38 of the Constitution of Kingdom of Cambodia,[14] provides for fair trial and Continuing with the Arbitration without considering the counterclaims of the Respondent due to lack of funds would violate the principle of Fair trial guaranteed under the laws.

9. The public policy provision set out in Article V(2)(b) of the New York Convention acknowledges the right of a state and its courts to exercise ultimate control over the arbitral process. Accordingly, a Cambodian court would likely refuse to recognize an award rendered in violation of Cambodian law for the underlying violation of public policy.[15] Enforcement of the award would violate Cambodia's basic notion of justice and introduce an element of illegitimacy into the proceedings.[16] Hence it is submitted that, the Tribunal shall decline jurisdiction on the ground that the agreement is incapable of being performed.

[12] Caroline Duclercq, Third Party Funding: vers un arbitrage pour tous? LE CERCLE LES ECHOS, Jan. 9, 2013,http://lecercle.lesechos.fr/entreprises-marches/services/autres/221162629/third-party-funding-vers-arbitrage. (Last accessed 06.07.018).

[13] Art. 18, UNCITRAL Model Law, 2010; Art. 17, UNCITRAL Arbitration Rules, 2013; IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC [2011] VSCA 248, Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd [2012] FCA 1214; The British Colombia Supreme Court 0927613 BC Ltd v. 0941187 BC Ltd, 2014 BCJ No 2659.

[14] Art. 38, Constitution of Kingdom of Cambodia, 1947.

[15] Hilmarton v. Omnium de Traitementet de Valorisation (OTV) XXII YBCA 696 (1997).

[16] Parson and Whittemore Overseas Co. Inc. v. Société Generale de l'industrie du papier (RAKIA) 508 F 2d 969 924 (2d cir, 1974).

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

10. Vader, which is the parent company of the Respondent, cannot be made a party to this arbitration. It is submitted that Vader itself is not in position to support RES. Rule 9 of the KLCRA cannot be applied as the essentials for making it applicable are not fulfilled. The Respondent acknowledge the fact the Arbitral Tribunals have evolved some theories to make a third entity, party to the arbitration. However, in the case before us the most prominent theories namely Group of Companies theory and theory of Estoppel do not have application.

[2.1] RULE 9 OF KUALA LAMPUR REGIONAL CENTRE OF ARBITRATION RULES, 2017 IS INAPPLICABLE

11. Rule 9 of the KLRCA Rules 2017 says that "*Any party to an arbitration or any third party may request one or more Additional Parties to be joined as a party to the arbitration, provided that all parties to the arbitration and the Additional Party give their consent in writing to the joinder, or provided that such Additional Party is prima facie bound by the arbitration agreement. The Request for Joinder will be determined by the arbitral tribunal or, prior to the constitution of the arbitral tribunal, by the Director*."

12. It is humbly submitted that the discretion to grant joinder vests with the Arbitral Tribunal. The consent of all the parties including the additional party is *sine qua non* for making this rule applicable.[17] In the case before us, there is willingness only on the part of the Claimant. The Respondent has denied for such a joinder and hence Rule 9 cannot be made applicable.

[17] Rule 9, Kaula Lampur Regional Centre for Arbitration Rules, 2017.

[2.2] THE GROUP OF COMPANIES DOCTRINE TO BIND VADER TO THE ARBITRATION AGREEMENT AND TO COMPLETE THE OBLIGATIONS IS NOT APPLICABLE

13. It is acknowledged on the behalf of Respondent that, there are certain doctrines which can be made applicable in order to make a non-signatory party to the arbitration. The doctrine which is primarily used by the Arbitral Tribunal is "Group of Companies" theory.

14. Under this principle non-signatories of a contract may be deemed parties to the associated arbitration clause based on the factors which are often roughly comparable to those relevant to alter-ego analysis.[18]

15. In particular, where a company is part of a corporate group subject to the control of corporate affiliate that has executed a contract and is involved in the negotiations, performance or termination of the contract then it may be subjected to the arbitration clause in it.[19]

[2.2.A] *Vader and RES did not form group of companies*

16. To form a group of companies it is not enough for the signatory and non-signatory to merely be part of the same corporate group. The tribunals will require the signatory and non-signatory to have established a tight group structure and strong organizational and financial links.[20]

17. It has also been settled by the tribunals that this doctrine does not have application merely by referring to the percentage of ownership. In ICC Case No. 7155 of 1993 the Tribunal

[18] Gary Born, International Commercial Arbitration, Vol. I, 2nd Edition, Alphen aan den Rijn 2009, p. 1167, (Hereinafter, Born).

