C1805-C

**KUALA LUMPUR REGIONAL CENTRE FOR ARRBITRATION**

**2018**

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**BETWEEN**

**CHUZI LEISHEN'S LLC**

**CLAIMANT**

**AND**

**ROBUSTESSE ESPACIAL SOLUCION CORP**

**RESPONDENT**

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# MEMORIAL FOR THE CLAIMANT

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Richard Stone, 'Forming Contracts without Offer and Acceptance, Lord Denning and the Harmonisation of English Contract Law' [2012] 4

**REFERENCE MATERIAL**

Stefan Vogenauer and Jan Kleinheisterkamp (eds), Commentary on The UNIDROIT Principles Of International Commercial Contracts

Multi-party Actions in International Arbitration

## STATEMENT OF JURISDICTION

The parties, Chuzi Leishen's LLC and Robustesse Espacial Solucion Corp, have agreed to submit the present dispute to arbitration in the Kingdom of Cambodia, in accordance with the Kuala Lumpur Regional Centre for Arbitration Arbitration Rules 2017.

## QUESTIONS PRESENTED

1. Whether the agreement to arbitrate is incapable of being performed due to the impecuniosity of the Respondent:
    a. Whether, despite the arbitration clause, itself, being valid, the clause was inoperable due to the impecuniosity of the Respondent; and
    b. Whether there would be a denial of the Claimant's, fundamental right of access to justice, should the arbitral Tribunal find that the clause is inoperable.
    c. Whether the Respondent is already bound by the arbitration agreement since they have already commenced the arbitral process through compliance with the Preliminary Meeting.
2. Whether the request of the Claimant to join Vader as a party to the Arbitration be granted by the Tribunal.
    a. What rules govern whether Vader can be a party to the Arbitration; and
    b. What is Vader's position in relation to Robustesse Espacial Solucions; and

c. Are Vader bound, prima facie, to join the Arbitration in conjunction with the Respondents.

3. Whether there was a valid acceptance of the Respondent's offer:

4. Whether the Tribunal should grant relief by way of the following:

a. Find that the arbitral clause is valid and operable

b. Find that Vader should be joint as a party to the arbitration

c. Find that there has been a valid acceptance of the Respondent's offer and concomitantly, request that there be a written contract reflecting same.

d. Order specific performance of the contract.

## STATEMENT OF FACTS

1. The Claimant, Chuizi Leishen's LLC ("CL" or "Buyer") is a commercial company whose main activity is construction, including the development of construction projects in different regions of China. Since 2013, CL has begun to explore markets in Southeast Asia.
2. The Respondent, Robustesse Espacial Solucion Corp ("RES" or "Seller") is a limited company duly incorporated in January 2013. RES is a wholly owned subsidiary of Vader Ltd. ("Vader"). Both companies' main activity is the production and selling of bricks.
3. On the 29th May 2013, the CEO's of both companies found a mutual business opportunity and came to an accord for their future venture. They decided that a formal contract should be executed at a later point in time, where their respective legal personnel could review it.
4. For the purpose of negotiating, CL employed a Malaysian-Indian construction specialist. Thus, Mr. Kalai Deewarvala became the representative of CL. Mr.

Deewarvala was duly authorised to execute any and all agreements regarding CL's B&R projects, and CL's communications with RES.

5. To head all their commercial activities in Cambodia and ASEAN, RES employed a Mexican specialist in baking bricks and building walls. Thus, Mr. Armando Paredes became the Managing Director of RES. Mr Paredes' position empowered him to execute any and all agreements on behalf of RES in Cambodia and ASEAN.
6. By September 2013, Mr. Paredes and Mr. Deewarvala (collectively, the "Representatives") had successfully drafted, revised and signed a contract.
7. The contract contained, among others, a valid arbitration clause.
8. Due to the successful traversal of the contract, on November 2014, the Buyer offered to pay a 15% price increase (the "First Incentive") if the Seller committed to perform 4 more deliveries during 2015.
9. Mr. Paredes accepted Mr. Deewarvala's offer through a handshake.
10. Due to the satisfactory performance of the extra deliveries, in November 2015, the Representatives decided to extend the agreement throughout 2016, for 4 more deliveries, and a second 15% price increase. No formal contract was executed by the representatives to record this agreement.
11. The Seller had been operating with no profits since its incorporation and consequently, did not have a loosened financial situation on its expenditure allocation.
12. In 2016, 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' activities.

