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 RESPONDENT

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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 the Respondent 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 2014 and 2015, the representatives of both Parties agreed to extend the Contract provided that the Claimant pays a 15% price increases for four deliveries in 2015 and 2016 respectively.
8. On 23 November of 2016, the representatives of both 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 ("**the Alleged Contract Extension**").
9. The representatives of both 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 sideway 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. As a preliminary matter, the Arbitration Agreement is governed by Cambodian law and the KLRCA Rules 2017 while the Contract between both Parties is governed by The UNIDROIT Principles of International Commercial Contracts 2016 ("**the UNIDROIT Principles**"). This Tribunal should declare that the Arbitration Agreement is incapable of being performed as *firstly*, the Respondent is deprived of an equal opportunity to effectively present their defence and *secondly*, the chance to pursue their Counter Claim. *In any event*, the Respondent is entitled to avoid the Arbitration Agreement based on the doctrine of *rebus sic stantibus* – an exception to the principle of *pacta sunt servanda* as the circumstances have changed so substantially and fundamentally due to Brexit, as compared to when the Arbitration Agreement was entered between both Parties. *Further*, this Tribunal should err at the side of caution as this arbitral award is highly susceptible to be set aside or refused enforcement due to public policy reasons.

II. This Tribunal should not grant the Claimant's request to join Vader into this arbitration as *firstly*, this Tribunal lacks jurisdiction over Vader – a non-signatory under the general principle of competence-competence. *Secondly*, the Claimant's request is merely a fishing expedition as the sole reason to join Vader in is to fund the Respondent's cost of arbitration. *In any event*, the Claimant lacks prima facie legal basis to bind Vader into this arbitration, as required under Rule 9(1) of the KLRCA Rules 2017.

III. This Tribunal should declare that there was no valid acceptance of the Contract. *Firstly*, under the subjective test – (i) the formation of the Contract was clouded by uncertainties in preliminary negotiations; (ii) practices established between both

Parties leave no room for such uncertainties; and (iii) the Claimant's subsequent conduct signifies the non-existence of the Contract. *Secondly*, under the objective test – (i) the nature and purpose of the Contract makes it impossible for the Contract to be concluded by a mere Indian head nod; (ii) the meaning commonly given to a head nod is easily misunderstood; and (iii) both Parties are not bound by the usage of the head nod. *In any event*, the Respondent is (i) entitled to avoid the Contract on mistake or (ii) entitled to termination or renegotiation of the Contract on the ground of hardship.

IV. Assuming but not conceding that the Contract was valid and enforceable, this Tribunal should not grant specific performance to the Claimant as (i) the performance of the Contract would be unreasonably burdensome or costly to the Respondent and (ii) the Claimant may reasonably obtain performance of the Contract from another source.

PLEADINGS

I. THE ARBITRATION AGREEMENT IS INCAPABLE OF BEING PERFORMED DUE TO THE RESPONDENT'S FINANCIAL IMPECUNIOSITY

A. Preliminary issue: the law governing the arbitration agreement is Cambodian law

1. When it comes to determining whether the Arbitration Agreement is capable of being performed or otherwise, this Tribunal must first determine the network of laws governing the procedural aspect of this arbitration – commonly known as the *lex arbitri,* as opposed to the laws that govern the substantive merits of this dispute.

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

[1] The Geneva Protocol on Arbitration Clauses 1923, Article 2.
[2] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985(GA Res 40/72, UN GOAR, 40th Sess, Supp No 17, Annex 1, UN Doc A/40/17 (1985)) ("Model Law") Article 1(2).
[3] Facts, ¶15.

arbitration.[4] The automatic nexus between the *lex arbitri* and the *lex loci arbitri* has been recognized in judicial decisions by various jurisdictions.

5. In 2002, the Singapore Court of Appeal in *PT Garuda Indonesia v Birgen Air*[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 the 2002 Singapore High Court case of *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd*[6] when it ruled "*if Singapore is the place of arbitration, the curial law of Singapore applies*".