[19] J.-M. Ahrens, Die subjektive Reichweite internationaler Schiedsvereinbarungen und ihre Erstreckung in der Unternehmensgruppe 128 et seq. (2001); Derains, Lextension de la clause d arbitrage aux non-signataires — La doctrine des groupes de societes, (ASA Special Series No. 8 1994) p. 241; Gaffney, The Group of Companies Doctrine and the Law Applicable to the Arbitration, 19(6) Mealey's Int'l At. International Commercial Arbitration (1999) PP 11500-506; Jarvin, The Group of Companies Doctrine, in The Arbitration Agreement — Its Multifold Critical Aspects, (ASA Special Series No. 8 1994) p. 181; Leadley & Williams, Peterson Farms: There Is No Group of Companies Doctrine in English Law, 2004 Intl Arb. L. Rev., p. 111.

[20] T, Hadden, The Control of Corporate Gropus (Institute of Advanced Legal Studies, University of London, 1983) 2.

refused to extend the arbitration clause to the non-signatory subsidiary company, although the signatory parent company owned 90.99 per cent of the subsidiary.[21]

18. Tribunals have found that a parent company controls a subsidiary when certain actions or decisions of parent company have significantly affected financial and legal position of the subsidiary.[22]

[2.2.B] *Vader was not involved in Negotiations, Performance and Termination of the contract*

19. It is clear that active involvement of non-signatory in the three different stages of the contract namely negotiations, performance and termination has to be read in conjunction in order to make the Group of Companies theory applicable.[23] It seems that practice of the majority of the tribunals is to examine the conduct of the non-signatory in conjunction in all different stages.[24]

20. It is humbly submitted that since Vader was involved only in preliminary negotiations[25], this doctrine cannot be made applicable. In ICC no. 10758 of 2000 the Claimant alleged that the non-signatory parent company had an active involvement in the negotiations and the conclusion of the contract as evidenced by the presence of representatives of parent company in the negotiations of the contract. The Tribunal noted that even though the parent company was involved in the negotiations of the contract, it cannot be concluded that the parent consented to arbitrate the matter.[26]

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[21] ICC Case No. 7155 of 1993, ICC Collection of Arbitral Awards 1996-2000.
[22] *Ibid*, at 474.
[23] Stavros L. Brekoulakis, Third Parties in International Commercial Arbitration, Oxford University Press 2010, p. 160. (Hereinafter, Stavros).
[24] Dow chemical v. Isover-Saint-Gobain (1984) 9 YBCA 131; ICC Interim Award no 6000 of 1988, (1991) 2(2) ICC Bull 31.
[25] *Moot Problem 2018*, Para 9, 10, 11.
[26] ICC Award in Case No 10758 (2000), Collection of ICC Arbitral Awards (2001-2007), pp 537-543; ICC 6610 of 1991, J Arnaldez, Y Derains, and D Hascher (eds), ICC Collection of Arbitral Awards 1991-1995 (Kluwer, 1997) 277; 5891 of 1988 in 2(2) ICC bull 23.

21. In the present case, even after the contract was drafted, the same was revised by the representatives of the parties to dispute.[27] Since there is no active involvement of Vader in all the three stages, this doctrine cannot be made applicable.

[2.2.C] *<u>There exists no common intention of the third party to arbitrate</u>*

22. To make this doctrine applicable, it is also required to show that there was a common intention to arbitrate the matter.[28] The important question for the tribunals to decide is whether the group has led its co-contractor to genuinely believe that the non-signatory member of the group was actually a party to the contract, notwithstanding the fact that it had not signed it.[29] The tribunals have went to examine whether there exists any confusion regarding who is the real contractor or not and then came to conclusion and keeping this in consideration a number of Published arbitral awards have declined to apply the Group of Companies theory to non-signatory Respondent.[30]

23. In the case before us although the CEOs concluded their discussions, they decided that a formal contract should be executed at a later point in time when their respective legal counsels and representatives could review it.[31] It is also to be noted that Mr. Paredes and Mr. Deewarvala had successfully drafted, revised and signed a contract which does away with any possibility of confusion regarding the contracting parties.[32] The Claimant was