13. On 23rd November 2016, Mr. Deewarvala proposed to maintain the First Incentive, and to give a bonus to the Seller after 4 compliant deliveries, as a second incentive (the "Second Incentive"). Mr. Paredes demanded to increase the price substantially before committing to further deliveries at a 35% increase in price.
14. Mr. Paredes offered to increase the brick price by 15% for 2017 and a 35% bonus at the end of each year thenceforth in exchange for 8 extra deliveries. Mr. Deewarvala restated the proposal and Mr. Paredes affirmed.
15. Mr. Deewarvala responded by doing an Indian head nod, a sideways nod.
16. Mr. Paredes interpreted the sideways nod as a refusal to his proposal.
17. Mr. Deewarvala believed that his nod communicated his acceptance of Mr. Paredes' proposal.
18. In Mid-March of 2017, CL contacted RES to confirm the date of the next delivery. The situation was brought to the attention of Mr. Paredes and Mr. Deewarvala, who quickly realised that there was a misunderstanding.
19. On the 15th. August 2017, the Buyer served the seller with a notice of arbitration. The Respondent refused to pay its share of the deposit, and the Claimant paid its 15% of the security deposit on the first week of January 2018.
20. The respondent argued that the agreement to arbitrate had become null due to its inability to perform it. Furthermore, the Respondent would be unable to raise any counter claims in the arbitration due to the increased cost of the arbitration. Since arbitration has already started, no court would assume jurisdiction and CL would again be left defenseless.

21. The Respondent further explained that it had sought funding from a number of third-party sources. However, the Respondent's attempts failed due to its precarious financial positions (i.e., excessive debts, no reported profits since incorporation, no disposable assets, and financial statements indicating that expenses outweigh income).
22. The Claimant denied the counter claims and expressed its intention of filing a request for Vader to join the arbitration since they believe that Vader would be able to support the costs of arbitration.

## SUMMARY OF PLEADINGS

**A. The agreement to arbitrate is capable of being performed, despite the impecuniosity of the Respondent.**

The impecuniosity of the Respondent neither automatically invalidates nor renders the agreement to arbitrate inoperable. Alternatively, it would be unfair for the Tribunal to deny the Claimant access to justice, based on the inability of the Respondent to remedy its wrongs. Since the Respondent has already begun the arbitral process, it is bound to comply.

**B. Vader should be a party the Arbitration.**

As the parent company of the Respondent, it is primarily responsible for the actions of the subsidiary. Vader are the sole shareholders in the Respondent's and the existence of the Respondent's is to help branch out Vader's business. These close

business ties should be enough to meet the prima facie threshold to have Vader joined to proceedings. As a consequence, the impecuniosity of the Respondent can be remedied by the inclusion of the parent company, Vader Ltd. Vader would possess the necessary funding required to allow for the Respondent to properly defend itself, through the pursuance of the counter claims.

**C. There was valid acceptance of the Respondent's offer:**

Relying on article 2.1.6, the conduct of the claimant amounts to a valid acceptance. While taking into account relevant considerations, a reasonable person in the position of the respondent would interpret the head nod as an assent to the offer.

**D. The Tribunal should grant relief by way of the following:**

a. Find that the arbitral clause is valid and operable
b. Find that Vader should be joint as a party to the arbitration
c. Find that there has been a valid acceptance of the Respondent's offer and concomitantly, request that there be a written contract reflecting same.
d. Order specific performance of the contract.

