At Asian International Arbitration Center

MEMORIAL FOR RESPONDENT

Claimant	**Respondent**
Chuizi Leishen's LLC	**Robustesse Espacial Solusion Corp**

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II. Abbreviations

Term	Official name / Formal name

AIAC/KLRCA	Asian International Arbitration Centre known as the Kuala Lumpur Regional Centre for Arbitration before 28 February 2018
Cambodia	Kingdom of Cambodia
China	People's Republic of China
UK	United Kingdom
EU	European Union
Claimant	Chuizi Leishen's LLC
Respondent	Robustesse Espacial Solucion Corp
The Parties	Claimant and Respondent
CEO/CEOs	Ms. Lee Qiang Bi and Mr. Auld Chap
Mr. Deewarvala	Mr. Kalai Deewarvala
Mr. Paredes	Mr. Armando Paredes

Representatives	Mr. Deewarvala & Mr. Paredes
Vader	Vader ltd
The Contract	The agreement executed by CL and RES in September 2013
B&R	Belt & Road Initiative
First Incentive	A 15% price increase in exchange for 4 future deliveries
Second Incentive	A 35% bonus for successful completion of 4 deliveries
P.	Page
para(s).	Paragraph(s)
C.	Clarifications to the moot problem
AC.	Additional Clarifications to the moot problem
Sec.	Section

Art.	Article
ed.	Edition
USD	United State Dollar

III. Index of Authorities

Articles and Works of Publicists

Abbreviation	**Books/Articles**	**Page No.**
Born	Gary B. Born *International Commercial Arbitration Vol 1* (2nd ed., Wolters Kluwer 2014)	22, 38
Kröll	Stefan M. Kröll The UNCITRAL Secretariat in conjunction with Profs Emmanuel Gaillard & George Bermann *The UNCITRAL Guide on the New York Convention* (Most recently updated on 18 July 2016) http://newyorkconvention1958.org	21
Redfern & Hunter	Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter *Redfern and Hunter on International Arbitration*	27

	(6ed., OUP Oxford 24 September 2015)	
Kudrna J	Jaroslav Kudrna *Arbitration and Right of Access to Justice: Tips for a Successful Marriage* (12 February 2013)	23, 25
GAR	Sabrina Ainouz, Romain Dupeyré, Jérôme Lehucher, Victor Datry and Marie-Claire Da Silva Rosa *Commercial Arbitration; France* (Global Arbitration Review 25 April 2018)	32, 34
Cambodia Legal System	The University of Melbourne *Southeast Asian Legal Research Guide: Introduction to Cambodia & its Legal System* http://unimelb.libguides.com/c.php?g=402982&p=4785153	32
Carter & Weiner	Barry E. Carter & Allen S. Weiner *International Law* (6th ed., Wolters Kluwer 2014)	29

Schwedt & Grothaus	Kirstin Schwedt and Julia Grothaus *When Does an Arbitration Agreement Have a Binding Effect on Non-Signatories? The Group of Companies Doctrine vs. Conflict of Laws Rules and Public Policy* (July 30 2014)	31, 33
The UNIDROIT Official comments	Stefan Vogenauer & Jan Kleinheisterkamp *Commentary on the UNIDROIT Principles of International Commercial Contracts 2016* https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016	41, 42
Kensy Cooperrider	Kensy Cooperrider *Gesture talks* (14 May 2018) https://aeon.co/essays/from-pointing-to-nodding-is-gesture-a-universal-language	46

Chartered Institute of Arbitrators	Chartered Institute of Arbitrators *Drafting Arbitral Awards Part III, Costs of International Arbitration Guidelines 2016* (8 June 2015) http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/drafting-arbitral-awards-part-iii-costs-8-june-2016.pdf?sfvrsn=4	54

Cases

Abbreviation	**Cases**	**Page No.**
	France	
LP case	Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Nov. 17, 2011, n° 09/2415	22, 24, 25
Paris Court of Appeals (1984)	Paris Court of Appeals, Rev. Arb. 1984, 98 (at 100)	32, 33
Dallah case	Gouvernement du Pakistan v. Société Dallah Real Estate & Tourism Holding	35

	Co, Cour d'appel de Paris, Pôle 1 – Ch. 1, n° 09/28533 (17 February 2011)	
	Dutch	
Decision AU4525	Judgment of 20 January 2006, LJN:AU4523	34
	Germany	
BGH case	German Federal Supreme Court ("BGH"), SchiedsVZ 2014, 151	34
	United Kingdom	
Peterson case	Peterson Farms Inc. vs. C&M Farming Ltd. (judgment of 4 February 2004, [2004] EWHC 121	28
Karoon case	Bank of Tokyo Ltd v. Karoon [1987] AC 45, 64	35
	The International Court of Justice	
Case concerning Barcelona Traction	Case concerning Barcelona Traction, Light and Power Company, Ltd [1970] ICJ 3,P.39	38
	ICC	
ICC No. 10758	Final Award in ICC case No. 10758, 128 J.D.I 1171 1176 [2000]	29
Dow Chemical case	Interim Award in ICC Case No. 4131, IX Y.B. Comm. Arb. 131 [1984]	31, 32, 34
ICC No. 3879	Interim Award in ICC case No. 3879 [1986]	38

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Abbreviation	**Citation**	**Page No.**

The UNIDROIT	The UNIDROIT principles of international Commercial Contract (2016)	19, 41, 42, 43, 45, 48, 50,52
The KLRCA Rules	The KLRCA Arbitration Rules (As revised in 2017)	13, 19, 24, 28, 30, 53
The Arbitration Law of Cambodia	The Commercial Arbitration Law of the Kingdom of Cambodia (2006)	18, 21, 24, 26, 27, 29, 30
The Commercial law of Cambodia	Law on Commercial Enterprises of the Kingdom of Cambodia (2005)	32, 37
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)	
The UNCITRAL Model Law	UNCITRAL Model Law on International Commercial	32

	Arbitration (1985), with amendments as adopted in 2006	

IV. Statement of Jurisdiction

This Tribunal has jurisdiction over this matter because Claimant and Respondent agree to have the arbitration held in Cambodia using the KLRCA Arbitration Rules.

