KUALA LUMPUR REGIONAL CENTRE FOR ARRBITRATION

2018

BETWEEN

CHUZI LEISHEN'S LLC

CLAIMANT

AND

ROBUSTESSE ESPACIAL SOLUCION CORP

RESPONDENT

MEMORIAL FOR THE RESPONDENT

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LEGISLATION

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

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Société Sponsor A.B. c/ Lestrade, Cour d'appel Paris, 1988 Rev. Arb. 154 and note A, Chapelle.

REFERENCE MATERIAL

Bernard Hanotiau, Multi-party Actions in International Arbitration, 2009, OUP, p. 47

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

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 continuance of the arbitration would result in an injustice, on the part of the Respondent, due to them being placed in a position to incur excess liability.

2. Whether the request of the Claimant to join Vader as a party to the Arbitration be granted by the Tribunal.
    a. What are the rules governing the request to have Vader become a party to the Arbitration proceedings; and
    b. What is Vader's role in the business of the Respondent's; and
    c. Can the Arbitration clause be extended to Vader via their ownership of the Respondent's?

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

4. Whether the Tribunal should grant the following:
    a. Find that the arbitration clause is inoperable;
    b. Find that Vader should not be added as a party to the arbitration;

c. Find that the there was no valid acceptance of the offer and that the contract was terminated by way of satisfactory performance;

d. Should the Tribunal not find in favour of the aforementioned, the Tribunal should find the following:

   i. Lost profits

   ii. For the payment of the Second Incentive for December of 2018, consisting in 35% of the total contract amount paid on 2018, which adds to USD$367,291,313.20;

   iii. 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); and

   iv. 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).

   v. Interest

   vi. Costs

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 incapable of being performed due to the impecuniosity of the Respondent.

The arbitration agreement remains valid; however, it is rendered inoperable due to the impecuniosity of the Respondent. Alternatively, it would be unfair for the Tribunal to allow the arbitration to continue, having knowledge of the impecuniosity of the Respondent, since the Respondent would be placed in a position whereby it remains open to excessive liability with no means of a defense.

B. Vader should not be a party to the Arbitration.

Under the AIAC rules, there is not enough to support a joinder for Vader to join Arbitration proceedings as it falls short of a prima facie case. Vader had no say in the business dealings of the Respondent's and they were carried out independently of Vader and as such were not a party to the written Arbitration clause. As such, there was no consent from Vader beyond any speculation and as such this fails to meet the standard for a prima facie case.

C. There was not valid acceptance of the Respondent's offer

The claimant's conduct does not qualify as a sufficient assent to the offer.

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

a. Find that the arbitration clause is inoperable

b. Find that Vader should not be added as a party to the arbitration

c. Find that the there was no valid acceptance of the offer and that the contract was terminated by way of satisfactory performance.

d. Should the Tribunal not find in favour of the aforementioned, the Tribunal should find the following:

   i. Lost profits:

   ii. For the payment of the Second Incentive for December of 2018, consisting in 35% of the total contract amount paid on 2018, which adds to USD$367,291,313.20;

   iii. 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); and

   iv. 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).

   v. Interest

   vi. Costs

PLEADINGS

I. THE AGREEMENT TO ARBITRATE IS INCAPABLE OF BEING PERFORMED DUE TO THE IMPECUNIOSITY OF THE RESPONDENT.

1. The arbitration agreement remains valid; however, it is rendered inoperable due to the impecuniosity of the Respondent (**A**). Alternatively, it would be unfair for the Tribunal to allow the arbitration to continue, having knowledge of the impecuniosity of the Respondent, since the Respondent would be placed in a position whereby it remains open to excessive liability with no means of a defense (**B**).

A. *Whilst the agreement to arbitrate remains valid, due to the impecuniosity of the Respondent, it is rendered inoperable.*

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]. This is so since there exists no feasible way of enacting the agreement to arbitrate due to the excessive financial constraints of the Respondent, therein voiding the intended legal effect of the clause. Once a party lacks the funds to arbitrate, it is automatically incapable of performing the arbitral agreement[8]. Therefore, the agreement to arbitrate remains inoperable.