[27] *Moot Problem 2018*, Para 13.
[28] Dow chemical v. Isover-Saint-Gobain (1984) 9 YBCA 131; Partial Award ICC Case no. 5894 of 1989, (1991) 2(2) ICC bull 25; ICC case of 4131 (Interim Award) of 1982, (1983) 110 Clunet 899; ICC case of 5721 of 1990 (1990) 117 Clunet 1019;Poudret Trois rernarques apropos de la theorie des groupes de societes, 13 ASA Bull. 145 (1995); O Sandrock, "Intra" and "Extra-Entity," Agreements to Arbitrate and Their Extension to signatories under German Law, 19 J. Int'l Arb. 423 (2002).
[29] Stavros, *Supra Note* 23 at 162.
[30] ICC Case No. 2138, S. Jarvin & Y. Derains (eds.), Collection of ICC Arbitral Awards 1974-1985 242 (1990); Award in ICC Case No. 3742, I11 J.D.I. (Clunet) 910 (1984); Partial Award in ICC Case No. 4402, IX Y.B. Comm. Arb. 138 (1984); Interim Award in ICC Case No. 4504, 113 J.D.I. (Clunet) 1118 (1986); Award in ICC Case No. 5281, 7 ASA Bull. 313 (1989); Interim Award in ICC Case No. 6610, XIX Y.B. Comm. Arb. 162 (1994) (same); Final Award in ICC Case No. 9839, XXIX Y.B. Comm. Arb. 66 (2004); Partial Award in ICC Case No. 10818, 16(2) ICC Ct. Bull. 94 (2005).
[31] *Moot Problem 2018*, Para 11.
[32] *Moot Problem 2018*, Para 13.

fully aware that RES is a separate entity and Vader does not have any role in the contract between two signatories.

[2.3] VADER IS NOT BOUND BY THE ARBITRATION CLAUSE EVEN UNDER THE ESTOPPEL THEORY

24. It is based on the premise that if a party is exercising rights under a contract which contains an arbitration clause, then the party would be normally bound by the arbitration clause too.[33] It is a well-recognised principle which can be invoked to preclude partied from denying that they are party to the Arbitration Agreement.[34]

25. The courts have pointed out that to allow a party to claim the benefit of the contract and simultaneously avoid its burden would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.[35]

26. It is humbly submitted that the parent company did not reap any benefit out of the contract entered into by the parties. After the negotiations, the contract was revised and signed by the parties and the role of Vader ended there. There has been no instance of Vader deriving profits out of the contract and hence it is improper to apply this equitable doctrine in this present case. It is submitted to the Tribunal that neither the commercial doctrine nor the equitable doctrine has any application in this case and hence the parent company of RES shall not be made a party to this Arbitration Proceedings.

[33] Born, *Supra Note* 18 at 1193.
[34] Pinsolle, Distinction entre le principe de I 'estoppel et le principe de bonne foi dans le droit du commerce international, 125 J.D.I. (Clunet) 905 (1998); Uloth & Rial, Equitable Estoppel as A Basis for Compelling Nonsignatories to Arbitrate —A Bridge Too Far?, 21 Rev. Litig. 493 (2002); P. Feltham, D. Hochberg & T. Leech (eds.), Spencer Bower, Estoppel by Representation (4th ed. 2004).
[35] Avila Group, Inc v. Norma J of California, 426 F sup 537, 542 (SDNY 1977); Tepper Realty v. Mosiac Tile 259 F Supp 688 (SDNY 1966) at 692.

[3] THERE WAS NO VALID ACCEPTANCE OF THE OFFER MADE BY THE RESPONDENT

27. *Firstly*, the offer of the Respondent was valid as it was sufficiently definite and sufficiently indicated the intention of the offeror to be bound upon acceptance. *Secondly*, the nod of the head was not a sufficient indication of Acceptance as it was insufficient to establish the common intention of the Claimant. *Thirdly*, the Respondent may take the defence of Mistake and is justified in avoiding the Contract.

[3.1] THERE WAS A VALID OFFER MADE BY THE RESPONDENT

28. Offer has been defined under Art 2.1.2 of PICC. It requires for a proposal that *(a)* is 'sufficiently definite' and *(b)* 'indicates the intention of the offeror to be bound upon acceptance'.[36] Both elements are interdependent and weakness in one can be compensated by the strength of the other. Further, the more detailed and definite the proposal, the more likely it is to be construed as an offer.[37]

[3.1.A] *The offer was 'sufficiently definite'*

29. Under Art 14(1) CISG[38] 'sufficiently definite' means a proposal that indicates the goods and expressly or implicitly makes provision for determining the quantity and the price.[39] The same has been incorporated in PICC.[40]

[36] Stefan Vogenauer, Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), Oxford University Press (ed.2, 266), (Hereinafter Vogenauer).
[37] Off. Cmt. 2 to Art 2.1.2, pp. 37-38.
[38] UNCITRAL Digest 2012, 91; CLOUT Case No. 330, 1995; CLOUT Case No. 131,1995; CLOUT Case No. 217, 1997.
[39] Vogenauer *Supra Note* 36 at 267, Para 3.
[40] *Ibid*.