V. Questions Presented

The Parties agreed that the issues to be decided in the arbitration are as follows:

1. Is the agreement to arbitrate incapable of being performed due to impecuniosity of the Respondent?

2. Should the request of Claimant to join Vader as a party to the Arbitration be granted by the Tribunal?

3. Was there a valid acceptance of the Respondent's offer?

4. What relief should the Tribunal grant?

VI. Statement of Facts

The Parties to this arbitration are Chuizi Leishen's LLC (hereinafter "**Claimant**") and Robustesse Espacial Solucion Corp (hereinafter "**Respondent**"; jointly referred to as **"Parties"**).

Claimant is a commercial company duly incorporated under the laws of China in 2000. Its main commercial activity is construction. Claimant employed Mr. Kalai Deewarvala (hereinafter "**Mr. Deewarvala**"), a Malaysian-Indian construction specialist, as the representative of Claimant for the purpose of negotiating the Contract between Parties and heading all the B&R projects.

Respondent a Limited Company duly incorporated under the laws of Cambodia in January 2013. Respondent is fully owned by Vader, which is a commercial company in UK. Both companies' main business activity is the production and selling of bricks. The management Director of Respondent is Mr. Armando Paredes (hereinafter "**Mr. Paredes**") who is a Mexican specialist in baking bricks and building walls.

1950	Vader Ltd (hereinafter "Vader") was duly incorporated under the laws of the United Kingdom.
2000	Chuizi Leishen's LLC (hereinafter "Claimant") was duly incorporated under the laws of China.
At the beginning 2013	Vader's CEO, Mr. Auld Chap, saw the possibility of the UK leaving the EU and decided to prepare for the off chance of a Brexit.
January 2013	Robustesse Espacial Solucion Corp (hereinafter "Respondent") was duly incorporated under the laws of Cambodia as a subsidiary of Vader.
February 2013	A Russian national, Ms. Zolushka Pupkina arranged for Mr. Chap and Ms. Lee (hereinafter "CEOs") to meet to discuss business.
September 2013	Mr. Paredes and Mr. Deewarvala (hereinafter the "Representatives") had signed the "Contract".

October 2014	The business of Vader in the EU started to be affected by the possibility of an upcoming Brexit.
November 2014	The Representatives met in Paris. The Parties agreed that Claimant would pay a 15% price increase for more 4 deliveries during 2015.
November 2015	The Representatives crossed emails and decided to extend the agreement throughout 2016 for 4 more deliveries and a second 15% price increase.
June 2016	The Brexit affected the business of Vader in the EU. As a result, Vader decided to stop controlling Respondent.
July 2016	The Parties started to communicate and to seek a new round of negotiations.
23th November 2016	The Representatives had a final Skype call.
Mid-March 2017	Claimant contacted Respondent to confirm the date of the next delivery. The Parties realized there was a misunderstanding.

VII. Summary of Pleadings

ISSUE 1: THE AGREEMENT TO ARBITRATE IS INCAPABLE OF BEING PERFORMED DUE TO IMPECUNIOSITY OF RESPONDENT

Respondent's impecuniosity has caused the arbitration agreement incapable of being performed. The arbitral tribunal should assure the respect of the fundamental principles such as access to justice and principle of equal treatment of parties. Respondent's impecuniosity has severe impact on its access to arbitral justice. Respondent is deprived of the possibility to have its counter-claims decided by arbitrators as it does not have enough funds to bring the counter-claims in arbitration. Lack of financial funds also impairs Respondent's effective defence, and consequently violate the right to present the case and the right to equal treatment. Even if the arbitration agreement is performed despite Repondent's lack of funds, the award rendered may be annulled or difficult to recognized or enforced under the Commercial Arbitration Law of Cambodia.

ISSUE 2: VADER SHOULD NOT BE BOUND BY THE ARBITRATION AGREEMENT

The tribunal cannot enforce Vader to join as a party to the arbitration under Rule. 9 of the KLRCA Rules. Generally, parties to an arbitration is parties whose signatories are written in a contract. It is exceptional case where a non-signatory party is bound to an arbitration agreement. Although Claimant may allege that Vader should join as a party to the arbitration under the group of companies doctrine which is accepted only in limited number of jurisdictions, there is no convincing evidence that Vader would be intended to be bound to the arbitration. Moreover, the principle of veil piercing cannot bind Vader to the arbitration because Vader did not establish Respondent for fraud or misconduct.

ISSUE 3: THERE WAS A VALID ACCEPTANCE OF CLAIMANT'S OFFER

Claimant did not validity accept Respondent's offer. Under Art. 2.1.6 of the UNIDROIT, an acceptance of an offer becomes effective when the indication of assent reaches the offeror. Considering the UNIDROIT includes an article regarding interpretation of statements and other conducts, the offeree's indication of asset must be understood by the offeror. While people use up and down head movement to indicate "yes" in almost countries, Indian sideway nodding means "yes". In this case, the representative of Respondent is not familiar with Indian culture although Claimant responded to the offer

by Indian sideway nodding. In addition, there is no circumstances where Respondent could have been aware of Claimant's asset.

