THE 13TH LAWASIA INTERNATIONAL MOOT

IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE (AIAC)

SIEM REAP, CAMBODIA

2018

BETWEEN

CHUIZI LEISHEN'S LLC

(CLAIMANT)

AND

ROBUSTESSE ESPACIAL SOLUCION CORP

(RESPONDENT)

MEMORIAL FOR CLAIMANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES AND RULES

CASES

ARBITRAL AWARDS

TREATIES AND CONVENTIONS

BOOKS

ARTICLES AND JOURNALS

OTHER REFERENCE MATERIALS

STATEMENT OF JURISDICTION

1. *Chuizi Leishen's LLC* ("**the Claimant**") instituted arbitration against *Robustesse Espacial Solucion Corp* ("**the Respondent**") and *Vader Ltd* before the Asian International Regional Arbitration Centre ("**the AIAC**", formerly known as KLRCA) tribunal, pursuant to the 2017 Kuala Lumpur Regional Centre for Arbitration Rules ("**the KLRCA Rules 2017**") regarding the dispute concerning the alleged existence of the Contract extension between the Claimant and the Respondent on 23 November 2016.

2. On 15 August 2017, the Claimant served the notice of arbitration with a receipt of acknowledgement to the AIAC. In response, the Respondent served its Response to the Notice of Arbitration on 15 September 2018 and denied the Claimant's claim.

3. On 15 December 2017, a 3-panel Arbitral Tribunal was constituted. On the first week of February 2018, the Tribunal called for a preliminary meeting to determine the value of the Claimant's claim and the Respondent's Counter Claim, if any. The tribunal sets the date of the hearing on 2-5 November 2018 to determine on the issues raised during the preliminary meeting.

QUESTIONS PRESENTED

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

II. Should the request of to join Vader as the party to the arbitration be granted by the Tribunal?

III. Was there a valid acceptance of the offer?

IV. What relief should the tribunal grant?

STATEMENT OF FACTS

1. Chuizi Leishen's LLC **("the Claimant")**, is a Chinese commercial company specializing in construction headed by its Chief Executive Officer **("the Claimant's CEO"),** Ms. Lee Qiang Bi. Robustesse Espacial Solucion Corp **("the Respondent")** is a Limited Company, incorporated under the laws of the Kingdom of Cambodia in January 2013. It is wholly-owned subsidiary by Vader Ltd, an English company specializing in the production and selling of bricks, directed under Mr. Auld Chap as the CEO **("Vader's CEO").** RES was set up by Vader to penetrate the Asian market and to carry out its Asian businesses in the event Brexit happens.

2. Pursuant to the revelation of the Belt & Road Initiative by the Chinese government, the Claimant intended to expand their operation across the Southeast Asian countries. In seeking potential commercial partners, a meeting was set up between the Claimant's CEO and Vader's CEO on 29 May 2013. The Parties agreed to cooperate and they came to consensus as to most of the terms of their business. However, the CEOs agreed that a formal Contract should be executed at a later point by the respective legal counsels.

3. The Claimant employed Mr Kalai Deewarvala, an Indian construction specialist as their representative. Mr. Deewarvala was given autonomy to supervise all agreements on behalf of the Claimant B&R projects and its relationship with the Respondent.

4. The Respondent appointed Mr. Armando Paredes, a Mexican specialist in baking bricks and building walls as the Managing Director. Mr. Paredes is authorised to execute any and all agreement of behalf of RES in Cambodia and ASEAN.

5. The Contract drafted, revised and signed by both the Claimant and the Respondent **("Parties")** in September 2013 **("the Contract")** was the Claimant's first Contract signed outside of China and the Respondent's first Contract signed since its incorporation. The Contract was structured as an exclusive distribution albeit the Respondent wanting to engage with multiple counterparts.

6. Aside from the Contractual terms, an arbitration clause was inserted to refer any dispute arising out or relating to the Contract to be settled via arbitration **("the Arbitration Agreement")** in accordance with the Kuala Lumpur Regional Centre for Arbitration Rules 2017 **("the KLRCA Rules 2017").**

7. In November 2015, the representatives of Parties agreed to extend the Contract provided that the Claimant pays a 15% price increases for four deliveries in 2015. On 23 November of 2016, the representatives of Parties negotiated on the terms of the Contract extension via a Skype call. Mr. Paredes agreed to extend the Contract if the price of the bricks is increase substantially with a 35% incentive be paid at the end of each year.

8. Mr. Deewarvala proposed to maintain the 15% price increment per year with four more deliveries with a bonus added after the compliance.

9. The representatives of Parties negotiated for more than 4 hours. Mr. Paredes proposed to Mr. Deewarvala to extend the deliveries to 8 deliveries if the brick price increases by 15% and a 35% bonus is given at the end of each year.

10. Mr. Deewarvala, in responding to the offer, accepted the proposal by conducting an Indian head nod, and reasonably believed his acceptance was communicated. Mr. Paredes interpreted it as a refusal to his proposal. No further communication was recorded between the representatives as they ended the Skype call right after.

11. On 15 August 2017, after realizing the misunderstanding, the Claimant served the Respondent with a Notice of Arbitration and sought relief from the tribunal in declaring the Contract exists and enforceable, an order of performance of the first two deliveries of 2017 and to set the terms of the Contract in writing.

12. The Respondent expresses their tense financial situation as the hurdle that stops them from participating in the arbitration. However, despite not being able to bring all their counter-claims **("Counter Claim"),** the Respondent presented their Counter Claim only in the event the Contract is still enforceable.

13. The Claimant, while denying the Respondent's Counter Claim, has also requested to join Vader into this arbitration to fund the Respondent who was impecunious.

SUMMARY OF PLEADINGS

I

1. The arbitral tribunal can still proceed to hear the matter despite the Respondent's incapability of funding their defence and Counter Claim. Impecuniosity alone is insufficient to render an arbitration agreement incapable of being performed. It must be coupled with obstacles which render the arbitration agreement impossible to perform.

2. Assuming that the Respondent is indeed impecunious, the facts do not support this position. The respondent, albeit of its incapability to perform the arbitration agreement, still managed to hire three outstanding legal counsels from a top legal firm in Cambodia. In addition, the Respondent's Counter Claim was set on the premise that the tribunal finds the Contract in existent and enforceable. These acts indicate that the Respondents are capable of perform the Contract, but are merely drawing excuses to avoid from performing their Contractual obligation.

II

3. The threshold that has to be met to be bring Vader into the arbitral proceedings is a mere prima facie threshold pursuant to Rule 9 of the Kuala Lumpur Regional Centre for Arbitration Rules 2017 ("**KLRCA Rules 2017**"). The Respondent was set up by Vader as a vehicle to break the ASEAN market and is their sole shareholder.

4. Although Vader is a non-signatory to the arbitration agreement, it was involved in the Respondent's overall commercial activities and was fully responsible in incorporating the Respondent, as well as the Contract in contention today. Therefore, Vader should be prima

facie bound to the arbitration by the virtue of the group of companies doctrine, principles of agency and as a third party beneficiary.