6. In 2009, the English High 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, the English Court of Appeal in *Sulamerica CIA Nacional De Seguros SA and Others v. Enesa Engenharia SA And Others*[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 Co Ltd & Anor v Government of the Lao People's Democratic Republic*[9] where in that case, the *lex arbitri* was absent in the arbitration

[4] Facts, ¶15; Nigel Blackaby et al, Redfern & Hunter on International Arbitration (Oxford University Press, 5th Ed, 2009), ¶3.61.
[5] *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401, ¶24.
[6] *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd* [2002] 1 SLR(R) 492, ¶54.
[7] *Shashoua and others v Sharma* [2009] EWHC 957, ¶23.
[8] *Sulamerica CIA Nacional De Seguros SA and Others v. Enesa Engenharia SA And Others* [2012] EWCA Civ 638.
[9] *Thai-Lao Lignite Co Ltd & Anor v Government of the Lao People's Democratic Republic* [2017] 9 CLJ 273.

agreement. On one hand – the law governing the main contract (the PDA agreement) was New York law[10] while on the other hand – the seat of arbitration was Kuala Lumpur, Malaysia.[11] It was subsequently held that the *lex arbitri* is Malaysian law, following the *Sulamerica* test.[12]

8. Despite having another possibility of opting the law governing the underlying contract between both parties to be the *lex arbitri*,[13] this approach however is not universally acceptable[14] due to the doctrine of separability – where an arbitration agreement is taken to be autonomous and separable from the main contract.[15] Further, the English Court of Appeal in *XL Insurance Ltd v. Owens Corning*[16] and *Noble Assurance Company and Shell Petroleum Inc v. Gerling Konzern General Insurance Company UK Branch*[17] 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.[18]

9. Following the general rule as canvassed above, since both Parties did not expressly choose the *lex arbitri*, it should typically follow the seat of arbitration – the Kingdom of Cambodia.[19] 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).[20]

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[10] *Thai Lao* (n9) ¶187.
[11] *Thai Lao* (n9) ¶186.
[12] *Thai Lao* (n9) ¶187.
[13] *Sulamerica* (n8) ¶14; *Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission* [1994] 1 Lloyd's Rep 45; *Leibinger v. Stryker Trauma GmbH* [2005] EWHC 690 (Comm); *Thai Lao* (n9) ¶167.
[14] *Thai Lao* (n9) ¶160.
[15] Williams and Kawharu on Arbitration at ¶4.8; *Thai Lao* (n9) ¶168; Redfern and Hunter (n4) ¶¶3.13,3.14.
[16] XL Insurance Ltd v. Owens Corning [2000] Lloyd's Rep 500.
[17] Noble Assurance Company and Shell Petroleum Inc v. Gerling Konzern General Insurance Company UK Branch [2007] EWHC 25322.
[18] See also *C v. D* [2007] EWHC 1541 (Comm); *Black-Clawson v. Papierwerke* [1981] 2 Lloyd's Rep 446, 483; *Thai Lao* (n8) ¶170.
[19] Facts, ¶15(f).
[20] Commercial Arbitration Law of the Kingdom of Cambodia.

B. Continuation of this arbitration will constitute a violation of due process

i. The Respondent should be afforded an equal opportunity to effectively present their defence

10. Right to a fair trial is a fundamental human right recognized under international conventions as enshrined under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR),[21] Article 6 of the European Convention of Human Rights (ECHR)[22] and Article 10 of the Universal Declaration of Human Rights (UDHR).[23] Such right is also encapsulated in the Constitution of the Kingdom of Cambodia as Article 31 of the Constitution recognizes all human rights stipulated under the UDHR.[24]

11. Article 26 of the CALC states that "*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*" (emphasis added).

12. Similarly, Article 17 of the KLRCA Rules 2017 provides that "*parties are treated with **equality** and that at an appropriate stage of the proceedings each party is **given a reasonable opportunity of presenting its case***" (emphasis added).