30. Further, as stated in Art 2.1.3, an offer becomes effective when it reaches the offeree. Implicit in the definition of offer is the provision that the offer must be articulated to and delivered to another in order for acceptance to take place.[41]

31. It is humbly submitted that the offer made by the Respondent was sufficiently definite as required under PICC. This could be deduced from the fact that the initial contract signed between the Buyer and Seller[42] was definite on all key terms including the quantity and quality of the goods, amount and time of payment of consideration, medium of payment as well as the arbitration clause in case of any dispute.

32. Further, the subsequent offer laid down on 23rd November 2016 was also sufficiently definite as Mr. Parades very specifically laid down the terms of the offer as to the payment of the two incentives and the number of deliveries[43] in consonance with the original contract and the subsequent contracts. Definiteness is also evident in the confirmation given by Mr. Parades to the enquiry made by Mr. Deewarvala as to the terms of the contract.[44]

[3.1.B] *There was sufficient indication of the intention of the offeror to be bound upon acceptance*

33. It is humbly submitted that there was sufficient indication of the Respondent to be bound by the acceptance of the Claimant. This is evident from the fact that despite having options of entering into entry level negotiations with new counterpart which would signify an increase in income, the Respondent relied on the strength of the relationship with the Claimant to draw a steady income.[45] This is of importance to note here because of the fact that RES had been operating with no profits since in incorporation.[46]

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[41] Vogenauer *Supra Note* 36 at 273, Para 2.
[42] *Moot Problem 2018*, Para 15.
[43] *Moot Problem 2018*, Para 34.
[44] *Ibid*.
[45] *Moot Problem 2018*, Para 25.
[46] *Moot Problem 2018*, Para 26.

34. Further, Brexit annihilated the business of Vader in the EU and as consequence, a motion was passed such that no further financing, compliance monitoring, or directives would be given by Vader to RES.[47] Hence, it is pleaded that despite their sunken profits, the Respondent preferred to continue the contractual relation with the Claimant which shows sufficient indication of their intention to be bound by the contract upon acceptance.

35. Hence, it is humbly submitted that the offer made by the Respondent was sufficiently definite and indicated the intention of the Respondent to be bound upon acceptance. Therefore, there was a valid offer made by the Respondent.

[3.2] THE NOD OF THE HEAD WAS NOT A SUFFICIENT INDICATION OF ACCEPTANCE

36. A commercial contract is concluded under PICC on the parties reaching sufficient agreement as established under Art 2.1.1. PICC. It employs two tools to establish whether the parties have reached a sufficient agreement: *(a)* by acceptance of an offer or *(b)* by conduct sufficient to show agreement.[48] Art. 2.1.6[49] defines acceptance and provides that the acceptance must contain an 'indication to assent' to an offer.

37. However, as a rule, acceptance is effective, and a contract is thereby concluded, when the acceptance reaches the offeror, as stated in Art 2.1.6(2).[50] Further, under Art 4.1(1)[51], 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. A conjoint reading of the two provisions leads us to conclude that common intention needs to be established but it cannot be done so where the acceptance is not effective, i.e., the acceptance has not reached the offerer.

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[47] *Moot Problem 2018*, Para 27.
[48] Vogenauer, *Supra Note* 36 at 289 Para 1.
[49] Art. 2.1.6, UNIDROIT PICC, 2016.
[50] Art 2.1.6(2), UNIDROIT PICC, 2016.
[51] Art 4.1(1), UNIDROIT PICC, 2016.

38. 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.[52]

39. To establish that the parties had a common intention, regard must be had to all the relevant circumstances of the case.[53] Further, Art 4.3(a)[54] expressly states that the preliminary negotiations are amongst the circumstances to be taken into account in interpreting a contract. The provision therefore implicitly rejects the notion that recourse to preliminary negotiations may be excluded from the interpretation of contracts.[55]

40. It is humbly submitted that the nod of the head by the Claimant was not a sufficient indication of the acceptance. There was lack of indication of common intention of the Claimant as is evident from the fact that the parties were involved in new round of negotiations since July 2016 and were unable to come to terms for more than 4 months.[56] Also, on 23rd November 2016, during the final Skype call the understanding of the two Parties were different on key terms of the number of deliveries and the incentives involved (annual increment in the payment and the bonus).[57]

41. Further, the nod of the head was a reply to the explicit yes or no[58] question of the Respondent. Hence, the side way nod can be easily interpreted by any individual in such circumstances to mean a rejection of the proposal.