III

5. The representatives of the Parties have established a long-term business relationship built on the foundation of trust and good faith. Thus, Mr. Paredes should have understood subjectively, the meaning behind the Indian head nod based on the preliminary negotiations, practice established between Parties and the subsequent conduct of the Parties after the conclusion of the Contract.

6. Since the Respondent did not explicitly signify any specific mode of acceptance to be used and the acceptance was received immediately during the Skype call, the reasonable conclusion is that the Indian head nod signifies a valid acceptance.

IV

7. The arbitration agreement does not impose any rules or limitation as to the tribunal's remedial power to grant any appropriate award to the Parties. Therefore, should the Contract be existent and enforceable, the claimant is entitled to a declaratory award, an order of specific performance and alternatively, an award of consent. The Claimant does not fall under any of the exceptions propounded under Article 7.2.2 of UNIDROIT Principles of International Commercial Contracts 2016 ("**UNIDROIT")**. Since the request for performance of first two deliveries of 2017 is neither impossible, unreasonably burdensome or expensive.

PLEADINGS

I. THE ARBITRATION AGREEMENT IS CAPABLE OF BEING PERFORMED

A. THE LAW GOVERNING THE ARBITRATION AGREEMENT IS CAMBODIAN LAW

1. To determine whether the arbitration agreement is capable of being performed, this Tribunal must first determine the network of laws governing the procedural aspect of this arbitration – commonly known as the *lex arbitri*.

2. Article 2 of the Geneva Protocol on Arbitration Clauses 1923 illustrated an early international view that the law applicable to the arbitration should be that of the arbitral seat: "*The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the Parties and by the law of the country in whose territory the arbitration takes place*".[1]

3. Similarly, Article 1(2) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 adopted the basic approach that the *lex arbitri* will be the law of the place where that arbitration takes place – commonly known as the *lex loci arbitri* or simply referring to the law of the seat of arbitration.[2]

4. When Parties do not make a direct choice on what the *lex arbitri* is – just like our case today,[3] the applicable *lex arbitri* flows from Parties' conscious choice of seat of arbitration.[4]

[1] Lex Arbitri, Procedural Law and the Seat of Arbitration by Alastair Henderson, Singapore Academy of Law Journal, (2014) 26 SAcLJ 886, ¶11.
[2] *Ibid*, ¶12.
[3] Record, ¶15
[4] *Ibid*, [15]; Nigel Blackaby et al, Redfern & Hunter on International Arbitration (Oxford University Press, 5th Ed, 2009) at para 3.61.

The automatic nexus between the *lex arbitri* and the *lex loci arbitri* has been recognized in judicial decisions by various jurisdictions.

5. In *PT Garuda*,[5] ruled that "*by choosing the 'place of arbitration' the Parties would have also thereby decided on the law which is to govern the arbitration proceedings*." The same principle was similarly expounded in *Dermajaya Properties*[6] when it ruled "*if Singapore is the place of arbitration, the curial law of Singapore applies*."

6. In the UK, the English Court in *Shashoua v Sharma*[7] ruled that "*an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause*." Later in 2012, *Sulamerica*[8] formulated the following three-stage test to determine the governing law of the arbitration agreement:

a. Is there an express choice of law governing the law of the arbitration agreement;

b. If not, can a choice be implied; and

c. In the absence of a choice, with which law does the arbitration agreement have the closest and most real connection.

7. The *Sulamerica* three-stage test has also been affirmed by the 2017 Malaysian Federal Court case of *Thai Lao Lignite* where in that case, the *lex arbitri* was absent in the arbitration agreement. On one hand – the law governing the main Contract (the PDA agreement) was New York law[9] while on the other hand – the seat of arbitration was Kuala Lumpur, Malaysia. It was subsequently held that the lex arbitri be Malaysian law, following the *Sulamerica* test.[10]

---

[5] *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 401.
[6] *Dermajaya Properties Sdn Bhd v Premium Properties Sdn* Bhd [2002] 1 SLR(R) 492.
[7] *Shashoua v Sharma* [2009] EWHC 957.
[8] *Sulamerica v Enesa Engenharia SA* [2012] EWCA Civ 638.
[9] *Thai-Lao Lignite Co Ltd & Anor v Government of the Lao People's Democratic Republic* [2017] 9 CLJ 273.
[10] *Ibid*, ¶187.

8. Despite having another possibility of opting the law governing the underlying Contract between Parties to be the *lex arbitri*,[11] this approach however is not universally acceptable[12] due to the doctrine of separability – where an arbitration agreement is taken to be autonomous and separable from the main Contract.[13] Further, in *XL Insurance Ltd v Owens Corning*[14] and *Noble Assurance Company v Gerling Konzern*[15] reemphasized that the *lex arbitri* typically follows the law of seat of arbitration and any exception to this general rule would only arise under rare circumstances.[16]

9. Following the general rule as canvassed above, since Parties did not expressly choose the *lex arbitri*, it should typically follow the seat of arbitration – the Kingdom of Cambodia.[17] As such, in determining whether the Arbitration Agreement is capable of being performed or otherwise, this Tribunal should refer to the Commercial Arbitration Law of the Kingdom of Cambodia (CALC).

[11] Supra, n.8; *Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission* [1994] 1 Lloyd's Rep 45; *Leibinger v. Stryker Trauma GmbH* [2005] EWHC 690 (Comm); Supra, n.9 ¶167.
[12] Arbitration of Commercial Disputes supra at 7.20; Supra, n.9 ¶160.
[13] Williams and Kawharu on Arbitration at 4.8; Supra, n.11 at ¶168.
[14] *XL Insurance Ltd v. Owens Corning* [2000] Lloyd's Rep 500.
[15] *Noble Assurance Company v Gerling Konzern General Insurance Company* [2007] EWHC 25322.
[16] *C v. D* [2007] EWHC 1541 (Black-Clawson v. Papierwerke [1981] 2 Lloyd's Rep 446, 483; Supra, n.9 ¶170.
[17] Record, ¶15.

B. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

(1) The Respondent's objection to the tribunal's jurisdiction is procedurally defective and ought to be disregarded *in limine*

10. Article 8(1) of the UNCITRAL Model Law states that parties to an arbitration agreement must submit to arbitration unless the arbitration agreement is rendered incapable of being performed.[18] In this case, the Respondent is challenging this tribunal's jurisdiction on the basis that the arbitration agreement is incapable of being performed due to Respondent's impecuniosity.