B. ***Alternatively, it would be unfair for the Tribunal to allow the arbitration to continue, having knowledge of the impecuniosity of the Respondent.***

10. The Respondent would be unable to properly defend itself or be able to pursue any counter claims against the Claimant, owing to the fact that it lacks the funding required to do so[9]. The more complex an issue is, compound with any further counter claims, increases the price of the arbitration[10]. The refusal to consider the counter claims of a party that fails to meet the financial obligations stipulated would still be capable of infringing the fundamental right of access to justice and the principle of fair and equal treatment of parties[11].
11. The Respondent has been placed in a financial situation whereby there was no leeway on its expenditure allocation[12], there exists no profits, its income is less than its expenditure, there are excessive debts[13] as well as there are no disposable assets capable of surmounting that financial burden. There have been efforts made by the Respondent to access funding

[7] Albon v Naza Motor Trading Sdn Bhd [2007] EWHC 665 (Ch)
[8] III ZR 33/00, CLOUT Case No. 404 (German Bundesgerichtshof)
[9] Moot Problem 2018 [60]
[10] Art 41 (1) UNCITRAL 1985
[11] Pirelli, Cour de cassation, 1e civ., 28 March 2013, no. 11-27.770
[12] Moot Problem 2018 [26]
[13] Moot Problem 2018 [61]

from third parties, however, due to their precarious financial positions, these attempts had failed. The Respondent's impecuniosity renders it unable to mount any meaningful defense and the Tribunal, having regard to all these facts, in allowing the continuance of the arbitral proceedings, would infringe on the right of access to justice of the Respondent.

II. VADER SHOULD NOT BE A PARTY TO THE PROCEEDINGS.

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[14]

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.

[14] AICA

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'[15]
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'[16]
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'[17]
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'[18]
8. Unless there is an independent and formally valid manifestation of consent of the other company of the group to the agreement to arbitrate, such an extension should be granted only in very particular circumstances which justify a bona fide reliance of a party on an appearance caused by the non-signatory[19].
9. Vader is not a party to the written arbitration agreement. Management of all operations are independent of the parent company and authority to execute all agreements for the

[15] ICC Case No. 9517, Nov. 30, 1998, unpublished
[16] Société Sponsor A.B. c/ Lestrade, Cour d'appel Paris, 1988 Rev. Arb. 154 and note A, Chapelle.
[17] Bernard Hanotiau, Multi-party Actions in International Arbitration, 2009, OUP, p. 47
[18] ibid
[19] ICC case no. 4402, 7 1 ICC Awards, supra note 10, at 153; 9 Y.B. Com. Arb. 138 (1984)

company is not vested in RES's managing director. As a matter of fundamental principles of arbitration Vader has not given its consent to the arbitration agreement.

10. As no intent on the part of Vader can be established beyond speculation as to its awareness at the independent business dealings of its subsidiary there is not enough for a prima facie case and therefore a joinder under rule 9 (1) of the KLRCA.

I11. THERE WAS NOT A VALID ACCEPTANCE OF THE RESPONDENT'S OFFER:

The parties have agreed to abide by the UNIDROIT principles of International Commercial Contracts. The specific provision is article 2.1.6 which 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.[20] Second, an acceptance of an offer becomes effective when the indication of assent reaches the offeror.[21]

To ascertain whether there was a valid acceptance, the implicit indication of the assent i.e 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.[22] This positive or constructive knowledge must exist at the

[20] Article 2.1.6 (1) UNIDROIT Principles of International Commercial Contracts
[21] Article 2.1.6(2) UNIDROIT
[22] Article 4.2 (1) UNIDROIT

moment the statement takes effect or earlier.[23] If the preceding section does not apply, 'such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.'[24]

The starting point is that everybody is free in its decision to whether or not to enter into the contract. This is the principle of freedom of contract and freedom from contract.[25] The 'buyer was aware of the fact that the seller wanted to terminate the contract'[26] and therefore, the respondent should not be enforce his rights since there was no agreement between the parties. Secondly, it is submitted that the burden of proof is on the party invoking the Art 4.2(1) to prove that they have intended to attach a particular meaning to a statement made or a conduct it engaged in.[27] Furthermore, the party invoking art 4.2(2) has to establish how a reasonable person of the same kind of knowledge would have understood the conduct.[28]

In practise the application of Art 4.2(2) is the rule and Art 4.2.(1) is the exception.[29] 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 not have understood

[23] Stefan Vogenauer and Jan Kleinheisterkamp (eds), 'Commentary on The UNIDROIT Principles Of International Commercial Contracts' 508
[24] Article 4.2 (2) UNIDROIT
[25] Article 1.2 UNIDROIT Principles On International Commercial Contracts
[26] Moot problem page 5 para 31
[27] Stefan Vogenauer and Jan Kleinheisterkamp (eds), 'Commentary on The UNIDROIT Principles Of International Commercial Contracts' 509
[28] Ibid
[29] Commentary on The UNIDROIT Principles 509

the Indian head nod. This is because although Mr. Parades had visited some Asian countries, it does not necessarily follow that he should be aware of the subtle body behaviours. Allowing the claimant's claim would only cause uncertainty in the application of the principles and thereby seriously prejudicing the overriding aim of the principles which is 'to establish a neutral set of rules that may be used throughout the world without any particular bias to one system of law over another'[30]

[30] The preamble, UNIDROIT Principles

III. THE TRIBUNAL SHOULD GRANT RELIEF BY WAY OF THE FOLLOWING:

A. ***Find that the arbitration clause is inoperable***

1. Based on the reasons outlined in section **I**, above, the arbitral Tribunal should find that the arbitration clause is inoperable, despite it being valid.