ISSUE 4: THE TRIBUNAL SHOULD GRANT RELIEFS WHICH REPONDENT CLAIMS

Respondent requests three reliefs. Firstly, to reject all requests from Claimant. Secondly, to order Claimant to pay for the deliveries for 2017 and 2018. Finally, to order Claimant to pay all costs of the arbitration. Regarding first relief, Although Parties had not agreed to extend the Contract, Claimant claims their requests assuming that the parties had reached the agreement. Concerning second relief, In the present case, although Claimant claims the Contract is valid, it had not made payment yet. As to final relief, Claimant's unreasonable conduct has an adverse impact on costs allocation.

VIII. Pleadings of Respondent

ISSUE 1: THE AGREEMENT TO ARBITRATE IS INCAPABLE OF BEING PERFORMED DUE TO IMPECUNIOSITY OF RESPONDENT

I. The Arbitral Agreement Becomes Null If a Party Is Not Able to Perform It

The Arbitration Law of Cambodia governs this arbitral proceeding because the Parties agreed that the seat of arbitration was Cambodia[1]. While the arbitral tribunal has power to rule its own jurisdiction, Art. 8 of the Arbitration Law of Cambodia stipulates that a national court can have its jurisdiction over a claim if it finds that the agreement is null and void, inoperative or incapable of being performed. In addition, the arbitral tribunal shall terminate the arbitral proceedings when it finds that "the continuation of the proceedings has, for any other reason, become unnecessary or impossible". In this case, the question is whether or not the Respondent's impecuniosity fulfills the condition of "incapable of being performed".

According to Born[2], "[i]t is relatively clear that Arbitration agreements that are "incapable of being performed" includes cases where the parties have agreed upon a procedure that

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[1] Problem, para. 15

[2] *International Commercial Arbitration* Vol 1 (Wolters Kluwer, 2nd Ed, 2014) (at p 844)

is physically or legally impossible to follow".

Moreover, Kröll[3] indicates the definition of "incapable of being performed" is generally understood as "relating to situations where the arbitration cannot effectively be set in motion".

Accordingly, Respondent submits that impecuniosity of Respondent has caused the arbitration legally impossible to be proceeded.

II. Respondent's Impecuniosity Has Severe Impact on Its Access to Arbitral Justice, Which May Lead to The Annulment of The Award

Parties to an arbitration has a right of access to justice. In LP case[4], the claimant requested the ICC Court to fix separate advance on costs according to the ICC rule. The respondent LP was unable to pay the advance on costs and its counterclaims were withdrawn thereby. The Paris Court of Appeal ("the Court") annulled the arbitral awards. The Court in its decision states that "[T]he right of access to justice implies that a person cannot be deprived of the concrete faculty to have its claims decided by a judge;

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[3] the UNCITRAL Guide on the New York Convention, prepared by the UNCITRAL Secretariat in conjunction with Profs Emmanuel Gaillard and George Bermann and was most recently updated on 18 July 2016 Available at http://newyorkconvention1958.org.

[4] Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Nov. 17, 2011, n° 09/2415

any restriction to the right of access to justice must be proportionate to requirements of the sound administration of justice. “It stresses that arbitral tribunals are not exempt from the application of these principles [the right of access to justice]”. The Court emphasized the jurisdictional nature of the arbitration by stating that arbitral tribunals are not exempt from applying the right of access to justice[5]. This case is identical to the current case, in which to enforce an impecunious party to perform the arbitration agreement will not only violate its procedural rights as it cannot finance its counterclaims, and present a case effectively, but also increase the uncertainty of the arbitral awards as it may be annulled by the court afterwards.

A. It Is a Violation of Respondent’s Right of Access to Justice and Principle of Equal Treatment If It Were Forced to Perform the Arbitration Agreement

Respondent is deprived of the possibility to have its counter-claims decided by arbitrators. Respondent does not have enough funds to bring the counter-claims in arbitration due to its tense financial situation[6]. It would increase the amount of the

[5] [Kudrna J]

[6] Problem, para. 59

arbitrators' fees and institution's administrative fees to bring the counter-claims, according to the calculation method provided by the rule of the KLRCA Rules. It is also only theoretical for Respondent to bring its claims to other proceedings in the current situation as no court will assume jurisdiction as the arbitral proceedings are already underway[7].

If the arbitration agreement is performed, the principle of equal treatment of parties would be violated. In accordance with Art. 26 of the Arbitration Law of Cambodia, the parties shall be with equality and each party shall be given a full opportunity to present his case, including representation by any party of his choice. The principle of equal treatment of parties has also been affirmed by the Court in LP case. The parties were not on equal footing before the tribunal since Respondent's defense will be restricted only to a reply to the claims of the adverse party. As Respondent would not be able to submit to the arbitral tribunal its counter-claims, which are sufficiently connected with principal claims, Respondent is also deprived of a possibility to offset claimant's claims and mutual debts.

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[7] Problem, para. 60

Respondent is not in a financial position to submit counterclaims in arbitral proceedings. Lack of financial funds will also impair the Respondent's effective defense, and consequently violate the right to present the case and the right to equal treatment. Taking into account the unfair situation Respondent will be faced with, the tribunal needs to consider seriously whether the performance of arbitration agreement shall prevail over right of the party.

B. Even the Arbitration Agreement Was Performed, The Award May Be Annulled Eventually Because Respondent Cannot Effectively Present Its Case

In LP case, the Court gives effect to right of access to justice and principle of equal treatment of parties and annuls the award on the ground of article 1520 4° (violation of due process) et 5° (violation of international public policy) of the French Code of Civil Procedure. The annulment of the arbitral award by the Court results in two years of arbitral proceedings for nothing, another two years of state proceedings for annulment and resources wasted. Both parties cannot receive justice[8].