13. Due to its financial impecuniosity, the Respondent could not afford to finance its defence. *Firstly*, the Respondent could not even pay for its share of non-specific security deposit amounting up to USD25,000[25] – what more the cost of the whole arbitration proceeding. Despite the Claimant already paying for the security deposit on behalf of the Respondent,[26] the costs which are necessary for Respondent's defence

[21] International Covenant on Civil and Political Right (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[22] European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953).
[23] Universal Declaration of Human Rights (UDHR) (adopted and entered into force 10 December 1948)
[24] The Constitution of the Kingdom of Cambodia, Article 31.
[25] Facts, ¶48.
[26] Facts, ¶48; Further Clarifications, ¶2.

also include, but are not limited to, attorney's fees, other expenses, and the readjustment of the advance on costs.[27]

14. *Secondly*, the Respondent could only afford local Cambodian in-house counsels to take care of its administrative issues[28] instead of international case counsels which are commonly needed for international arbitration.

15. *Thirdly*, since incorporation, the Respondent has made zero profits, and has been saddled with heavy debts.[29] Continuing with this arbitration proceeding will further stretch the Respondent's finances and make it impossible for the Respondent to perform any contract, including the one that the Claimant itself insisted.

16. *Fourthly*, the sole shareholder of the Respondent – Vader, decided to stop injecting capital into the Respondent.[30] Taking into consideration all these factors in totality, this arbitration proceeding should not go on as both parties are no longer standing on equal footing anymore.

ii. The Respondent is deprived of access to justice

17. The German Federal Supreme Court in 2000[31] ruled that when one of the parties to an arbitration agreement is impecunious, the arbitration agreement can be declared to be "*incapable of being performed*". The only exception to this general rule is when the other party is willing and able to bear the full cost of the arbitration proceeding.[32] Here, it is apparent that the Claimant is not willing to bear the full cost of this arbitration

[27] Patricia Zivkovic, 'Impecunious Parties in Arbitration: An Overview of ECHR Practice', Croat. Arbit. Yearb. Vol. 23 (2016), pp. 33-52, ¶51.
[28] Facts, ¶¶26,52.
[29] Facts, ¶26.
[30] Facts, ¶27; Clarifications, ¶9.
[31] Bundesgerichtshof, III ZR 33/2000, BGHZ 145, 116.
[32] 'The Impact of Party Impecuniosity on Arbitration Agreement' *BMH Avocats* (Kuhner, 16 October 2014) <http://bmhavocats.com/impact-party-impecuniosity-arbitration-agreements/#_ftn5> accessed 11 September 2018.

proceeding when the Claimant requested before this Tribunal to join Vader into this arbitration – solely to bear the cost of this proceeding.[33]

18. This decision was based on Article 1032 of the German Zivilprozessordnung (German Code of Civil Procedure) which provides that Courts can assume jurisdiction if "*the arbitration agreement is null and void, inoperative or* ***incapable of being performed.***" This threshold is modelled after Article 8 of the UNCITRAL Model Law, and also reflected under Cambodian law as Article 8 of the CALC provides for Court to assume jurisdiction if *"it finds that the agreement is null and void, inoperative or* ***incapable of being performed***."

19. This threshold is arguably lower than for the French Courts under Article 1448 of the French CPC, which requires the arbitration agreement to be "***manifestly*** *null or manifestly inapplicable*" before Courts can assume jurisdiction. Hence, the liberal approach taken under the French jurisprudence[34] to generally declare an arbitration agreement to be still capable of being performed regardless of impecuniosity is an anomaly.

20. The Respondent's current dire financial situation makes it impossible to pursue the Counter Claim if this arbitration proceeding is not terminated. The Counter Claim which reflects the true value of the Contract amounting up to USD2,962,328,815.20[35] made it even more difficult – if not impossible, for the Respondent to pursue its Counter Claim[36] due to the enormous cost of proceedings amounting up to USD3,313,395.93.[37]

[33] Facts, ¶62.
[34] *Pirelli & Co. v. Licensing Projects and other*, A contribution by the ITA Board of Reporters, Kluwer Law International (First Civil Law Chamber 2013).
[35] Facts, ¶58.
[36] Facts, ¶57.
[37] Schedule 1, Kuala Lumpur Regional Centre for Arbitration Rules 2017 (KLRCA Rules 2017).