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[52] RTS Flexible Systems Ltd v. Molkerei Alois Müller [2010] UKSC 14, [2010] 1 WLR 753, Para 45.
[53] Off Cmt to Art. 4.1, p. 138; Off Cmt 1 to Art 4.3, p. 140.
[54] Art 4.3(a), UNIDROIT PICC.
[55] Vogenauer *Supra Note* 36, p. 588, Para 5.
[56] *Moot Problem 2018*, Para 28.
[57] *Moot Problem 2018*, Para 31, 32, 34.
[58] *Moot Problem 2018*, Para 34.

[3.3] THE RESPONDENT IS JUSTIFIED IN AVOIDING CONTRACT ON THE GROUND OF MISTAKE

42. Art. 3.2.1[59] defines mistake as "an erroneous assumption relating to facts or to law existing when the contract was concluded". Hence, Art. 3.2.1 takes a very broad approach to the concept of mistake. Further, according to Art 3.2.3[60], even error in expression or transmission are regarded as mistakes under the PICC.[61]

43. The first requirement, hence, is that there is an erroneous assumption; therefore, at least one party must be in error by having an incorrect or an incomplete understanding of the situation.[62] Further, the second requirement is that the error must relate to either fact or to the law.[63]

44. Art. 3.2.2[64] specifies the requirements in order for the mistake to be relevant under PICC. Primarily, Art. 3.2.2 (1) employs an "open-ended formula" under which it is necessary for a mistake to be relevant that a reasonable person in the same situation as the party in error would have concluded the contract on materially different terms if the true state of affairs had been known.[65] The use of such a wide formula aims at granting a high degree of flexibility and at taking into account the intentions of the parties and the specific circumstances.[66]

45. The PICC follow a combined subjective-objective approach[67] and question of seriousness is determined from the view of 'a reasonable person in the same situation as the party in

[59] Art 3.2.1, UNIDROIT PICC, 2016.
[60] Art 3.2.3, UNIDROIT PICC, 2016.
[61] Vogenauer, *Supra Note* 36, p. 474, Para 1.
[62] *Ibid*. at Para 3.
[63] Off Cmt 1 to Art 3.2.1, p. 99.
[64] Art. 3.2.2, UNIDROIT PICC, 2016.
[65] Off Cmt 1 to Art 3.2.2, pp 100-101.
[66] *Ibid*.
[67] Off Cmt 1 to Art 3.2.2, pp 100-101; HC Grigoleit, 'Irrtum, Tauschung und Informationspflichten in den European Principles und in den UNIDROIT- Principles' in R Schulze et al (eds), Informationspflichten und Vertragsschluss Acquis communautaire (2003) 201, 217.

error.'[68] Further, 'materially different terms' can be interpreted with the assistance of Art 19(3) CISG. For instance, terms relating to price, payment, quality or quantity of the contractual objects and the liability of parties should therefore be regarded as material.[69]

46. Art 3.2.3[70], provides for consideration of error in expression or transmission as a mistake of the person from whom the declaration emanated. The article serves two purposes: the *first* objective is to attribute errors in expression and transmission to the party from which the declaration emanated. The *second* objective is that an error in expression or transmission must be regarded as a mistake under the PICC.[71]

47. The term 'error in expression' covers a situation where the real intention of the declaring party differs from the content of the declaration as interpreted under Art 4.2.[72] Art 4.2 deals with interpretation of statements and other conduct of the parties and clarifies that such statements and other conduct of the party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

48. Hence, if the content of the declaration and the real intention diverge, there is an error in expression. As a general rule, an error in expression under Art 3.2.3 only arises where, first the other party neither knew nor should have known the mistaken party's real intention (Art 4.2(1)) and, secondly, a reasonable party in the other party's position would not have understood that intention (Art 4.2(2)).[73]

49. Hence, it is humbly submitted that even if it is considered that the nod of the head by the Claimant was an indication of acceptance, mistake subsisted as there was an error of expression and hence, the Respondent are justified in avoiding the contract.

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[68] Vogenauer, *Supra Note* 36, p. 480, Para 6.
[69] *Ibid* Para 7.
[70] Art 3.2.3, UNIDROIT PICC, 2016.
[71] Off. Cmt. 1-2 to Art 3.2.3, pp. 103-104.
[72] Art 4.2, UNIDROIT PICC, 2016.
[73] Vogenauer, *Supra Note* 36, p. 490, Para 4.