[8] [Kudrna J]

There is also a ground for Cambodian courts to either set aside or refuse to recognize or enforce the arbitral award. The arbitral award may be set aside or unable to be recognized or enforced because Respondent cannot effectively present its case, pursuant to article 44 and article 46 of Commercial Arbitration Law of Cambodia. The article 44 (2)(a)(ii) provides that "[A]n arbitral award may be set aside by the Appeal Court and Supreme Court only if: […] the party […] was otherwise unable effectively present his case." The article 46(1)(b) provides that "[R]ecognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: at the request the party against whom it is invoked, if that party furnishes to the Appeal Court where recognition or enforcement is sought proof that […]the party[…]was otherwise unable effectively present his case."

Thus, even if the arbitral arbitration is performed and even if an arbitral award rendered is in favor of Claimant, the claimant may find it difficult to have the award recognized and recognized in Cambodia. Further, upon the application of Respondent to the court, the award is possible to be annulled eventually, resulting in waste of the time and money for both parties. Leaving the control until the annulment stage is not satisfactory. If the

proceedings are conducted despite one party's lack of funds, the above-mentioned issues will arise eventually.

III. Conclusion

For the above reasons, Respondent right of access to justice has been breached because lack of opportunity to counter-claim is against Art. 26 of the Arbitration Law. Therefore, the arbitral agreement between the Parties has been incapable to be performed due to Respondent's impecuniosity.

ISSUE 2: VADER SHOULD NOT BE BOUND BY THE ARBITRATION AGREEMENT

I. The Tribunal Can Decide Whether or Not a Non-Signatory Party Shall Be Bound to an Arbitration Agreement

A. The Principle of Competence-Competence Is Recognized in International Law

The principle of competence-competence provides the arbitral tribunal with the power to decide on its jurisdiction[9]. Additionally, in Cambodia, which is the seat of arbitration,

[9] Redfern & Hunter P,340

arbitration tribunals are allowed to rule on its jurisdiction[10].

Thus, under the principle of competence-competence, the tribunal has the authority to decide its own jurisdiction including jurisdiction over non-signatories of the arbitration agreement.

B. Art. 9 of the KLRCA Arbitration Rules Affirm The Tribunal's Authority to Join Non-Signatories Considering All Relevant Circumstances

The Parties agreed that the arbitration would proceed under the KLRCA arbitration rules as applicable arbitration rules. The KLRCA arbitration rules affirm that the tribunal can order non-signatory parties to join to the arbitration.

Rule. 9 of the KLRCA rules states that "any party to an arbitration…may request …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".

Claimant requests the tribunal to conclude that Vader shall join as a party to the arbitration. However, Respondent highlights that there is no sufficient evidence to bind Vader to the

[10] Art. 24 of the Arbitration Law of Cambodia

arbitration according to all relevant circumstances Rule. 9.5 of the KLRCA rules.

Respondent submits that this Claimant's contention shall be rejected for the following reasons:

- Vader has not consent to the arbitration agreement (II);
- Neither the group companies doctrine nor the principle of veil piercing shall apply to this case (III, IV);

II. Vader Is Not a Party to The Contract Including the Arbitration Agreement

A. Generally, Only Parties Who Agreed with an Arbitration Agreement Will Join to an Arbitration

"[A]rbitration generally occurs only pursuant to an arbitration agreement between the parties"[11]. It means that rights and obligations of international arbitration agreement apply only to the agreement's parties and not others[12].

Thus, a general rule is that only signatories to a contract are bound by it. this principle is longstanding and widespread because in most cases, arbitral tribunals look at signatures of the Contract in order to determine who are parties to the arbitration[13].

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[11] Carter & Weiner (at p.366)
[12] Art. II of New York Convention
[13] FinalAwardinICCcaseNo.10758,128J.D.I 1171 1176 [2000]

This principle is also recognized under the arbitration law of Cambodia, which is the seat of arbitration[14]. According to Art. 2(d) of the Arbitration Law of Cambodia, "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

In addition, if parties want to resolve their dispute in an arbitration, generally they agree to do it in writing[15].

In this case, the arbitration clause was included in the Contract which was signed by the Parties, not Vader[16]. Thus, Vader has no obligation to be involved in the arbitration in principle.

B. It Is a Very Exceptional Case That a Non-Signatory Party Is Bound by an International Arbitration Agreement

There are some exceptional legal theories that have been developed by courts and arbitral tribunals to bind non-signatory parties to an arbitration agreement.

However, this case is the same as general cases and such exceptional rules cannot be used

[14] Problem, para. 15
[15] Rule 1 of the KLRCA rules
[16] Problem, para. 15

as to bind Vader to the arbitration in this case although Claimant may contend that the group companies doctrine or the principle of veil-piercing apply to this case (III, IV).

III. Vader Should Not Be Bound to the Arbitration Agreement Under The Group of Companies Doctrine

The group of companies doctrine has been developed as a specialized rule which is applicable only to non-signatory issues in international arbitration agreements. Claimant may submit that Vader shall join as a party to the arbitration on the ground of the group of companies doctrine, relying on the Dow case. However, the doctrine cannot apply to this case for the following reasons.

A. The French Case Law Regarding the Group of Companies Doctrine Does Not Apply to This Case

The group of companies doctrine are controversial issue and has been accepted in only a limited number of jurisdictions[17] .