C. In any event, the Respondent is entitled to avoid this Arbitration Agreement based on the doctrine of *rebus sic stantibus*

21. *Pacta sunt servanda* – or commonly known as the sanctity of contract is a paramount feature of the law of contract. This means parties must adhere to the terms of their contract.[38]

22. Nonetheless, it is arguable that the promisor should not be held to his promise when circumstances have changed so fundamentally that a hardship or *force majeure* event has occurred to him.[39] As such, the strict application of *pacta sunt servanda* has been diluted with the possible application of the doctrine of *rebus sic stantibus* – the doctrine of changing of circumstances.

23. This doctrine allows for non-observation of contractual obligations when the situation existing at the conclusion of the contract changed so completely that parties, acting as reasonable person, would not have made the contract, or would have made it differently, had they known what was going to happen.[40]

24. This doctrine has been recognized in several jurisdictions – including but not limited to the American "*commercial impracticability*",[41] the English "*frustration of purpose*",[42] the German "*Wegfall der Geschäftsgrundlage*",[43] the French "*imprévision*"[44] or the Swiss "*impossibility*".[45]

25. This doctrine has been translated into the test of "*impossibility*" under Cambodian law where Article 392 of the Civil Code of Cambodia provides that "*performance shall also*

[38] *Liamco v. Libya award*, April 12, 1977, 101.
[39] 'Changed Contract Circumstances', (Chengwei Liu, April 2005) < http://www.cisg.law.pace.edu/cisg/biblio/liu5.html> accessed 2 September 2018.
[40] Clive M. Schmitthoff, Schmitthoff's Export Trade: The Law and Practice of International Trade (Sweet & Maxwell, 8th Ed, 1986), 146; Hans van Houtte, 'Changed Circumstances and Pacta Sunt Servanda' TDM 5 (2007) < www.transnational-dispute-management.com/article.asp?key=1060> accessed 1 September 2018.
[41] Uniform Commercial Code, Section 2-615; Restatement (Second) of Contracts, Section 268(2).
[42] *National Carriers Ltd v. Panalpina Northern Ltd* [1981] AC 675, 693.
[43] German Civil Code, Article 242 and 275.
[44] French Civil Code, Article 1134.
[45] Swiss Civil Code, Article 2.

*be deemed impossible where performance is determined to be impossible from a social or **economic** standpoint* (emphasis added)." Article 415 of the same Code further provides that when such "*impossibility*" is established, the obligation can be extinguished "*if performance of an obligation has become impossible **without the fault** of the obligor* (emphasis added)."

26. Here, when both Parties initially signed the Arbitration Agreement on September 2013,[46] the Respondent was fully funded by its sole shareholder and parent company – Vader.[47] In fact, the Respondent was set up by Vader as a vehicle to penetrate the Asian market due to the possibility of the UK leaving the EU.[48]

27. However, when Brexit truly happened, instead of focusing fully on the Respondent's business in the Asian market, Vader decided to abandon the Respondent by cutting all ties in terms of financing, compliance monitoring and directives.[49]

28. Vader's move due to the supervening event of Brexit was unforeseeable and not within the contemplation of the Respondent when signing the Arbitration Agreement. By losing its one and only financial pillar, the performance of the Arbitration Agreement should be deemed impossible.

D. This arbitral award is highly susceptible to be set aside or rendered unenforceable

29. Even if assuming but not conceding that the Arbitration Agreement is capable of being performed, this Tribunal should err at the side of caution as there is a high risk that the arbitral award is highly susceptible to be set aside or rendered unenforceable as it is contrary to (i) public policy and (ii) the principle of equality.

[46] Facts, ¶13.
[47] Clarifications, ¶3.
[48] Facts, ¶6.
[49] Facts, ¶27; Clarifications, ¶9.

i. *This arbitral award could be set aside or rendered unenforceable due to public policy reasonings*

30. Article 44(2)(b)(ii) and Article 46(2)(b) of the CALC provides that an arbitral award can be set aside or rendered unenforceable respectively if "*the recognition of the award would be contrary to public policy of the Kingdom of Cambodia*".

31. As adumbrated above,[50] this arbitration proceeding violates the constitutional rights under the Constitution of the Kingdom of Cambodia and hence contrary to public policy.

ii. *This arbitral award could be set aside or rendered unenforceable as the Respondent is deprived of an equal opportunity to effectively present its case*

32. Article 44(2)(a)(ii) and Article 46(1)(b) of the Commercial Arbitration Law of the Kingdom of Cambodia provides that an arbitral award can be set aside or rendered unenforceable respectively if "*the party making the application ... was otherwise unable effectively present his case*".