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

50. The Respondent is justified to put forth counter claims against the Claimant. The Claimant may be obligated for payment of Second Incentive of 35% for the years 2016, 2017 and 2018. Further, the Tribunal may direct the Claimant for payment of consideration for the deliveries scheduled for 2017 and 2018. Finally, the Request for Security for Costs, if such a request is made by the Claimant, may be denied by the Tribunal.

[4.1] THE TRIBUNAL MAY ACCEPT THE COUNTER-CLAIMS OF THE RESPONDENT

51. Art 6.2.1[74] establishes the general rule set out in Art 1.3 of PICC that a contract is binding and that it must be performed in accordance with the terms. Art 6.2.1 purports to establish that given the binding character of the contract, 'performance must be rendered as long as it is possible and regardless of the burden it may impose on the performing party'.[75]

[4.1.A] The Claimant may be held obligated for payment of Second Incentive of 35% for the years 2016, 2017 and 2018

52. It is of importance to note the terms of the contract that was concluded according to the Claimant and hence, alleged to be enforceable before the tribunal. The terms, inter alia, provided for the maintenance of First Incentive of 15% price increment per year offered by Mr. Deewarvala[76] which was accepted by Mr. Paredes[77] as well as included the proposal of Mr. Paredes of compliance of 8 more deliveries if the Claimant agreed to give a 35% bonus at the end of each year from now on[78] which were allegedly accepted by Mr. Deewarvala by doing an Indian head nod.[79]

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[74] Art 6.2.1, UNIDROIT PICC, 2016.
[75] Off. Cmt. 1 to Art 6.2.1, p 212.
[76] *Moot Problem 2018*, Para 31.
[77] *Moot Problem 2018*, Para 34.
[78] *Moot Problem 2018*, Para 34.
[79] *Moot Problem 2018*, Para 35.

53. Hence, a judicious interpretation of the term clearly set out that the payment of the bonus of 35% was agreed upon by the two parties in December of every year *from now on*. Therefore, it is humbly submitted that the Respondent is righteous in claiming for the payment of Second Incentive for December of 2016, consisting in 35% of the total contract amount paid on 2016, which adds to USD 277,725,000.00.[80]

54. It is also submitted that with reference to the terms of contract mentioned above, the Respondent is righteous in claiming the payment of Second Incentive for December of 2017 and of 2018, consisting of the total contract amount paid in the years, which adds to USD $ 319,383,750.00[81] and USD $ 367,291,313.20[82] respectively. Hence, the compliance of the same may be obligated on the Claimant.

[4.1.B] *The Claimant be held Obligated for payment for the deliveries supposedly scheduled for 2017 and 2018*

55. The terms of the supposed contract provided for the maintenance of the First Incentive of 15% price increment per year[83] and 8 more deliveries in the course of 2017 and 2018.[84] Also the first contract signed between the parties provided for, inter alia, payment of consideration of each delivery at least 5 days before the delivery date.[85] Therefore, in the light of Art 6.2.1, it could be concluded that the terms of the contract dictate the payment of consideration before the delivery of the bricks.

56. Hence, it is submitted that the Claimant may be held obligated to make payment of the consideration *before* the delivery of the bricks can be made by the Respondent. Therefore, it is submitted that the Claimant may be asked to make the payment

[80] *Moot Problem 2018*, Para 58, a) i.
[81] *Moot Problem 2018*, Para 58, a) ii.
[82] *Moot Problem 2018*, Para 58, a) iii.
[83] *Moot Problem 2018*, Para 31, 34.
[84] *Moot Problem 2018*, Para 34.
[85] *Moot Problem 2018*, Para 15 e).

i. For the amount corresponding to 4 deliveries supposedly scheduled for 2017 for the amount of USD $ 912,525,000.00 (including a 15% increase in price from the price set for 2016);[86] and

ii. For the amount corresponding to 4 deliveries supposedly scheduled for 2018 for the amount of USD $ 1,049,403,752.00 (including a 15% increase in price from the price set for 2017)[87]

[4.1.C] *The Claimant may be held obligated to pay the interests accrued*

57. Art 7.4.9[88] acts as an evidence of an international usage that there is right to recover interest in the case of late payment of sum of money.[89] Art 7.4.9 (1) establishes that if the party does not pay a sum of money when it falls due, the aggrieved party is entitled to interest upon the sum from the time the payment is due to the time of payment.[90]

58. Hence, it is humbly submitted that the Respondent is justified in claiming for interest on the payment of second incentives for the years of 2016, 2017 and 2018.[91] Also the Respondent may claim interest on the amount to be paid as consideration for the deliveries of 2017 and 2018 including the increment of 15% annually to the payment of consideration.[92]