11. However, according to Article 8 of the CALC which mirrors Article 8(1) of the UNCITRAL Model Law, the proper forum for such a jurisdictional objection would be the Cambodian courts and not this tribunal. This is because the tribunal's jurisdiction to rule on its own jurisdiction under the doctrine of *kompetenz-kompetenz* is only limited to some, but not all, jurisdictional objections (such as inter alia the existence and validity of the arbitration agreement,[19] and whether dispute falls within the scope of the Arbitration Agreement.[20]

12. Here, the Respondent made no attempt to challenge this tribunal's jurisdiction in court; and even if it is true that the Cambodian courts will not entertain the case as alleged by Respondent,[21] this tribunal has jurisdiction to hear the matter. On this basis alone, the Respondent's jurisdictional objection should fail, and this arbitration should proceed despite its financial impecuniosity. Thus, Clause (f) of the arbitration agreement is still valid and enforceable based on the doctrine of separability.[22]

---

[18] UNCITRAL Model Law, Article 8(1).
[19] Commercial Arbitration Law of the Kingdom of Cambodia, Art 24(i).
[20] Born, G. (2009), *International Commercial Arbitration*. (Vol 1.) Wolters Kluwer Law & Business at 891-894.
[21] Record, ¶60.
[22] *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Limited* [2013] EWHC 1063.

(2) This tribunal has jurisdiction *ratione materiae*

13. The *ratione materia* is the scope and subject matter of the arbitration agreement. To establish *ratione materiae*, two elements have to be fulfilled whereby the dispute must arise out of the Contract, and the dispute in question must be a legal dispute.[23] The Parties in the arbitration agreement agreed that any dispute, controversy or claim arising out or relating to this Contract,[24] breach, termination or invalidity shall be settled by arbitration in accordance with the KLRCA Rules 2017.[25]

14. Neither party have raised any objections that the matter in dispute is outside the scope of the arbitration agreement and secondly, it raises a legal issue regarding mode of acceptance. Hence, the two elements are fulfilled, and this tribunal has the jurisdiction to hear the dispute as it falls under the *ratione materiae*.[26]

(3) This tribunal has jurisdiction *ratione temporis*

15. The *ratione temporis* is the timeframe of when the particular dispute occurred.[27] Here, the dispute between the Parties occurred on 23 November 2016 - after the Arbitration Agreement was concluded. Thus, since the dispute occurred after Clause (f) of the Arbitration Agreement was agreed by both the Claimant and Respondent, then this tribunal has jurisdiction *ratione temporis* to hear the dispute from the Parties.

[23] Convention on the Settlement of Investment Disputes between States and Nationals of other States, Article 25; *Klockner v Cameroon* (1984) ICSID Case No. ARB/81/2.2.
[24] *Fiona Trust v Privalov* [2015] EWHC 527.
[25] Record, ¶15.
[26] ICSID Case No. ARB/12/29 (2015) ¶¶25,26.
[27] *Société Générale de Surveillance v. Republic of the Philippines* (2007) ICSID Case No. ARB/02/6; *Impregilo SpA v. Islamic Republic of Pakistan* (2005) ICSID Case No. ARB/03/3 at 308.[25]

C. IN ANY EVENT, THE ARBITRATION AGREEMENT REMAINS OPERATIVE AND EFFECTIVE

16. An arbitration agreement is considered valid unless this tribunal finds that the arbitration agreement is incapable of being performed.[28] If the arbitration agreement is rendered incapable of being performed, there is a possibility that the Claimant will have to seek recourse at the Cambodian local courts, whereby the Cambodian domestic law might apply instead of the UNIDROIT principles. This is because the governing law clause for the Contract falls under clause (f) of the Arbitration Agreement.[29]

17. Once the arbitration agreement is declared to be invalid, the clause will be automatically struck out in its entirety. Such consequence is contrary to the Parties' intention which had specifically stipulated that the law governing the Contract is the UNIDROIT principles.

(1) As a matter of law, financial impecuniosity alone is not a basis to invalidate the Arbitration Agreement

18. The principle of *pacta sunt servanda* which is the sanctity of Contract encapsulates the doctrine of good faith[30] and mutual obligation of the Claimant and Respondent to honour the arbitral process.[31]

19. Financial impecuniosity alone could not render the arbitration agreement inoperative as the threshold of incapability of performance is high across all jurisdictions - both civil and common law. Incapable of being performed is defined in Article 392 of the Cambodia Civil

[28] Supra n.18.
[29] Record, ¶15.
[30] *Instinet Corp v Archipelango LLC* (2003) WL 22721404 8.
[31] *Himpurna Calif Energy Ltd v PT Persero* (1999) XXV Y.B. 13 ¶¶58,59; The New York Arbitration Convention 1958.

Code as "*where it is physically impossible to perform the obligation, from a social or economic standpoint.*"[32] Incapability of the arbitration agreement being performed must be more than mere difficulty or delay but an obstacle which cannot be overcome even if the Parties are able and willing to perform the agreement.[33]

20. In *Janos Paczy,*[34] the Court held that the impecuniosity of one party does not render an agreement incapable of performance because administrative problems would arise before the Courts in assessing the party's resources. Also, the Singapore High Court in the case of *Heartronics Corporation*[35] laid down several scenarios whereby an arbitration agreement is deemed to be incapable of being performed where financial impecuniosity is not included as one of the reasons.

21. The language of paragraph (f) of the Arbitration Agreement is clear that the Parties intended to bring their respective claims only to a tribunal.[36] Thus, Respondent's financial impecuniosity alone could not render the Arbitration Agreement incapable of being performed.

(2) As a matter of fact, Respondent in any event is not impecunious

22. Alternatively, looking at the factual matrix of the Respondent's case, in any event Respondent is not financially impecunious. First, the Respondent today is not insolvent but merely unprofitable,[37] which is common amongst start-up companies. Second, the Respondent hired top legal counsels in Cambodia.[38] Third, the Respondent is in a position to readily engage

[32] Cambodia Civil Code, Article 392.
[33] *Sembawang Engineers and Constructors v Covec* [2008] SGHC 229.
[34] *Janos Paczy v. Haendler & Natermann* [1981] 1 Llyods Law Rep 302 ¶¶307, 309.
[35] *Heartronics Corporation v EPI Life Pte Ltd and Others* [2017] SGHCR 17.
[36] Record, ¶15.
[37] Record, ¶26.
[38] Record, ¶52.

with another counterpart on more competitive terms.[39] Fourth, the Respondent made a counter offer which was actually premised upon their own representative's offer back then in 2016.[40] This clearly shows that the Respondent is financially sound and has the capacity to perform the Arbitration Agreement.

23. Furthermore, if the Respondent is indeed impecunious, the burden is on the Respondent to prove to the tribunal.[41] This is to ensure that the Respondent is not merely delaying the whole arbitral process due to their reluctance in performing the Contract.[42] Such act is against the doctrine of *pacta sunt servanda* and doctrine of good faith between the Parties. In stark contrast, the Claimant observed the duty of a *sui generis* Contractual provision[43] between both Parties by paying for the Respondent's initial security deposit.[44]

24. The Respondent's assertion that they are financially impecunious could not stand legally and factually. Thus, the Arbitration Agreement is operable and effective and both Parties must continue with the arbitral process.