33. As adumbrated above,[51] the Respondent is handicapped in financing its defence and effectively present its case due to its precarious financial situation.

[50] See ¶10 of this Memorial.
[51] See ¶¶11,12,13,14,15 of this Memorial.

II. THIS TRIBUNAL SHOUD NOT GRANT THE CLAIMANT'S REQUEST TO JOIN VADER AS A PARTY TO THIS ARBITRATION

A. This Tribunal lacks jurisdiction over Vader

34. Consent is the cornerstone of arbitration.[52] It is a creature of contract, a dispute resolution mechanism that has no form outside the four corners of the parties' arbitration agreement.[53] Pursuant to the general principle of *competence-competence*, an arbitral tribunal may rule on questions regarding its own jurisdiction.[54] This principle is adopted by both Article 24(1) of the CALC[55] and Article 23 of the KLRCA Rules 2017.[56]

35. Since this Tribunal's jurisdiction is derived from the validity of the Arbitration Agreement,[57] this Tribunal's jurisdiction only extends to those parties bound by the Arbitration Agreement[58] – which naturally excludes Vader, a non-signatory to the Arbitration Agreement.

36. It is general rule that only the true intent of the parties can bind additional parties to an arbitration proceeding.[59] As eloquently pointed out by an ICC arbitral tribunal, "*If [a party] had intended [the non-signatory] to be a party to the contract or its arbitration clause he could have so insisted at that time*."[60]

37. Here, the Arbitration Agreement was signed by representatives of both the Claimant and the Respondent.[61] Only the Seller (Respondent) and the Buyer (Claimant) were

[52] William W. Park, 'Non Signatories and International Contracts: An Arbitrator's Dilemma', (Oxford, 2009), ¶1.01.
[53] Park (n52) ¶1.01.
[54] Redfern & Hunter (n4) ¶5.42.
[55] Commercial Arbitration Law of the Kingdom of Cambodia, Article 24(1)
[56] KLRCA Rules 2017 (n37) , Article 23.
[57] Redfern & Hunter (n4) ¶1.58.
[58] Gary Born, International Commercial Arbitration (Kluwer Law International, 2nd Ed, 2014), 1405.
[59] Born (n58), 1405.
[60] ICC Case No. 10758.
[61] Facts, ¶13.

named in the Arbitration Agreement.[62] Vader was not at any time involved nor mentioned throughout the long-term business relationship between both Parties.

38. When it comes to binding a non-signatory into an arbitration proceeding, this Tribunal should err at the side of caution as any misjoinder of non-signatories will expose the arbitral award to the risk of being refused enforcement under Article V(1)(d) of the New York Convention.[63]

B. The Claimant's request is merely a fishing expedition

39. The only reason the Claimant requested to join Vader into this arbitration was because "*from the Claimant's point of view, Vader would be able to support the costs of the arbitration*".[64] With that being said, the Claimant claims no legal liability from Vader but still insisted on forcing Vader into this arbitration as a co-defendant. It is apparent that the Claimant's request was none other than a fishing expedition.

C. In any event, the Claimant has no *prima facie* legal basis to join Vader into this arbitration

40. The only way for the Claimant to bind Vader as a non-signatory to this arbitration is by proving that that *"such Additional Party [Vader] is prima facie bound by the arbitration agreement*" pursuant to Rule 9(1) of the KLRCA Rules 2017.

41. The issue of joinder builds on principles related to corporate personality and usually, the *lex societatis* ie. law of the place of incorporation of the subsidiary has traditionally served as the starting point in determining the extent of a corporate personality.[65]

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[62] Facts, ¶¶1,7,15
[63] *Thai Lao* (n9); *PT First Media TBK v. Astro Nusantara International BV* [2013] SGCA 57; *Peterson Farms Inc v. C & M Farming Ltd* [2004] APP.L.R. 02/04, *Sarhank Group v. Oracle Corp* 404 F.3d 657 (2nd Cir. 2005), *Pakistan v. Dallah Real Estate and Tourism Holding Company Case* No. 09/28533.
[64] Facts, ¶62.
[65] Park (n52) ¶1.64.