# PLEADINGS

## I. THE AGREEMENT TO ARBITRATE IS CAPABLE OF BEING PERFORMED, DESPITE THE IMPECUNIOSITY OF THE RESPONDENT.

**1.** The impecuniosity of the Respondent does not automatically invalidate the agreement to arbitrate **(A).** Alternatively, it would be unfair for the Tribunal to deny the Claimant access to justice, based on the inability of the Respondent to remedy its wrongs **(B).** Since the Respondent has already begun the arbitral process, it is bound to comply **(C).**

### A. *Impecuniosity does not affect the validity or operability of the arbitration agreement.*

2. The arbitration clause is valid since it meets all the necessary international requirements. According to the New York Convention [1], each contracting state undertakes to recognise and give effect to an arbitration agreement when the following requirements are fulfilled:

a) *The agreement is in writing.*

3. The arbitral agreement included an arbitral clause in the contract which was signed by both parties [2]. Since the arbitral agreement is compliant with the stipulated requirements[3], the agreement suffices the first criterion of the validity test.

b) *The clause encompasses future disputes.*

[1] Arts II (1), V (1)(a) and II (3) of the New York Convention on 7 July 2006
[2] Moot Problem 2018 at [15 (f)]
[3] Art II (2) New York Convention

4. The arbitration agreement would only take effect having regard to 'any dispute, controversy or claim arising out of or relating to this contract…"[4]. It is clear to see that the arbitration clause was intended for future disputes, therein sufficing the second criterion for validity.

c) *There is a defined legal relationship.*

5. Since the arbitration agreement forms part of the contract between the two parties, therein creating a contractual relationship, such a relationship would be able to suffice this criterion[5].

d) *The subject matter of the arbitration is arbitrable*

6. The arbitration agreement stipulated that the parties shall arbitrate when issues arising out of the contract are presented. Since issues arising out of the contract form the basis of the arbitration, the issues before the arbitral tribunal are arbitrable.

e) *The parties to the arbitration possessed the capacity to fulfil the agreement.*

7. Mr. Paredes, acting on behalf of the Respondent and Mr. Deewarvala, acting on behalf of the Claimant, were duly authorised to conduct and execute any and all agreements regarding the contract.

f) *The agreement is not null and void, inoperative or incapable of being performed.*

8. The arbitration agreement is not null and void since it is not devoid of legal effect[6]. The arbitration clause is neither inconsistent nor uncertain.

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[4] *n 2* [15 (f)]
[5] *n 3*
[6] *Rhone Mediterranee v Achile Lauro* 712 F.2d 50 (3rd Cir.1983)

9. For an arbitration clause to be inoperable, it must cease to have legal effect[7]. An inability to pay advances on the costs of arbitration[8], or to make payment of an award[9] should not mean that an arbitration clause is inoperative or incapable of being performed. The inability of the Respondent to meet its financial obligations due under the arbitration agreement would not suffice as a measure capable of invalidating the arbitration clause nor rendering it inoperable.

10. The competence-competence rule, allows an arbitral tribunal to have the ability to rule on its own jurisdiction. This would allow for the continuance of the arbitration since the impecuniosity of the Respondent would not per se prevent the arbitration clause from applying[10]. The validity of the arbitration clause should not be affected by external factors that do not pertain to the agreement itself. Therefore, the agreement is not inoperative.

**B.** ***To allow the agreement to be invalidated due to the impecuniosity of the Respondent would result in an injustice to the Claimant.***

11. Disallowing the pursuance of a prospective breach of contract due to the impecuniosity of the Respondent would encroach on the Claimant's right of access to justice. The denial of the fundamental right,[11] as opposed to the enforcement of the arbitration agreement, would concomitantly result in a manifest injustice since the claimant would

[7] Albon v Naza Motor Trading Sdn Bhd [2007] EWHC 665 (Ch)
[8] El Nasharty v J. Sainsbury plc [2007] EWHC 2618 (Comm)
[9] The Rena K [1979] QB 377
[10] Lola Fleurs Cours d'Appel de Paris, Pôle 1 Ch. 1, 26 février 2013, n° 12/12953.
[11] Wall Street Institute de Portugal v Centro de Inglês Santa Barbra LDA, Supreme Court [2008] 162/N4

be denied its right to be heard and could possibly allow for the discontinuance of the contract.

**C. *The Respondent is already bound by the arbitration agreement.***

12. Where a party takes part in an arbitration without denying the existence of the arbitration agreement[12], it will, in the normal course, be bound by implied consent. Since the arbitration has already begun, following the preliminary meeting, the Respondent would be bound to complete the arbitration.