(3) Respondent is not denied access to justice

25. There is no denial of justice in this arbitral proceedings towards the Respondent. The Respondent's inability to raise their Counter claim should not prejudice the Claimant's claim. The case of *Portugal No. 1, A Netherlands*,[45] involves a Respondent who claims to be denied access to justice due to the Respondent's inability to raise Counter Claims. The Portugese

[39] Record, ¶40.
[40] Record, ¶58.
[41] *Umerji v Khan & Zurich* [2014] EWCA 357.
[42] Partial Award in ICC Case No. 3896 110 J.D.I at 914 (1983); Award in ICC Case No. 8486, XXIVa Y.B. 162 ¶172 (1999).
[43] *Societe Qualiconsult v Groupe Lincoln* (1996) Rev. Arb 121.
[44] Record, ¶48; Further Clarification, ¶2.
[45] *Portugal No. 1, A (Netherlands) v B & Cia Ltda* (2003) 1647/02, in Al- bert Jan van den Berg, Yearbook Commercial Arbitration 2007, Volume XXXII (Kluwer Law International 2007) at 474.

Supreme Court held that there was no violation of access to justice or public policy under Article V(2)(b) of the New York Convention, due to the fact that the right to justice is not absolute and both Parties have waived their access to courts when Parties agreed to arbitration.[46] Furthermore, the financial costs of this arbitration is proportionate to the value of the Contract.[47] Thus, the Respondent should have foreseen the financial costs of arbitration when concluding the agreement with the Claimant. It was the Respondent's own choice to be bound by the Arbitration Agreement.

26. Alternatively, even if the Respondent refuses to pay further advance deposit, the proceedings of the arbitral tribunal can still continue as the AIAC is only entitled to withhold the award to Parties, not to completely stop proceedings.[48] Also, the Claimant is able to pay on the Respondent's behalf or obtain an interim relief from this tribunal to compel the Respondent to pay for the deposit.[49]

27. Furthermore, this tribunal can still hear disputes and grant award even in the event of the Respondent's default[50] or non-participation.[51]

[46] *Deweer v Belgium (*19080) ECHR 1; *El Nasharty v J Sainsbury Plc* [2008) 1 Lloyd's Rep 360.
[47] Record, ¶45.
[48] KLRCA Rules 2017, Rule 12(7).
[49] *Ibid.*
[50] UNCITRAL Model Law, Article 25.
[51] ICC case No. 6670 119 J.D.I (1992); ICC Case No. 7701 (1997).

II. THE TRIBUNAL SHOULD GRANT THE CLAIMANT'S REQUEST TO JOIN VADER AS A PARTY TO THIS ARBITRATION

A. THE TRIBUNAL HAS JURISDICTION *RATIONE PERSONAE* TO DETERMINE THE PROPER PARTIES TO THE ARBITRATION AGREEMENT

28. The doctrine of *kompetenz-kompetenz* - expressly embedded within the *lex arbitri* of this proceeding and universally recognised as an inherent power of an arbitral tribunal[52] – empowers this Tribunal to decide on specific aspects of its jurisdiction,[53] including the Parties to an arbitration. Several courts have determined that *ratione personae* is an aspect of arbitrability that is canvassed under the jurisdiction of an arbitral tribunal.[54]

29. Jurisdiction *ratione personae* refers to the power vested in the Tribunal to determine the Parties to an arbitration.[55] In the present case, this Tribunal's power to examine the Claimant's Request for Joinder stems from Rule 9(1) of the KLRCA Rules 2017, which stipulates that: "*The request for joinder will be determined by the arbitral tribunal or, prior to the constitution of the arbitral tribunal, by the Director."*

30. Therefore, this Tribunal has the jurisdiction hear this Request for Joinder, and to join Vader as a party to this arbitration.

[52] Commercial Arbitration Law of the Kingdom of Cambodia, Art 24(1); Case Law on UNCITRAL Texts; Alan Uzelac, 'Jurisdiction Of The Arbitral Tribunal; Current jurisprudence and problem areas under UNCITRAL Model Law" (Report for the R.I.Z. / UNCITRAL / DIS Conference, Cologne, March 2005).
[53] Commercial Arbitration Law, Art 24(1); UNCITRAL Arbitration Rules, Art 23(1).
[54] New York Convention Guide, V(I)(c); *C v D1 and Others*, [2015] EWHC 2126.
[55] Born, G. (2009), *International Commercial Arbitration*. (Vol 1.) Wolters Kluwer Law & Business.

B. VADER COULD BE JOINED INTO THIS ARBITRATION WITHOUT THEIR CONSENT.

(1) Forced joinder is authorised under the KLRCA Rules 2017

31. Despite a common belief that consent is the cornerstone of arbitration, its role has diminished in many areas.[56] International jurisprudence has evolved to acknowledge the notion of forced joinder, whereby a non-signatory additional party may be joined to an arbitration agreement on the basis that the additional party is *prima facie* bound to an arbitration agreement.

32. The traditional case which outrightly rejected the notion of forced joinder is the case of *PT Media*[57] whose decision was guided by Rule 24(b) of the SIAC Rules 2007. The decision was subsequently followed by the case of *Titan Unity (No.2).*[58] In both instances, the courts held that forced joinder is strictly not allowed unless all Parties consent to the joinder in writing.

33. However, since 2016, Rule 7 of the SIAC Rules has been amended to allow forced joinder of non-signatories as long as they are prima facie bound by the arbitration agreement. Subsequently, the AIAC in 2017 followed the footsteps of SIAC, by also adopting the similar forced joinder provision as reflected in Rule 9 of the KLRCA Rules 2017.

34. As the significance of consent in arbitration has been diluted, this tribunal is empowered to join Vader into this proceeding even without their consent. This is because Vader is prima facie bound by the arbitration agreement under the second limb of Rule 9 of the KLRCA Rules 2017.

[56] Margeret L. Moses, 'Challenges for the Future – The Diminishing Role Of Consent In Arbitration' (2015) 4 YB on Int'l Arb 19.
[57] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57.
[58] *The Titan Unity (No.2)* [2014] SGHCR 04.

C. VADER SHOULD BE JOINED AS A PARTY TO THIS ARBITRATION AS VADER IS *PRIMA FACIE* BOUND BY THE ARBITRATION AGREEMENT

35. The Claimant merely has to prove sufficient Contractual nexus between Vader and the Parties to this case in order to bind the former to this arbitration agreement. As long as the Request for Joinder is properly executed by the Tribunal, the Tribunal will be vested jurisdiction over the third party.[59] The court in *C v D1*[60] held that at this preliminary stage of a hearing,[61] there is no need to scrutinise the merits of the Request for Joinder – i.e. whether there exists claims towards the third party being joined, which is a substantive issue to be decided at the merits.[62] It is precisely for the reasons of ascertaining the true transaction of events, as well as for efficiency of this dispute resolution, that the Claimant seeks to join Vader as a party to this arbitration.

36. To establish a contractual nexus between Vader and the Parties, the following legal doctrines independently and cumulatively form a *prima facie* case towards Vader being a party to the arbitration agreement, as firstly, under the group of companies doctrine, there is common intention between all Parties for Vader to be bound to the arbitration agreement. Secondly, Vader is a third-party beneficiary under the Contract, and thirdly, Vader is the principal agent of the Respondent.

[59] *C v D1 and Others* [2015] EWHC 2126.
[60] *Ibid.*
[61] Additional Clarifications, ¶4.
[62] Supra, n.58.