42. Here, since the Respondent was incorporated under the laws of Cambodia, [66] Cambodian law should serve as the governing law to determine whether Vader is bound to this arbitration.

43. Under Cambodian law, the Claimant has *no prima facie* legal basis to join Vader into this arbitration either under (i) the principle of agency, (ii) third party beneficiary or (iii) the group of companies doctrine.

i. *The principle of agency is not recognised under Cambodian company law*

44. As a matter of general rule, a principal can enforce an arbitration agreement made for its benefit by an agent even where the other party to the contract did not know about the undisclosed principal.[67] Here, the principle of agency cannot apply as it is not recognised under Cambodian law.

45. Article 271 of the Cambodian Law on Commercial Enterprises lays down three mutually exclusive categories by which a foreign business may operate in the Kingdom of Cambodia – (a) through commercial representative office or commercial relations office; (b) through a branch; or (c) through a subsidiary. It is explicitly mentioned under the same Article that only "*the commercial representative office and branch are agents of their principals and do not have legal personality separate from their principals*."

46. It simply means that as a matter of principle, subsidiaries set up by foreign businesses in the Kingdom of Cambodia cannot be agents of their principal (parent company). Since the Respondent was set up by Vader, a UK company in the Kingdom of Cambodia,[68] the agency principle should be rejected from the outset and cannot serve as a legal basis to bind Vader into this arbitration.

[66] Facts, ¶7.
[67] *Interbras Cayman Co. v. Orient Victory Shipping Co*., S.A., 663 F.2d 4, 6 (2d Cir. 1981).
[68] Facts, ¶¶4,7.

ii. *The doctrine of third party beneficiary fails to be a legal basis to bind Vader into this Arbitration Agreement*

47. The doctrine of third party beneficiary cannot apply in this case because (a) the "intention test" has not been met and (b) in any event, the elements of "third party beneficiary" under Cambodian law were not fulfilled.

a. *The "intention test" has not been met*

48. Under the doctrine of third party beneficiary, not only a party deemed to be a third party beneficiary of a contract may invoke the arbitration clause, courts usually have to look at the intention of parties at the time of execution of the contract.[69] The signatories of a contract must intend to admit the claim of a non-party for arbitration or for a non-party to invoke the arbitration clause.[70]

49. Here, since Vader was neither explicitly nor implicitly mentioned in the Arbitration Agreement, there were insufficient evidence to show both Parties' intention to confer benefit to Vader directly from the Arbitration Agreement or for Vader to invoke the arbitration clause in the Arbitration Agreement. The fact that Vader remains the sole shareholder of the Respondent is insufficient to constitute a "direct intention" to confer benefit to Vader under the Arbitration Agreement.[71]

b. *The elements of "third party beneficiary" under Cambodian law were not fulfilled*

50. While from the outset, the doctrine of third party beneficiary is recognised under Cambodian law, pursuant to Section V of the Civil Code of Cambodia, the elements were not fulfilled in our present case.

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[69] *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates S.A.S.* 269 F.3d 187, 200, (3d Cir. 2001); *John Hancock Life Ins. Co. v. Wilson* 254 F.3d 48, 59-60 (2d Cir. 2001); *JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 600 (5th Cir. 2007).

[70] *Thai Lao* (n9) ¶141; *Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor-Management Cooperation, Pensions & Welfare Funds v. Syracuse Floor Sys*, Inc No 13-CV-1509 (SJF) 2015 WL 222133 (E.D.N.Y. Jan 13, 2015).

[71] Facts, ¶8.

51. *Firstly*, Article 379 of the Civil Code of Cambodia provides that there must be an agreement between signatories to a contract to "*confer a right or benefit arising under the contract upon a third party*." *Secondly*, Article 381(1) of the Code provides that both Parties must make an "*intended third-party beneficiary's declaration of intention to accept the benefit*". *Thirdly*, Article 381(2) of the same Code provides that the third party beneficiary must "*declare an intention to accept the right or the benefit*".