[86] *Moot Problem 2018*, Para 58, a) iv.
[87] *Moot Problem 2018*, Para 58, a) v.
[88] Art 7.4.9, UNIDROIT PICC, 2016.
[89] Arbitral Award 19 May 2004, ICACRF case no 11/2002, Unilex; Arbitral Award December 1996 (Zurich), ICC case no 8769, Unilex; Arbitral Award 1995 (Basle), ICC case no 8128, Unilex; Arbitral Award 15 June 1994 (Vienna), Internationales Schiedgericht der Bundeskammer der gewerblichen Wirtschaft case no SCH- 4318, Unilex; Arbitral Award 15 June 1994 (Vienna), Internationales Schiedgericht der Bundeskammer der gewerblichen Wirtschaft case no SCH- 4366, Unilex.
[90] Art 7.4.9, UNIDROIT PICC, 2016.
[91] *Moot Problem 2018*, Para 51 b) i.
[92] *Moot Problem 2018*, Para 51 b) ii.

[4.2] IN CASE THE CLAIMANT REQUESTS FOR SECURITY FOR COSTS THE SAME SHOULD BE DENIED

59. Born defined provisional measures as "…awards or orders issued for the purpose of protecting one or both parties to a dispute from damage during arbitral process" [93] 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 case of an unsuccessful claim, any eventual award of legal fees assessed against the Claimant or counter-Claimant by the Arbitral Tribunal.[94]

[4.2.A] *Tribunal does not have the power to grant Security for claims*

60. It is humbly submitted that the tribunal does not have any power to grant Security for Costs. When drafting arbitration agreements, parties have the opportunity to negotiate the rules applicable to the arbitration, allowing them to tailor and control the procedure according to their specific wishes and needs.[95] Due focus on this clause is of crucial importance since it determines the extension of the Arbitral Tribunal's jurisdiction.[96]

[93] 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.

[94] Jan Paulsson et al., International Chamber of Commerce Arbitration 467, Para 26.05 (3d ed., 1999); 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 pp. 339–40 (R. Briner et al. eds., 2001); Claude Reymond, 'Security for Costs in International Arbitration', (1994) 110 L.Q. REV. 501.

[95] X Panama v. Une personne physique domiciliée à Genève, Award, available at ASA Bulletin, Volume 13, Issue 3, Kluwer Law International 1995; Lew Julian D. M.. Mistelis Loukas A., Kröll Stefan M. Comparative International Commercial Arbitration Kluwer Law International, 2003, p. 3.

[96] Gaillard Emannuel, Savage John Fouchard Gaillard Goldman On International Commercial Arbitration Kluwer Law International, 1999. p. 395.

61. In the present case, neither the Arbitration Agreement nor the Rules chosen by the Parties address security for costs.[97] Thus, neither Party foresaw, at the time of contracting, the granting of such measure. Hence, the absence of an express agreement regarding security for costs excludes the Tribunal's power to order so. This view is supported by a Swiss Tribunal, which held that only an explicit agreement of the parties would permit the Arbitral Tribunal to order the payment of a security deposit.[98]

62. In fact, international commercial contracts do not usually address security for costs as the parties see little benefit in making concessions in exchange for what seems a relatively minor procedural detail.[99] Their silence is evidence of their lack of intention to request the arbitrator to order security.[100]

[4.2.B] *Even If the Tribunal is empowered to order Security for Costs, it may not grant it*

63. The power to grant security for costs should be exercised with extreme caution and considerable restraint.[101] As a result of this restrictive approach, arbitral tribunals are very reluctant to order security for costs.[102] Furthermore, the burden of proof lies on the requesting party that needs to provide credible evidence to justify its request.[103]

[97] *Moot Problem 2018*, Para 15; UNCITRAL Model Law, 2010 (Incorporated by Arbitration Law of Cambodia), KLRCA Rules 2017.
[98] Not Indicated v. Not Indicated, Schiedsgerict Der Zürcher Handelskammer, Not Indicated, 12 November 1991, ASA Bulletin, Volume 13 Issue 1 Kluwer Law International 1995.
[99] Rubins, Noah, In God we trust, all others pay cash: Security for Costs in International Commercial Arbitration 11 American Review of International Arbitration (2000), p. 5; Hoellering Michael F., Conservatory and provisional measures in international arbitration: The Practices and Experience of the AAA in ICC Conservatory And Provisional Measures In International Arbitration, 1993. P.31; X Panama v. Une personne physique domiciliée à Genève, *Supra Note* 95.
[100] Rubins, *Ibid*, p. 29.
[101] Sandrock Otto, The Cautio Judicatum Solvi in Arbitration Proceedings or the Duty of an Alien Claimant to Provide Security for the Costs of the Defendant,14(2) Journal of International Arbitration (1997), pp. 17-38.
[102] Ad Hoc Case (November 2002) ABC AG (in prov. Nachlassstundung), Claimant, v. Mr. X, Respondent, Procedural Order no. 14 of 21 November 2002; ICC Case No. 12853 of 2003 Procedural Order of 3 December 2003, ICC Bull. 2010, Special Supplement, p. 80.
[103] ICC Case No. 8786 of 1996 Interim Award, ASA 2001, p. 751.