(1) The group of companies doctrine provides for common intention between all Parties for Vader to be bound by the Arbitration Agreement

37. The group of companies doctrine[63] has high referential value to this Tribunal, considering the heavy influence of French jurisprudence in the Cambodian hybrid legal system.[64] There are two limbs to the group of companies doctrine, [i] whether there exists a group of companies that constituted a single economic entity, [ii] active participation of the non-signatory group of company(s) in the formation, performance or termination of the Contract – both of which is determinative of mutual intention of the Parties to consider the non-signatory bound to an arbitration agreement.

i. The requirement of the single economic entity is obsolete

38. The Cambodian Law on Commercial Enterprises expressly recognises the doctrine of separate legal entity, whereby parent companies and their subsidiaries enjoy separate legal personalities[65]. As such, the Claimant acknowledges the parent-subsidiary relationship between Vader and the Respondent,[66] hence the existence of separate legal personalities with limited liabilities, which is a longstanding fundamental principle of company law.[67]

39. Even so, the group of companies doctrine allows an arbitral tribunal to extend its jurisdiction towards non-signatories, despite them enjoying separate legal personalities.[68] The requirement of a single economic entity may be dispensed with if a contractual nexus can be

[63] *Dow Chemical v. Isover St. Gobain* ICC Award No. 4131.
[64] Hor Peng, Kong Phallack, Jorg Menzel, *Introduction to Cambodian Law* (Konrad-Adenauer-Stiftung, 2012).
[65] Cambodian Law on Commercial Enterprises, Art 284.
[66] Record, ¶8.
[67] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1.
[68] *Supra, [66]*; *Gouvernment du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company* (Case No. 09/28533).

established via active participation of the non-signatory in the formation, performance or termination of the Contract.[69]

ii. Vader had significant active involvement in the formation of the Contract

40. An additional party may be bound by an arbitration agreement if it had participated in discussions leading up to the conception of the Contract, and had been in the heart of those negotiations.[70]

41. The catalyst of the Contract between the Parties is the business meeting between the CEOs of Vader and the Claimant in 2013.[71] In that meeting, not only had Vader found an amicable business partner with the Claimant, but both Parties had in fact discussed and finalised all terms of the Contract.

42. Vader's monumental role in the formation of the Contract here cannot be undermined, considering the fact that this Contract involved two Parties from two different countries, both exploring unprecedented business transactions. The successful outcome of the meeting was arguably due to the Claimant's faith in Vader's prominent reputation,[72] which illustrates its significance in the formation of the Contract. It would have been inconceivable for a Contract to be concluded at such short instance in the environment of a public arbitration talk if the agreement had been instead negotiated and finalise by the representative of the Respondent – a company without proven business track record.[73]

[69] ICC Case No. 10818 (2000).
[70] ICC Case No. 6519 (1999).
[71] Record, ¶10.
[72] Record, ¶5.
[73] Record, ¶10

iii. Vader had significant involvement in the performance of the Contract.

43. Despite enjoying separate legal personalities, certain behaviours of a parent-subsidiary relationship amounts to significant involvement in the operations of the latter, which may warrant an intention for the former to be bound to the Contract. [74] These behaviours include the parent causing the incorporation of the subsidiary and the parent financing the subsidiary, both of which are present in our case today.

44. Vader is the parent company of the Respondent,[75] and Respondent was incorporated by Vader in light of Brexit.[76] Ever since the Respondent's inception up until June 2016, which is a significant period of the Contract, Vader had provided constant financing, compliance monitoring and directives to the Respondent.[77] These contributions form a monumental portion of the Respondent's operations, and are akin to a hidden hand operating behind the Respondent itself. Based on decided cases, these contributions sufficiently extend arbitral jurisdiction over the non-signatory additional party.[78]

45. As such, taking into account Vader's extensive involvement throughout the period of Contract between the Claimant and the Respondent, common intention between all Parties can be deduced to bind Vader to this arbitration agreement.

[74] Clint Corrie, 'Challenges in International Arbitration for Non-Signatories.' (2007) 29 Comparative Law Yearbook of International Business 58.
[75] Record, ¶9.
[76] Record, ¶6.
[77] Record, ¶27.
[78] *Estate of Lisle vs. Commissioner*, (2003) 341 F.3d 375; *Oxford Capital Corp. v United States*, (2000)211 F.3d 280 ¶284.

(2) Vader is a third-party beneficiary to the Contract

46. The doctrine of third-party beneficiary is encapsulated within the Cambodian Civil Code, whereby Parties to a Contract can agree to confer all benefits of a Contract to a third party.[79] The party receiving such benefit is a third-party beneficiary. There are numerous judicial and arbitral decisions around the globe acknowledging third-party beneficiary as a valid ground to extend jurisdiction towards a non-signatory.[80]

47. Here, this Contract was entered into by the Claimant with the knowledge that Vader is the Respondent's parent company. Despite attempts to render the Respondent independent of its control, Vader remains the sole shareholder of the Respondent. Vader obtains all benefits from the Contract, hence becoming a third-party beneficiary who is prima facie bound to the arbitration agreement. Such intention to be bound is evident when Vader initiated discussions with the Claimant in 2013, and extensively concluded the terms of the Contract between the Parties.

48. Further, the US District Court in *Collins I* held: *"When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement. The claims against the two entities are based on essentially the same facts and are in the court's view inherently inseparable."*[81]

[79] Cambodian Civil Code, Art 379.
[80] *American Bureau of Shipping v Tencara Shipping SPA* (1999) 170 F.3d 349; *Cargill P.V. v M/T Pavel Dybenko & Novorossiysk Shipping Co* (1993), 991 F.2d 1012; *Nisshin Shipping Co. Ltd. v. Cleaves & Company Ltd.* [2003] EWHC 2602.
[81] *Collins I* (1997) 169 F.R.D. 690.

49. Despite the Claimant today not delving into the merits of its claims against the Respondent or Vader, the aforementioned decision suggests that it is necessary to join Vader at this stage to expedite the process of accessing the merits of this case at the later stage.

50. In any event, the Respondent intends to file a Counter Claim worth USD 2.6 billion.[82] Clearly, this arbitration will be of great interest to Vader who is itself struggling to find its feet in the volatile European Union market.

(3) Respondent is an agent of Vader incorporated for the sole purpose of penetrating the Asian market

51. The doctrine of agency states that a representative may enter into a Contract with another party on behalf of a principal within the scope of authorisation, the effects of which are directly imputed to the principal.[83]

52. The Respondent was incorporated by Vader for the purpose of venturing into the booming Asian market.[84] In the very first place, it was Vader which negotiated and agreed to conduct business with the Claimant via the Respondent.[85] The Contract was unprecedented business for both Parties - two companies from two different countries. The Contract was made possible only because of Vader's reputation as a strong industry player in the EU market,[86] and Respondent being a wholly-owned subsidiary[87] of Vader.

[82] Record, ¶58.
[83] Cambodian Civil Code, Art 364.
[84] Record, ¶6.
[85] Record, ¶10.
[86] Record, ¶5.
[87] Record, ¶8.