1. The Tribunal Should Consider the Laws of Cambodia in Deciding

[17] Schwedt & Grothaus

the Application of the Group of Companies Doctrine

In an international transaction, parties can choose the law applicable to their arbitration agreement, and the tribunal should resolve their dispute under the law[18].

In this case, the Parties agreed that the seat of arbitration should be Cambodia[19].

As a result, it is critical matter whether the group of companies doctrine is acceptable under the laws of Cambodia.

2. The Group of Companies Doctrine Is Not Part of Cambodian Law, Which Is the Law of the Seat

Under Art. 284 of the Commercial Law of Cambodia, a subsidiary has separate legal personality from its parent company. Thus, the group of companies doctrine is not included in the laws of Cambodia.

Claimant may submit that French case law is relevant in resolving a dispute under Cambodia law since Paris Court of Appeals affirmed the Dow arbitration Award, which included the group of companies doctrine[20].

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[18] Art. 28 of the UNCITRAL Model Law

[19] Problem, para. 15

[20] Paris Court of Appeals, Rev. Arb. 1984, 98 (at 100)

Indeed, during French colonization Cambodian legal system were almost wholly based on the French legal system[21]. However, the legal system of Cambodia was rebuilt because it had been destroyed completely by the Khmer Rouge[22]. As a result, the current legal system is a hybrid legal system, which is influenced by not only the French legal system but also the common law system and foreign aid to reform Cambodian legal system[23]. Thus, the relevance of French case law, if any, on Cambodian law is not dispositive.

In any event, French law does not specially recognize the group of companies doctrine[24]. Hence, the decision of Paris Court of Appeals was limited to determining whether an award should be set aside and was not an affirmation that the group of companies is part of French law.

3. Conclusion

It is still not clear whether or not the group of companies doctrine is recognized under Cambodian law in the same way as the French legal system. Hence, the French case law affirming the doctrine cannot apply to this case directly.

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[21] Cambodia Legal System
[22] Cambodia Legal System
[23] Cambodia Legal System
[24] GAR

B. The Approach of The UK Supreme Court to Enforcement Should Be Considered

1. The Group of Companies Doctrine Is Not a Widely Accepted International Practice

The group of companies doctrine are controversial issue and has been accepted in only a limited number of jurisdictions[25]. There are court decisions which did not apply the doctrine to issues whether a non-signatory is a party to an arbitration agreement. Dutch Supreme Court rejected the group of companies doctrine[26]. In addition, the German Federal Supreme Court did not adopt the Dow chemical approach[27]. Moreover, in the UK, where Vader was incorporated, the English High Courts mentioned that "the Group of Companies doctrine … forms no part of English law"[28].

These cases tended to examine specific circumstances of the cases in judging the non-signatory issue.

2. The Tribunal Should Take Account of Enforceability of an

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[25] Schwedt & Grothaus

[26] [judgment of 20 January 2006, LJN:AU4523]

[27] [German Federal Supreme Court ("BGH"), SchiedsVZ 2014, 151]

[28] [Peterson Farms Inc. vs. C&M Farming Ltd. (judgment of 4 February 2004, [2004] EWHC 121, para62)]

Arbitration Award by National Courts

Arbitration awards must be recognized and enforced by national courts at the final stage. There is a case regarding the group of companies doctrine which was affirmed in France and rejected in UK: *Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company* case.

In principle, both French and English law do not specially recognize the group of companies doctrine[29]. While French courts accepted by French case laws, English courts have expressly rejected the doctrine as a matter of English law[30].

In *Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company* case, the French and UK courts reached different conclusions in reviewing the arbitration award. Paris Court of Appeal affirmed the non-signatory shall be bound to the arbitration agreement based on involvement of it during negotiation, performance of the Contract[31].

On the other hand, the UK Supreme Court rejected the arbitral decision on jurisdiction

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[29] GAR

[30] *Bank of Tokyo Ltd v. Karoon [1987] AC 45, 64]*

[31] [Gouvernement du Pakistan v. Société Dallah Real Estate & Tourism Holding Co, Cour d'appel de Paris, Pôle 1 – Ch. 1, n° 09/28533 (17 February 2011)]

on the ground of lack of proof that there was common intention for the non-signatory to be bound by the arbitration agreement[32].

In this way, case laws of national courts require higher standard of proof that a parent company consented to the arbitration agreement for the purposes of enforcement as well as the UK.

Hence, the tribunal should analyze evidences of common intention that Vader consented to arbitrate from the view of enforceability of arbitration awards.

C. There Was No Common Intention to Bind Vader to the Arbitration Agreement

Claimant may submit that Vader shall be bound to the arbitration clause under the group of companies doctrine. However, considering the circumstances, it is clear that there was no common intention for Vader to be bound by the arbitration agreement.

Indeed, the beginning of the Contract was the meeting between Claimant and Vader[33]. Since that time, Vader was not involved in negotiations on whether the Contract would

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[32] [Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46]

[33] Problem, para. 10

be extended or not[34]. Moreover, Vader stopped further direction to Respondent after the Brexit[35]. As a result, when the Parties had the final negotiation which caused this arbitration, Mr. Paredes had full control to Respondent's activities[36].

Hence, there was no common intention that Vader would be bound to the arbitration agreement.

D. Conclusion

For these reasons, the group of companies doctrine cannot apply to this case. Therefore, Vader has no obligation to join as a party to the arbitration under the group of companies doctrine.

IV. Vander Cannot Join to the Arbitration as an Additional Party under The Principle of Piercing the Corporate Veil

Under Art. 284 of the Commercial Law of Cambodia, a subsidiary company exists as a legal person separate from its parent company. This structure legally allows the parent company not to have responsibility for the liability of its subsidiary. Thus, Vader cannot be bound in principle to the arbitration agreement which was made between the Parties.