B. ***Find that Vader should not be added as a party to the arbitration***

2. Based on the reasons outlined in section **II**, above, the Tribunal should find that Vader should not be added as a party to the Arbitration.

C. ***Find that the there was no valid acceptance of the offer and that the contract was terminated by way of satisfactory performance.***

3. Based on the reasons outlined in section **III**, above, the Tribunal should find that there was not a valid acceptance of the Respondent's offer and as such there is no valid contract.

D. ***Should the Tribunal not find in favour of the aforementioned, the Tribunal should find the following*** :

i. Lost profits:

a. For the payment of the 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;

4. The claimant has asked that the contract be made in writing and that it be completed satisfactorily and as such, following from the negotiation had between Mr. Deewarvala and Mr. Paredes, the aforementioned forms a quintessential aspect of the agreement between the parties. It represents a *consensus ad idem* for the works done on the part of the Respondent, in exchange for the agreed-upon consideration.

b. For the payment of the Second Incentive for December of 2017, consisting in 35% of the total contract amount paid on 2017, which adds to USD$319,383,750.00;

5. The claimant has asked that the contract be made in writing and that it be completed satisfactorily and as such, following from the negotiation had between Mr. Deewarvala and Mr. Paredes, the aforementioned forms a quintessential aspect of the agreement between the parties. It represents a *consensus ad idem* for the works done on the part of the Respondent, in exchange for the agreed-upon consideration.

ii. For the payment of the Second Incentive for December of 2018, consisting in 35% of the total contract amount paid on 2018, which adds to USD$367,291,313.20;

6. The claimant has asked that the contract be made in writing and that it be completed satisfactorily and as such, following from the negotiation had between Mr. Deewarvala and Mr. Paredes, the aforementioned forms a quintessential aspect of the agreement

between the parties. It represents a *consensus ad idem* for the works done on the part of the Respondent, in exchange for the agreed-upon consideration.

iii. 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); and

7. The claimant has asked that the contract be made in writing and that it be completed satisfactorily and as such, following from the negotiation had between Mr. Deewarvala and Mr. Paredes, the aforementioned forms a quintessential aspect of the agreement between the parties. It represents a *consensus ad idem* for the works done on the part of the Respondent, in exchange for the agreed-upon consideration.

iv. 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).

8. The claimant has asked that the contract be made in writing and that it be completed satisfactorily and as such, following from the negotiation had between Mr. Deewarvala and Mr. Paredes, the aforementioned forms a quintessential aspect of the agreement between the parties. It represents a *consensus ad idem* for the works done on the part of the Respondent, in exchange for the agreed-upon consideration.

v. Interest :

a. The amounts referred to in (a)(i) to (a)(iii) above from their day of maturity until their payment date; and

b. The amounts referred to in (a)(iv) and (a)(v) from their corresponding date of maturity until their payment date.

9. The Respondent's lost out on profits from business with the claimants due to a mistake made in negotiations. As well as claiming back lost profits, any interest on those lost profits should also be paid to the Respondent's.

vi. Costs:

a. All the costs of arbitration and administrative fees; and

b. All counsel's fees and expenses.

10. The Claimants have forced the Respondent's into Arbitration despite the Respondent's financial situation being made clear. As such, the Respondent's wish the Claimants to pay any cost incurred by the Respondent's due to their actions.

PRAYER FOR RELIEF

1. The Respondents request the tribunal find that:

a. The contract between the respondents and the claimants is invalid

2. Should the contract be found to be valid then the respondents request that the tribunal find that:

a. The lost profits should be awarded including;
    a. 2nd incentive for December 2016 (35% of total contract amount paid on Dec 2016)
    b. 2nd incentive - Dec 2017 - 35% of amount paid
    c. 2nd incentive - Dec 2018 - 35% of amount paid
    d. For the full amount of the 2017 deliveries (at 15% increase in price from 2016)

       For the full amount of the 2017 deliveries (at 15% increase in price from 2016)
    e. For the full amount of the 2018 deliveries (at 15% increase in price from 2017)
b. Interest should be awarded:
    a. (for incentive) from day of maturity until payment dates
    b. (for full contract amount) from day of maturity until payment dates
c. Costs incurred including:
    a. all costs for arbitration and administration fees
    b. All counsel's fees and expenses