53. Considering that the Respondent is directly accountable to Vader for a substantial period of the Contract as a mere vehicle for Vader to explore the Asian market, the Respondent is an agent of Vader. The doctrine of agency provides a basis for Vader, the principal, to be *prima facie* bound to the arbitration agreement.[88]

[88] *Antoine Biloune v Ghana Investment Centre*, Ad Hoc Awards (October 1989 and June 1990); *Bank Voor Handel En Scheepvaart, NV v Administrator of Hungarian Property* [1954] 1 All ER 969*; First National City Bank v. Banco Para el Comercio Exterior de Cuba* (1983) 462 U.S. 611.

III. THERE WAS NO VALID ACCEPTANCE OF THE OFFER

54. The dispute revolves around the Indian side-way head nod that had caused grave misunderstanding between Parties, leading to the validity of the acceptance in question. The Claimant submits that [A] the acceptance satisfies all requirements propounded under the UNIDROIT Principles 2016 **("UNIDROIT")**, [B] the Indian sideway head nod constitutes acceptance pursuant to the 'subjective test' under Article 4.3 of the UNIDROIT Principles and [C], mistake cannot be used as a defence to avoid the Contract.

A. THE CLAIMANT'S CONDUCT SATISFIES THE REQUIREMENTS OF ACCEPTANCE UNDER ARTICLE 2.1.6 OF UNIDROIT PRINCIPLES

55. Under the UNIDROIT, an acceptance can be indicated by a statement or a conduct,[89] and it must be communicated to the offeror.[90] An acceptance is only effective when it reaches the offeror.[91] 'The term 'reaches' only refers to physical communication – 1) notice is served to the other party orally or 2) delivered at the place of business.[92] The consensus of mind is not a prerequisite to a valid acceptance.[93]

(1) The Claimant's sideway head nod is a valid mode of acceptance

56. Any statement or conduct can be construed as an acceptance, provided that the offer does not impose any particular mode of acceptance.[94] Here, since no specific medium of communicated was required in the offer, nothing prevents the Claimant from indicating his

[89] UNIDROIT Principles, Article 2.1.6(1).
[90] *Ibid,* Article 2.1.6(2).
[91] Michael Joachim Bonell & Roberta Peleggi, "UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: a Synoptical Table" (2004).
[92] UNIDROIT Principles, Article 1.10(3).
[93] *Marble Ceramic Center, Inc v Ceramics Nouava* [1998] 144 F.3d 1384.
[94] UNIDROIT Principles, Article 2.1.6(2).

assent via an Indian side-way head nod. Thus, Mr. Deewarvala's sideway head nod is a valid mode of acceptance to Mr. Paredes' offer.

(2) The communication of acceptance reached the offeror

57. As an oral offer must be accepted immediately unless the circumstances indicated otherwise,[95] the Claimant had indeed indicated acceptance of the offer in the same period as the skype call.[96] No glitches or technical malfunction occurred in the course of transmission. Thus, the acceptance was effectively communicated and received by Mr. Paredes.

B. THE CLAIMANT'S SIDEWAY HEAD NOD CONSTITUTES ACCEPTANCE PURSUANT TO THE SUBJECTIVE TEST UNDER 4.3 OF THE UNIDROIT PRINCIPLES

58. In interpreting a unilateral statement or conduct, the UNIDROIT provides a two-tier test to aid the arbitral tribunal or the courts in such interpretation. The primary test is the subjective test, and if the subjective test is not met, the objective test (reasonableness test) applies.[97] In applying the test, regard is to be given to all relevant circumstances as listed in Article 4.3.

59. Article 4.3 provides for six circumstances which may be taken into consideration – a) preliminary negotiations between the Parties, b) practices which the Parties have established between themselves, c) the conduct of the Parties subsequent to the conclusion of the Contract, d) the nature and purpose of the Contract, e) the meaning commonly given to terms and expressions in the trade concerned and f) usages.

[95] UNIDROIT Principles, Article 2.1.7.
[96] Record, ¶35.
[97] UNIDROIT Principles, Article 4.2.

(1) Under the subjective test pursuant to Article 4.2(1), the Claimant's conduct is an indication of assent

60. When Parties have strong long term business ties, it can be safely assumed that statements and conduct of a party will be known and decoded by the other.[98] In applying the subjective test, the onus lies on the Claimant to prove whether the Respondent either had actual or constructive knowledge of the meaning behind the head nod.[99]

61. Due consideration is given to the first three circumstances, namely a) preliminary negotiations between Parties, b) practices which they have established between themselves and c) subsequent conduct of the Parties to the conclusion of Contract.[100]

i. The Claimant's intention to extend the Contract was established in the preliminary negotiations between Parties.

62. If Parties' correspondences and conduct indicates an agreement intended to be binding, such proof is sufficient to form a binding Contract in law.[101] With regards to continuing negotiations, the court must construe the correspondences in totality and decide whether, on its true construction, the Parties had agreed to the same terms.[102] If so, there is a Contract even though either party had reservations not expressed in the correspondence.[103]

63. Here, both Parties had negotiated for more than 4 months.[104] The final Skype call lasted more than 4 hours.[105] If Mr. Deewarvala had intended to reject the offer, he would have

[98] ICC Case No. 8324 (1995).
[99] UNIDROIT Principles, Article 4.2(1).
[100] *Ibid,* Article 4.3.
[101] *Gibson v Manchester City Council* [1979] UKHL 6.
[102] *Chitty on Contracts*, (Vol 1, 27th edn, Sweet & Maxwell 1994) ¶2-017.
[103] *Projection Pte Ltd v Tai Ping Insurance* [2001] SGCA 28.
[104] Record, ¶28.
[105] Record, ¶30.

counter-offered and continued negotiating. Hence, when he ended the call immediately after the head nod, the most reasonable inference of such conduct was acceptance of the Respondent's offer.

ii. Both Parties have established practice in concluding the Contract informally

64. Aside from the first Contract being in written form, the Parties extended the Contract through informal means. The first extension was effected via a handshake in Paris.[106] The second extension was effected via an email[107] and the third extension in dispute was conducted orally via the skype call.[108] Hence, it is reasonable for the Claimant to indicate his assent by way of the sideway head nod.

iii. The Respondent's subsequent conduct is indicative of the Contract being extended.

65. The conduct of Parties subsequent to the formation of the Contract have probative evidential value towards ascertaining Parties' intention to be bound.[109] Acts of performance by the Parties, especially the promisor, is highly indicative of such intention.[110] An admission or other unequivocal acknowledgement by the promisor of the existence of a binding Contract may be particularly telling to the formation of Contract.[111]

[106] Record, ¶22.
[107] Record, ¶24.
[108] Record, ¶30.
[109] D W McLauchlan. *Contract Formation, Contract Interpretation, and Subsequent Conduct.* (2006) ¶78.
[110] *Ibid.*
[111] *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep 5.

66. In *Brooks Towers Corporation,*[112] the court held that silence from the party amounts to an acceptance when the relationship between Parties create an expectation or duty to the offeror to reply or communicate their acceptance or rejection.