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[34] Problem, para. 19
[35] Problem, para. 27
[36] Problem, para. 27

Claimant may allege that Vader should join to the arbitration based on the principle of piercing the corporate veil. This principle is used sparingly in international commercial arbitration: "[e]quity, international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment[37]". However, this case is not such a situation where the veil-piercing can apply.

A. The Principle of Piercing the Corporate Veil Requires Not Only Effective Absence of Separate Personality of a Subsidiary but also Using It for Fraud by The Parent Company

The International Court of Justice explained multiple case laws indicated that "the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations[38]".

Likewise, in applying the veil-piercing, many national courts and international arbitration tribunal require convincing evidences of (1) non-existence of legal personality of a subsidiary and (2) fraud or other misconduct schemed to avoid liability[39].

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[37] [InterimAwardinICCCaseNo.3879[1986]]
[38] [Case concerning Barcelona Traction, Light and Power Company, Ltd [1970] ICJ 3,P.39]
[39] Born, P.1432-1433.

B. The Veil between Vader and Respondent Cannot Be Pierced

1. Respondent Has Been Conducting Its Business as an Entity Separated From Vader

During the course of performance of the Contract, Vader's Board of Directors itself resolved that the operation of Respondent should remain independent because the possibility of the Brexit threatened Vader's activities in Europe[40]. In addition, Respondent pays salaries and other expenses within income from its operation[41]. Hence, a legal personality of Respondent separates from Claimant clearly existed.

2. Vader Had Not Used Respondent for Fraud or Misconduct

In this case, Vader established Respondent in Cambodia as to extend its business into the Asian market in the future, preparing for possibility of the Brexit[42]. Moreover, it was common intention between Claimant and Vader that Contract would be concluded between Parties[43]. There is no evidence of fraud or misconduct in business relations or operations.

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[40] Problem, para. 19
[41] Problem, para. 26
[42] Problem, para. 6
[43] Problem, para. 10

C. Conclusion

For the above reasons, the two main requirements of the veil-piercing have not been satisfied. Consequently, Vader should not be bound to the arbitration agreement because there is no persuasive evidence to remove separation between Vader and Respondent.

V. Conclusion

For the above reasons, it is obvious that Vader does not an obligation to be bound by the arbitration agreement. Consequently, the tribunal cannot have its jurisdiction over Vader.

ISSUE 3: THERE WAS A VALID ACCEPTANCE OF CLAIMANT'S OFFER

I. Background relevant to this case

Respondent started a business relationship with Claimant from the Contract concluded in 2013[44]. Respondent had an obligation to deliver bricks during 2014 under the first Contract[45]. After that, the Parties decided whether the Contract would be extended or not through negotiations every year[46]. In 2016, Respondent realized that the price of bricks in Asia had risen considerably due to increased demand in the area[47]. Accordingly,

[44] Problem, para. 13
[45] Problem, para. 15
[46] Problem, paras. 20, 24, 30
[47] Problem, para. 25

although the Parties wanted to maintain their good relationship, they were unable to come to terms for four more months[48]. In these circumstances, it was unsurprising that Claimant refused Respondent's offer in negotiation through the Skype call[49]. Claimant nevertheless alleges that it accepted the offer.

II. Claimant's Indian Nodding Was Not a Valid Acceptance under Art.2.1.6 of the UNIDROIT

The parties had concluded Contracts whereby the UNIDROIT is applied as a governing law from 2013. Art.2.1.6 of the UNIDROIT lists three requirements of mode of acceptance. According to Art.2.1.6 of the UNIDROIT, an acceptance is "[a] statement made by or other conduct of the offeree indicating assent (1) to an offer (2)" and "[a]n acceptance of an offer becomes effective when the indication of assent reaches the offeror (3)".

In the case where there is an implicit indication of assent, the third requirement whether such an indication of assent reached the offeror or not is the critical matter.

A. Claimant's Asset to the Offer Must Be Recognized by Respondent under

[48] Problem, para. 28
[49] Problem, para. 36

Art.2.1.6 of The UNIDROIT

Art. 2.1.6 (2) stipulates that "[a]n acceptance of an offer becomes effective when the indication of assent reaches the offeror". Thus, Claimant's purported acceptance by nodding would not be effective unless such an indication of assent reached Respondent.

Art.1.10 of the UNIDROIT establishes the general principle regarding notice. While Art.1.10 does not mention the addressee's understanding for effectiveness of notice, the UNIDROIT contain articles regarding interpretation of statements and other conducts in Art.4.2 of the UNIDROIT. "[I]t can be deduced from Art. 4.2(2) that a notice must be comprehensible for a reasonable person of same kind and in the same circumstances as the addressee[50]".

If this were not required, it could lead an unreasonable situation where a contract can be concluded without recognition of an offeror.

As a result, Art. 2.1.6 of the UNIDROIT requires the offeror's understanding the offeree's intention of assent as one of tests for validity of acceptance.

B. Interpretation of Nodding Should in Accordance With Art. 4.2 of the

[50] The UNIDROIT Official comments of Art.1.10, para 13

UNIDROIT

In interpreting statements and other conducts, Art. 4.2 of the UNIDROIT set the subjective test in paragraph (1) and the reasonableness test in paragraph (2). "In practice …the application of Art. 4.2(2) is the rule, whilst Art. 4.2(1) is the exception[51]" because it is normally difficult for the parties to prove that the other party knew or could have been aware of that party's intention.