## II. VADER SHOULD BE A PARTY THE ARBITRATION.

**A. *The applicable rules are the AICA 2018***

1. The parties agreed in writing to arbitrate according to the AICA 2018. This makes the relevant law rule 9 (1) of the AICA 2018 which states:
2. Any party can request an additional party to be joined as a party to arbitration provided the following conditions are satisfied: 1. The additional party (Vader) and all the parties to the arbitration (respondent) should consent (OR) 2. provided that the additional party (Vader) is prima facie bound by the arbitration agreement.[13]

**B. *Robustesse Espacial Solucion Corp (RES) is a subsidiary of Vader Ltd***

3. RES is a single member private company. Vader owns 100% of the shares in RES. RES's managing decisions from the moment of contracting were independent of Vader.

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[12] Sanders, "Arbitration", In Cappelletti (ed.) *Encyclopaedia of International and Comparative Law, Vol XVI* (Brill, 1987)
[13]KRLCA Rules 2017

**C. *Arbitration clause can be extended within group of companies***

4. 'The question whether persons not named in the agreement can take advantage of an arbitration clause … is a matter which must be decided on a case to case basis'[14]
5. 'a group of companies, in spite of the separate legal personality of each of the latter, has a single economic reality, which the courts must take into account, as its existence is recognized by the usages of international trade'[15]
6. 'The mere existence of a group of companies is not a sufficient element per se to allow the extension of an arbitration agreement concluded by another member of the group to a non-signatory'[16]
7. 'In most cases, courts and tribunals require proof of the existence of at least an implicit intention of all the parties that non-signatories should be parties to the underlying contract and its arbitration clause'[17]
8. Vader Ltd by its capital injection has made possible the contractual performance by RES. RES only exists as a company to expand Vader's operations. Vader owns 100% of RES and benefits to the exclusion of any other possible stakeholder. It is part of the single economic activity that is the production and delivery of bricks to CL.
9. The business ties between Vader Ltd and RES should meet the threshold for a prima facie case. They should give rise to a presumption that Vader is bound by the arbitration agreement.

[14] ICC Case No. 9517, Nov. 30, 1998, unpublished
[15] Société Sponsor A.B. c/ Lestrade, Cour d'appel Paris, 1988 Rev. Arb. 154 and note A, Chapelle.
[16] Multi-party Actions in International Arbitration, p. 47
[17] Ibid

## III. THERE WAS VALID ACCEPTANCE OF THE RESPONDENT'S OFFER

The parties have agreed to abide by the UNIDROIT principles of International Commercial Contracts. Article 2.1.6 governs the rules on acceptance. First, an acceptance can either be an express statement or any other conduct of the offeror indicating assent to an offer.[18] Second, an acceptance of an offer becomes effective when the indication of assent reaches the offeror.[19] It is submitted that the present case is one of the implicit indication of assent through conduct, where by Mr. Deewarvala has responded to Mr. Parades's offer by doing an Indian head nod, a side-ways nod.[20] Although this article does not specifically mention the form the conduct shall assume,[21] it is submitted that the principle of no requirement as to the form applies to unilateral acts.[22] Therefore, a head nod is capable of amounting to a valid acceptance if the required conditions are met.

**The conduct of the claimant amounts to a valid acceptance:**

To ascertain whether there was a valid acceptance, the conduct of the party in question has to be interpreted according to the subjective test of art 4.2 (1) which is as follows: the statements and other conduct of the party shall be interpreted according to the party's intention if the other party knew or could not have been unaware of that intention.[23] This positive or constructive knowledge must exist at the moment the statement takes effect or earlier.[24] If the preceding section does not apply, 'such statements and other conduct shall be interpreted according to the

[18] Article 2.1.6 (1) UNIDROIT Principles of International Commercial Contracts
[19] Article 2.1.6(2) UNIDROIT
[20] Moot problem page 6, para 35
[21] Comment on Article 2.1.6 UNIDROIT
[22] Article 1.2 UNIDROIT
[23] Article 4.2 (1) UNIDROIT
[24] Stefan Vogenauer and Jan Kleinheisterkamp (eds), 'Commentary on The UNIDROIT Principles Of International Commercial Contracts' 508

meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.'[25] In both the cases, other conduct of the parties includes active behaviour such as 'a motion of the head' or raising a hand..[26]