64. When addressing a request for security for costs, the Tribunal must analyse whether the applicant has established a prima facie case on the merits of one or more of its claims.[104]In the case at hand, the preliminary assessment of Respondent's counter claims evidences it's *bona fide* and seriousness, culminating in the denial of the interim measure.

65. The first condition to be fulfilled by the Claimant is that, it has to show that there is a reasonable possibility that the requesting party will succeed on the merits of the claim. In the case before us, the Claimant's case is very weak and hence there is a possibility that tribunal may decide in the favour of the Respondent on merits.

66. The Respondent has successfully contented that there was no valid acceptance on behalf of the Claimant and question of a valid contract does not arise. The Claimant are seeking relief on the basis on a contract which is invalid. Also, the fact that Respondent did not obtain third party funding[105] does not indicate its unlikelihood to win the dispute since a funder rejecting a case does not mean that the case lacks merit.[106]

[4.2.C] *<u>No harm is likely to result to the Claimant</u>*

67. It is also contended that, if the Tribunal refuses to grant this interim measure then no harm by an award of damages is likely to result. The Respondent duly acknowledge the fact that its financial condition is such that it would not be able to meet the costs of arbitration, but merely establishing impecuniosity will not compel the tribunal to grant Security for costs.

68. Even when the one party's ability to pay has deteriorated after the conclusion of the Arbitration Agreement, some tribunals have held that such deterioration alone was normal

[104] Producer v. Construction Company, Interim Award NAI Case No. 1694, 12 December 1996, Albert Jan van den Berg (ed.), available at Yearbook Commercial Arbitration 1998, Volume XXIII, Kluwer Law International 1998.
[105] *Moot Problem 2018*, Para 61.
[106] Sahani, Victoria S. The Impact of Third-Party Funders on the Parties They Decline to Finance, Kluwer Arbitration Blog (2015), <http://kluwerarbitrationblog.com/2015/07/06/the - impact-of-third-party-funders-on-the-parties-theydecline-to-finance/> (Last accessed 08.08.2018).

commercial risk and does not justify an order for security for costs.[107] In A.S.p.A. v. B AG, arbitration proceedings conducted under the Rules of Arbitration of the Geneva Chamber of Commerce and Industry, the Claimant had applied for security for costs on the grounds that the Claimant had filed for liquidation after the start of the proceedings.[108] The Tribunal refused to order security for costs and considered that the Claimant's insolvency was a normal commercial risk that the Respondent should bear.[109]

69. The enforcement of the award is not endangered. Because both the nations, Kingdom of Cambodia and Peoples Republic of China are parties to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, and their courts are obliged as a matter of public international law to recognize and enforce foreign arbitral awards.[110] As a consequence, there is a strong presumption that such awards will always be enforceable in in relevant jurisdiction[111]

[107] Jean Ho, Getting the Shoe to Fit – Obtaining Security for Costs under the Rules of Arbitration of the International Chamber of Commerce, 9 Vindobona J. of Int'l Comm'l Law & Arb. 336 (2005).
[108] A.S.P.A. v. B AG, 25 September 1997, (2001) ASA Bulletin 745.
[109] *Ibid.*
[110] New York Arbitration Convention, Contracting States, <http://www.newyorkconvention.org/countries>, (Last accessed 09.09.18).
[111] Bucher, Andreas Die neue internationale Schiedsgerichtsbarkeit in der Schweiz Basel/Frankfurt 1989, p. 76; Schreuer, Christoph The ICSID Convention: A Commentary, Cambridge 2001, p. 241.

PRAYER FOR RELIEF

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

1. The agreement to arbitrate is incapable of being performed;
2. The request of the Claimant to join Vader as a party to the Arbitration may not be granted by the Tribunal;
3. There was no valid acceptance of the offer;
4. The Contract is not enforceable;
5. If enforceable, the Respondent may be allowed to present counter-claims and the Claimant may be obligated for the fulfillment of the same;
6. If asked for, Security of Costs may be denied to the Claimant.

All of which is respectfully affirmed and submitted.