In addition, in applying Art. 4.2 of the UNIDROIT, all relevant circumstances shall be considered under Art. 4.3 of the UNIDROIT

1. Respondent Could Not Have Been Aware of Claimant's Intention Under Art.4.2 (1) of The UNIDROIT

Art. 4.2(1), the subjective test, states that "[t]he statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention."

Although Claimant contends that Respondent knew or could not have been unaware of intention of its nodding, it was impossible for Respondent to have been aware considering

[51] The UNIDROIT Official comments of Art.4.2, para9

all relevant circumstances to this case.

a. There Is No Evidence That Mr. Paredes, The Representative of Respondent, Was Familiar with Indian Gestures

Mr. Paredes was born in Mexico and went to school in Mexico City. He graduated from University in Mexico City. He completed MBA in France[52]. In addition, Mr. Paredes left for Cambodia to work for Respondent directly after he was hired by Respondent. Mr. Paredes spent most of his time in Cambodia[53].

Hence, in his life, there is no evidence that he is familiar with Indian culture and gestures. By contrast, it was normal for Mr. Parties that nodding side-way means rejection based on his own culture.

b. It Was Difficult to Know About Nodding through Negotiations with Mr. Deewarvala

The Parties had negotiated about the Contract four times from 2013 to 2016. However, at least twice negotiations were held without direct meetings[54]. Because of few direct meetings, it was difficult for Respondent to recognize Mr. Deewarvala's habits and

[52] C., para. 5
[53] C., para. 6
[54] Problem, paras. 24,30

gestures.

c. Conclusion

For the above reasons, Mr. Parties could not have been aware of Claimant's intention of its Indian nodding. It was reasonable to regard the Indian nodding as rejection of the offer.

2. Reasonable Person of The Same Kind as Respondent also Must Understand Claimant's Nodding the Same Way as Respondent under Art.4.2 (2) of the UNIDROIT

Art. 4.2(2) of the UNIDROIT, the reasonableness test, stipulates that "[i]f the preceding paragraph is not applicable, 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".

As Respondent alleges above[55], since Art. 4.2(1) cannot apply to this case, Claimant's intention of its nodding shall be interpreted according to understanding of a reasonable person of the same kind as Mr. Paredes, such as a businessman working for a company selling and producing bricks.

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[55] III. B 1

a. The Indian Head Nod Is Different from the International Standard Way to Nod

In most parts of the world, people use nodding to say "yes" and shaking their head to say "no". At least two other systems have been found in the other few countries[56]. Indian culture has one of the systems, with side-ways nod meaning "yes". Thus, a reasonable person of the same kind as Mr. Paredes regards side to side nodding as refusing Respondent's offer.

b. The Parties Had Renewed the Contract Every Year

Respondent was suffering from the significant rise in the price of bricks[57]. For the reason, the Parties negotiated every year to decide whether or not the Parties extend the Contract[58]. Although Claimant wanted to continue the relationship with Respondent, this depended on whether Claimant accept Respondent's suggestion to increase price or not[59].

In addition, the total payment of bricks in 2016 was approximately US$1,416,700,000, which is more than twice that in 2014, US$600,000,000[60]. It led the Representatives to

[56] Kensy Cooperrider
[57] Problem, para. 25
[58] Problem, paras. 22, 24, 33
[59] Problem, para. 32
[60] Problem, para. 15,34

be unable to come to terms for more than four months[61]. Thus, it was not surprising that Claimant rejected Respondent's offer.

c. Mr. Deewarvala's Upbringing Cast Doubt on Claimant's Interpretation of His Nod

Mr. Deewarvala was born in Malaysian and went to school in Kuala Lumpur. He graduated University in Kuala Lumpur. Later, he completed an MBA in Australia[62]. Thus, he must have been aware that using a side-way nod for "yes" is common and was surrounded by those who followed this practice. Hence, Mr. Deewarvala should have not responded to Respondent's offer by Indian nodding and must have at least appreciated the potential for misunderstanding.

d. Conclusion

Therefore, according to the meaning that a reasonable person of the same kind as Mr. Paredes would give to Claimant's Indian nodding, it shall be interpreted as rejection to Respondent's offer.

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[61] Problem, para. 28
[62] C., para. 5

III. Conclusion

For the above reasons, Claimant's Indian nodding in this circumstance should be interpreted as rejection to the offer. As a consequence, there was not valid acceptance by Claimant.

ISSUE 4: THE TRIBUNAL SHOULD GRANT RELIEFS WHICH REPONDENT CLAIMS

I. To Reject All Requirements from Claimant

A. The Contract Is Not Valid and Claimant Does Not Have a Right to Request Respondent to Deliver the Bricks

As Respondent submitted in issue (C), the Parties terminated the Contract on 23 November 2016. There is no agreement to extend the Contract for 2017 and 2018. Respondent does not have an obligation to deliver the bricks in 2017 and 2018. Therefore, Claimant is not entitled to request Respondent to deliver the bricks.

B. Even Though the Contract Is Valid, Claimant Is Not Entitled to Request Respondent to Perform Its Obligation under UNIDOROIT Art.7.2.2

Because the Request Meets Exceptions

1. The UNIDROIT Art. 7.2.2. Stipulates Five Exceptions to the Right to Request Performance

The exceptions are:

(a) Performance is impossible in law or in fact;

(b) Performance or, where relevant, enforcement is unreasonably burdensome or expensive;

(c) The Party entitled to performance may reasonably obtain performance from another source;

(d) Performance is of an exclusively personal character;

(e) The Party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

2. The Request by Claimant Meets Exception (a)

Respondent cannot deliver the bricks in fact because it does not have enough money to perform its obligation. In the present case, Respondent could not deposit a total of USD

25,000 because of its impecuniosity[63]. Of course, to deliver the bricks costs much more than the deposit, so it is clear that Respondent does not have money to perform its obligation. In addition, Respondent has no source to get funds. In the present case, Respondent had sought funding from a number of third-party sources. However, Respondent's attempts failed due to its precarious financial position[64]. Moreover, Respondent cannot rely on Vader, which is a parent company of Respondent. There are two reasons. Firstly, Vader had decided that it has no control to Respondent. This means Vader does not give financing, compliance monitoring or directives[65]. Secondly, as Respondent submitted in issue (B), Vader should not join as a party to the arbitration. In light of these conditions, Respondent does not have money to deliver the bricks. Therefore, Respondent cannot perform its obligation in fact.