However, in practise the application of art 4.2(2) is the rule and art 4.2.(1) is the exception.[27] In the present case, applying the objective test, a reasonable person of the same kind as the other party i.e. Mr. Parades, in the same circumstances would have understood that Mr. Deewarvala's head nod amounted to acceptance. The circumstances such as 'preliminary negotiations'[28] between the parties are to be taken into account in order to establish the understanding of the reasonable person. The representatives maintained a 'very good relationship between them'[29] and the negotiations between them began since July 2016.[30] Furthermore, Mr. Parades travelled to 4 other South Asian countries on four occasions and is expected to have fair knowledge of the Asian culture generally.[31] In particular, at one instance where Mr. Parades said 'Amigo'[32] during the course if negotiations, it can be inferred that the representatives were aware of each other cultures and linguistic habits.

Even if the provisions of article 4.2 (2) are not satisfied, applying the subjective test, it is submitted that the respondent's representative 'knew that the buyer wanted to extend the contract,'[33] the proof of which is the increase in the price. Therefore, it is submitted that, the

[25] Article 4.2 (2) UNIDROIT
[26] Stefan Vogenauer and Jan Kleinheisterkamp (eds), 'Commentary on The UNIDROIT Principles Of International Commercial Contracts' 507
[27] Commentary on The UNIDROIT Principles 509
[28] Article 4.3(3) UNIDROIT
[29] Moot problem page 5 para 28
[30] Moot problem page 5 para 28
[31] Clarifications to the moot problem
[32] Moot problem page 6 para 34
[33] Moot problem page 5 para 32

claimant's conduct qualifies both the subjective and the objective test rendering the head nod as a valid acceptance.

**The contract is enforceable despite the precise identification of acceptance:**

Although offer and acceptance remain the integral part of the process of identifying agreements, there is evidence of a more flexible approach in American and English jurisdiction.[34] In the case of *RTS Flexible Systems Ltd v Molerei Alois Muller Gmbh*,[35] the court delivered the judgment without any reference to offer and acceptance. It is submitted that, even if the acceptance is not sufficient to bind the parties to the contract, the tribunal should consider the overall conduct of the parties by taking a purposive approach towards the principles.

[34] Richard Stone, 'Forming Contracts without Offer and Acceptance, Lord Denning and the Harmonisation of English Contract Law' [2012] 4 <Web JCLI http://webjcli.ncl.ac.uk/2012/issue4/stone4.html>
[35] [2010] 1 WLR 753

## IV. THE TRIBUNAL SHOULD GRANT RELIEF BY WAY OF THE FOLLOWING:

***a. Find that the arbitral clause is valid and operable***

1. Based on the reasons outlined in section **I**, above, the arbitral Tribunal should find that the arbitration clause is operable and valid.

***b. Find that Vader should be joint as a party to the arbitration***

2. Based on the reasons outlined in section **II**, above, the arbitral Tribunal should find that the parent company, Vader Ltd, be added as a party to the proceedings.

***c. Find that there has been a valid acceptance of the Respondent's offer and concomitantly, request that there be a written contract reflecting same.***

3. Based on the reasons outlined in section **III**, above, the arbitral Tribunal should find that there was a valid acceptance of the Respondent's offer and as such make a declaration that a formal, written contract be created.

***d. Order specific performance of the contract.***

4. Based on the reasons outlined in section **1V**, above, the tribunal should order the performance if the contract because the claimant's conduct amounts to a valid acceptance.

## PRAYER FOR RELIEF

1. The Claimants request that the tribunal find that:

a) The contract is valid and therefore enforceable

b) The Respondent should be made to perform the contract as had been agreed

c) The terms should be set in writing

2. Should the tribunal choose to make an award rather than order specific performance the Tribunal should award the claim, valued at USD$456,262,500[36]

[36] Moot Problem 2018 [55]