67. Based on previous negotiations, silence after concluding the Contract is a norm for both Parties. This has led the Claimant to reasonably believe that the side-way head nod was understood as an acceptance since no request of clarification or confirmation of termination was made by the Respondent.

(2) Alternatively, under the objective test pursuant to Article 4.2, the Claimant's conduct is an indication of assent

68. If the subjective test is not met, the statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.[113]

i. The Respondent ought to have reasonably understood the meaning of the sideway head nod

69. Usages is one of the means of interpreting a Contract enumerated under article 4.3 of the UNIDROIT. A usage must be widely recognized and regularly observed in the particular international trade.[114]

70. Here, the Contract is a business relationship fostered between two nationalities – China and Cambodia. It is part of the USD900 billion dollar project initiated by the Chinese

[112] *Brooks Towers Corporation v The Hunkin-Conkey Construction Company* (1972) 454 F.2d 1203.
[113] UNIDROIT Principles, Article 4.1; Bruno Zeller (2006), *The Unidroit Principles of Contract Law; Is There Room For Their Inclusion Into Domestic Contracts*, pp 122, Vol.26:115.
[114] UNIDROIT Principles, Article 1.9

government to increase connectivity and co-operation of China and Eurasian countries.[115] Therefore, in multinational construction projects, the international business culture requires managers to familiarise with the cultural background of their counterparts.[116]

71. Mr. Paredes, the Managing Director of the Respondent, [117] have experienced working in different countries[118] and is given autonomy to execute any and all agreements on behalf of the Respondent in Cambodia and ASEAN.[119] Furthermore, the Claimant is their sole client since its establishment.[120] Thus, Mr. Paredes ought to have understood that the head nod, which is a paramount feature of the Indian community, signified assent.

ii. In any event, the practice of informal Contract extensions falls under Article 2.1.6(3) of the UNIDROIT Principles

72. The UNIDROIT sets out an exception to the general rule, whereby if there is a practice established among the Parties, the principle allows acceptance by performance without notice to the offeror.[121]

73. Here, there is a practice whereby after every negotiation, Parties will remain silent until their performance is due.[122] Therefore, it is reasonable for the Claimant to assume that the Contract had been formed considering no notice of clarification or confirmation of termination

[115] Record, ¶16.
[116] Edwin H.W Chan and Raymond Y.C Tse.(2003). *Cultural Considerations in International Construction Contracts.*(Volume 129, Issue 4).
[117] Record, ¶12.
[118] Clarification, ¶6.
[119] *Ibid.*
[120] Record, ¶14.
[121] Fabien Gelinas, *Trade Usages and Implied Terms in the Age of Arbitration*. (Oxford University Press 2006); *Filanto v Chilewich* [1992] 789 F. Supp. 1229.
[122] Record, ¶21, 24, 28.

was sent to the Claimant. Hence, the acceptance was valid and the Contract indeed came into existence.

C. IN THE EVENT THE CONTRACT IS DEEMED ENFORCEABLE, MISTAKE CANNOT BE INVOKED TO AVOID THE CONTRACT.

74. Mistake is a ground for avoidance of Contract under Chapter 3 of the UNIDROIT. Article 3.4 defines mistake as "an erroneous assumption relating to facts or to law existing when the Contract was concluded".[123] Hence, mistake can only be raised when a valid Contract exist, which the Respondent disputes

75. Furthermore, the Respondent has not pleaded mistake as an alternative defence. Instead, its alternative plea in the event this tribunal finds the Contract as valid and enforceable is for the Contract to be performed in accordance to the terms set out in its Counter Claim.

76. Hence, avoidance of the Contract on the ground of mistake is not an issue in dispute before this tribunal.

[123] UNIDROIT Principles, Article 3.4.

IV. THE CLAIMANT IS ENTITLED TO AN AWARD OF DECLARATION AND SPECIFIC PERFORMANCE

77. An arbitral tribunal possesses wide latitude in granting remedies except those which are expressly restricted by an arbitration agreement.[124] Since the arbitration agreement does not expressly limit the arbitral tribunal's remedial power,[125] the tribunal is not restricted from granting any appropriate remedy to the Parties.

78. The Claimant seeks the following reliefs, [A] a declaration that the Contract exists and is enforceable, [B] an order of specific performance for the first two deliveries of 2017 and [C] a declaration to set the terms of the Contract in writing.[126]

A. THIS TRIBUNAL SHOULD GRANT A DECLARATORY AWARD THAT THE ARBITRATION AGREEMENT IS VALID AND THE CONTRACT IS ENFORCEABLE

79. This tribunal may grant a declaratory award on the existence or non-existence of a state of affairs.[127] This creates legal certainty as it determines and records a situation of law or fact and thereby, establishes the legal position definitively which has a binding effect between the Parties.[128] Hence, should the tribunal find that the arbitration agreement is capable of being performed and the Respondent's acceptance is valid, the tribunal should declare as such.

---

[124] Supra, n.54.
[125] Record, ¶15(f).
[126] Record, ¶45.
[127] Michael E. Schneider (2011), *Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice,* in Michael E. Schneider and Joachim Knoll (eds.), Performance as a Remedy: Non-Monetary Relief in International Arbitration (ASA Special Series No.30) p.24.
[128] Stefan Leimgruber. (2014). Declaratory Relief in International Commercial Arbitration. (32 ASA Bulletin, Issue 3, pp 467-489).

B. THIS TRIBUNAL SHOULD GRANT SPECIFIC PERFORMANCE AS IT DOES NOT FALL UNDER THE EXCEPTIONS OF ARTICLE 7.2.2 OF THE UNIDROIT PRINCIPLES

80. Specific performance is a remedy to compel persons to perform their obligation.[129] The arbitration agreement as well as Cambodian law being the *lex arbitri* are silent as to the tribunal's remedial power.[130] Since the UNIDROIT is chosen as the applicable law of the Contract and provides the remedy of specific performance,[131] the tribunal has jurisdiction to grant specific performance to the Claimant.[132]

81. Similar to other civil law regimes, specific performance is the presumptive and primary remedy for the breach of Contract under the UNIDROIT.[133] Article 7.2.2 of the UNIDROIT allows specific performance to be granted to a party when the other party does not perform their Contractual obligation.

82. However, specific performance may not be granted if the performance is (1) impossible, (2) unreasonably burdensome or expensive, (3) reasonably obtained via alternative sources, (4) an obligation of an exclusively personal character, and (5) not required by the party entitled to performance within reasonable time.[134]

[129] UNIDROIT Principles, Art 4.2.1
[130] Record, ¶15(f).
[131] *Ibid.*
[132] *Marion Manufacturing Co. v. Long*, 588 F.2d 538 (6th Cir. 1978); *Island Creek Coal Sales Company, Plaintiff, v. City of Gainesville* 729 F.2d 1046 (6th Cir. 1984).
[133] French Civil Code (1804); Contract Law of the People's Republic of China (1999); German Civil Code (1900).
[134] UNIDROIT Principles, Article 7.2.2.