II. To Order Claimant to Make Payment for the Deliveries Including Payment That Will Have to Be Made in December of 2018.

A. Respondent Is Entitled to Require Claimant to Make Payment under the

[63] Problem, para. 48
[64] Problem, para. 61
[65] Problem, para. 27

UNIDROIT Art. 7.2.1

The UNIDROIT Art. 7.2.1 states that where a party who is obliged to pay money does not do so, the other party may require payment.

1. Claimant Had Not Performed Its Obligation to Make Payment Although It Claims That the Contract Is Still Valid

According to the term (d) of the Contract, Claimant has an obligation to make payment for each delivery at least five days before the delivery date[66]. The delivery dates are on the last working day of March, June, September and December[67]. However, Claimant had not made payment since it had paid for the last delivery of 2016[68].

2. Respondent Is Entitled to Require Claimant to Make Payment That Will Have to Be Made in December of 2018.

Claimant will have to pay for the last delivery and Second Incentive on the last working day of December of 2018[69]. This obligation has not fallen into due yet. However, as Respondent submitted in above clause, Claimant did not made payment since it had paid

[66] Problem, para. 15
[67] Problem, para. 15
[68] Problem, paras. 42, 43
[69] Problem, para 15

for the last delivery of 2016[70]. Considering this fact, it is clear that Claimant has no intention to pay for the delivery and Second Incentive on the last working day of December of 2018. This can be regarded as non-performance of payment. Therefore, Respondent is entitled to request Claimant to pay for the last delivery of 2018 and Second Incentive.

III. To Order Claimant to Pay Interest for The Payment

A. Respondent Is Entitled to Request Claimant to Pay Interest for the Payment under the UNIDROIT Art. 7.4.9

The UNIDROIT Art. 7.4.9 states that If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.

As Respondent submitted in Ⅱ of issue D, although most payment for the bricks had already fallen due, Claimant had not made payment. Regarding the payment that has not fallen into due, it is regarded as non-performance because Claimant has no intention to perform. Therefore, Respondent is entitled to request Claimant to pay interest upon that

[70] Problem, paras. 42, 43

sum from the time when payment is due to the time of payment

IV. To Order Claimant to Bear the Costs of the Arbitration

A. The Arbitral Tribunal Can Determine the Proportion of Costs to Be Borne by the Parties under Rule 13 (9) of Part I of KLRCA

Rule 13 (9) of Part I of KLRCA rules states that notwithstanding Rule 13, the arbitral tribunal may determine the proportion of costs to be borne by the Parties.

1. The Definition of "All Costs of The Arbitration

Respondent claims that Claimant should pay administrative fees, arbitrator fees and expenses, and counsel fees and expenses as "all costs of the arbitration".

2. There Are Factors that Should Be Taken in Account When Arbitrators Consider the Allocation for Costs

According to Art.2 and Commentary on Article 2 of Drafting Arbitral Awards Part III, Costs of International Arbitration Guidelines 2016[71], there are four factors that arbitrators should consider whether it is appropriate to allocate liability for both the procedural and party cost.

[71] Chartered Institute of Arbitrators p,6-10

The factors are:

(i) The outcome of the proceedings in terms of relative success of the Parties;

(ii) The conduct of the Parties in the preceding;

(iii) Any offers to settle the dispute;

(iv) Any other factor which they consider to be relevant.

3. Claimant Should Pay All Costs of the Arbitration Considering Factors in the Present Case

Regarding factors (i), (ii) and (iii), there is nothing to consider. It is because the outcome is not clear, there are no Claimant's conducts regarding the preceding and the Parties do not have any offers to settle the dispute. Regarding factor (iv), Claimant's conduct meets this factor. The commentary states that Arbitrators may also consider the Parties' conduct before the arbitral proceedings, including, for example, whether one party unreasonably failed to take steps to settle the dispute[72]. In the present case, after the Parties realized there was a misunderstanding regarding whether the Contract had been extended or not, Claimant tried nothing to settle the dispute but suddenly sent Respondent Notice of

[72] Chartered Institute of Arbitrators

Arbitration after about five months since the realization had turned out[73]. Although Claimant had other ways to settle the dispute like negotiating with Respondent to gain the bricks, it tried nothing. In addition, Claimant did not even tell Respondent that it needed the bricks. This conduct is unreasonable and Claimant failed to take steps to settle the dispute. Considering this factor, Claimant should pay all cost of the arbitration.

V. Conclusion

As submitted above, Respondent respectfully request the arbitral tribunal to grant four reliefs. They are to reject all requirements from Claimant, to order Claimant to make payment for the deliveries including payment that Claimant will have to make in the future, to order Claimant to pay interest and to order Claimant to pay all cost of the arbitration.

[73] Problems, paras. 43,44

IX. Request for Relief

In light of the submissions made above, Respondent respectfully requests the tribunal to find:

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

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

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

4. The Tribunal should grant reliefs which Respondent counter-claims.