(1) The performance is not of impossibility

83. The UNIDROIT recognizes the rule "*ímpossibilium nulla est obligation*".[135] Specific performance cannot be granted it involves an act that is impossible in law or in fact. However, impossibility will not nullify a Contract as other remedies may be available. Even if the impossibility is temporary in nature, the enforcement of performance is excluded only during that time.[136]

84. The performance of the first two deliveries will not be of impossibility as the Respondent is not insolvent, nor have they alluded any proof that they lack the machineries and expertise to produce the bricks at the same volume and intervals as they had produced before.

85. In addition, the Respondent's own Counter Claim is premised on specific performance being granted for the payment for future deliveries.[137] Such payments are only due if they deliver the bricks to the Claimant, hence their Counter Claim itself is an admission that they are capable and willing to perform the Contract.

(2) The performance is not unreasonably burdensome or expensive

86. The UNIDROIT Commentary recognises cases whereby the surrounding circumstances have changed so drastically that requiring performance would run counter to the general principle of good faith and fair dealing.[138] A performance may be deemed unreasonable depending on the economic assessment by the courts, by balancing the economic costs and

[135] Chengwei Liu, (2005). "Specific Performance: Perspective from the CISG, UNIDROIT Principles, PECL and Case Law."
[136] Principles of European Contract Law (PECL), Article 46.
[137] Record, ¶58.
[138] UNIDROIT Principles, Article 7.2.2 Comment 3.b.

benefits of the performance[139]. Here, the two deliveries will not be unreasonably burdensome or expensive for several reasons:

i. Payment of delivery is made in advance

87. The Claimant will make payment for the before the Respondent's delivery of the bricks. Such advance payment provides a solid form of security in the event of default of payment by the Claimant. Given the Respondent's alleged 'impecunious' state, specific performance of the two deliveries will not be unreasonably burdensome or expensive, but instead provides the Respondent a financial boost to facilitate the production of the bricks.

ii. The Respondent is not in a dire financial state

88. Despite being unable to gain any profit since its incorporation[140], the Respondent's business operation is nowhere near insolvency. Instead, they are still financially capable to hire three prominent lawyers from a leading Cambodian firm.[141] Given the fact that the company is still in operation without any concrete evidence of financial hardship (such as laying off employees or selling away assets), producing two deliveries of bricks will not be unreasonably burdensome or expensive.

iii. The Respondent has an alternative remedy to obtain finances

89. Even if the Claimant takes cognisance of the Respondent's purported financial difficulty to produce the bricks, such difficulty can be alleviated by obtaining financing from a third party. For instance, the Respondent can enter into a factoring agreement[142] with a third

[139] Amin Dawwas (2010) *Alteration of the Contractual Equilibrium Under the UNIDROIT Principles.* (Vol.2, Issue 5).
[140] Record, ¶26.
[141] Record, ¶53.
[142] UNIDROIT Convention On International Factoring.

party who is assigned the Respondent's rights under the Contract, and whom the Respondent could be paid in advance. Hence, the Respondent is not short of options to finance their production of bricks as requested by the Claimant.

(3) The performance cannot be reasonably obtained from another source

90. Specific performance will normally be granted in cases in which the subject matter of the Contract is something unique and/or irreplaceable in nature – in other words, something not readily available elsewhere.[143]

91. Since the bricks are of state-of-the-art technology, special sized, tailor-made and color-coated,[144] the Claimant is the party short of options as they cannot reasonably obtain bricks of such high quality and quantity from another source.

(4) The performance is not an obligation of an exclusively personal character

92. When performance has an exclusively personal character, enforcement would interfere with the personal freedom of the obligor.[145] However, the phrase 'exclusively personal character' does not extend to obligations undertaken by a company.[146]

93. The Respondent is a limited company equipped with machineries and manned by numerous employees.[147] Furthermore, the Respondent's main activity is the production and selling of bricks,[148] to which they have been supplying to the Claimant exclusively since

[143] Mahdi Zahraa & Aburima Ghith, (2002) S*pecific Performance in the Light of the CISG, the Unidroit Principles and Libyan Law* (Volume 7, Issue 3, 751-773).
[144] Record, ¶15(a).
[145] UNIDROIT Principles, Article 7.2.2.
[146] *Ibid.*
[147] Record, ¶7.
[148] Record, ¶8.

2014.[149] Hence, the Respondent's obligation under the Contract to produce and deliver the bricks to the Claimant cannot be deemed as an 'exclusively personal character'.

(5) The performance is required within a reasonable time

94. Specific performance will not be granted if the party entitled to performance fails to demand performance within a reasonable time, as then the defaulting party will be entitled to assume that the former is not insisting upon performance[150]. Here, the Claimant contacted the Respondent to confirm the first delivery of bricks in mid-March 2017,[151] and then commenced this arbitration 5 months later in August.[152] Hence, the demand for performance was made within reasonable time without delay.

C. THIS TRIBUNAL SHOULD SET THE CONTRACTUAL TERMS IN WRITING

95. The final relief prayed by the Claimant is for the terms of the Contract to be set in writing, by way of a declaratory award.

96. Alternatively, if Parties are inclined to re-negotiate the Contract, such settlement can be recorded as a form of award made by way of consent.[153] Such a consent award is binding on Parties of the arbitration proceedings,[154] as well as recognized and enforceable by the courts[155]

[149] Record ¶15(c).
[150] Commentary to Article 7.2.2.
[151] Record, ¶43.
[152] Record, ¶44.
[153] Rule 12(9) of KLRCA Arbitration Rules 2017; Article 30(1) of the UNCITRAL Model Law.
[154] *Fabien Gelinas, Trade Usages and Implied Terms in the Age of Arbitration. (Oxford University Press 2006).*
[155] *Mazza v District Council of New York* (2007) WL. 2668116*; Halifax Life Ltd v Equitable Life Assur. Society* [2007] EWCH 50; *Benaim (UK) Ltd v Davies Middleton & Davies Ltd [2004] EWCH 737*.

97. It would appear that the Parties have contrasting views of interpretation as to whether the 35% incentive should be paid at the end of 2016 or 2017.[156] Hence, it is critical to set the terms of the Contract in writing, so to resolve this issue once and for all.

98. Lastly, since the Respondent's Counter Claim is premised on the basis that the Contract is enforceable in the terms as envisaged by the Respondent,[157] the Counter Claim would also be determined in tandem with the Contract being set in writing. In other words, the Respondent's Counter Claim is already subsumed within the scope of the claim itself, hence need not be further considered by this tribunal.

[156] Record, ¶34.
[157] Record, ¶58.

PRAYER OF RELIEF

The Claimant respectfully request the tribunal to adjudge that:

1. The arbitration agreement is valid and capable of being performed;
2. The request to join Vader as a party to the arbitration be granted;
3. The Claimant's acceptance of the Respondent's offer to extend the Contract via the side-way head nod was valid and enforceable; and
4. The Claimant is entitled to a declaratory award to set the terms of the Contract Extension in writing, and also for an award of specific performance to compel the Respondent to deliver the bricks to the Claimant in the time and manner as this tribunal sees fit.