52. As canvassed above,[72] neither of the Parties nor Vader made any direct declaration for the latter to benefit from the Arbitration Agreement. As such, the third party beneficiary doctrine is not a valid premise to bind Vader into this arbitration.

iii. *Vader is not prima facie bound by the Arbitration Agreement under the group of companies doctrine*

53. The group of companies was firstly recognised under French jurisprudence through the leading case of *Dow Chemical Group v Isover-Saint-Gobain*.[73] This doctrine binds non-signatories into an arbitration when (i) the non-signatory has played a part in the conclusion, performance *and* termination of the contract containing the arbitration agreement; *and* (ii) it was the common intention (express or implied) of the parties that the non-signatory be bound by the contract and the arbitration agreement within it.

54. However, the group of companies doctrine cannot apply here as (a) it is not recognised under Cambodian law and (b) in any event, the prerequisites in *Dow Chemical* were not fulfilled.

a. *The group of companies doctrine is not recognised under Cambodian law*

55. Separate legal entity is the core principle governing a principal-subsidiary relationship pursuant to Article 271 of the Cambodian Law on Commercial Enterprises. As the

[72] See ¶49 of this Memorial.
[73] *Dow Chemical Group v Isover-Saint-Gobain* ICC Case No. 413 ICC Case No. 4131.

group of companies doctrine contradicts this principle,[74] it has no validity under Cambodian law and should not bind Vader.

b. <u>In any event, the prerequisites in Dow Chemical were not fulfilled</u>

56. *Dow Chemical* only allows binding non-signatories into an arbitration when ***<u>firstly</u>***, the party sought to be joined will have been involved in the initial and final stages of the transaction: the negotiation and conclusion of the contract, as well as in performance and termination[75] and ***<u>secondly</u>***, the application of the arbitration clause "*conforms to the mutual intent of the parties*".[76]

57. Here, despite the initial meeting was between the Claimant's CEO and Vader's CEO,[77] Vader was not in any way involved in the performance or conclusion of the Arbitration Agreement. As such, there is no mutual intention between all parties to have the four corners of the Arbitration Agreement to be extended to Vader.

[74] *Peterson Farms* (n63) ¶62.
[75] Park (n52) ¶1.72.
[76] *Dow Chemical* (n73), 904.
[77] Facts, ¶10.

III. THERE WAS NO VALID ACCEPTANCE

A. The head nod cannot be interpreted as an acceptance

58. The UNIDROIT Principles provides that an acceptance can be made either by a statement or other conduct of the offeree indicating assent to an offer.[78] However, a conduct will only be an acceptance when an indication of assent successfully reaches the offeror.[79]

59. In the absence of express conduct or statement, Article 4.2 of the UNIDROIT Principles is used to interpret a unilateral conduct as such. Article 4.2 lays down two tests to interpret the head nod. The primary test is the subjective test and in the alternative, the objective test will only be triggered if the subjective test is not satisfied.[80]

i. *Subjectively, the head nod is not an acceptance*

60. Based on the subjective test, there could only be acceptance if the Claimant's conduct was understood by the Respondent or is one that the Respondent could not have been unaware of.[81] Article 4.3 propounds 6 circumstances that may be taken into account in interpreting such conduct.

61. However, the first three circumstances are more relevant in proving the subjective test which includes the (a) preliminary negotiations between the parties; (b) practices established between the parties; and (c) the conduct of the parties subsequent to the conclusion of the contract as enumerated in UNIDROIT Principles.[82]

[78] UNIDROIT Principles 2016, Article 2.1.6.
[79] UNIDROIT Principles 2016, Article 2.1.6.
[80] UNIDROIT Principles 2016, Article 4.2.
[81] UNIDROIT Principles 2016, Article 4.2.
[82] UNIDROIT Principles 2016, Article 4.3. Comment ¶2

a. <u>The Alleged Contract Extension was clouded by uncertainties in preliminary negotiations</u>

62. The preliminary negotiations for this Alleged Contract Extension lasted for four months, peculiarly lengthy in comparison with previous transactions. Previously, both Parties extended the Contract in a single meeting[83] and via email correspondences[84] that took less than a month to conclude. Having negotiated for four months with no outcome has indeed highlighted both parties' long-running disagreement and inability to come to terms in the course of dealing.

63. These uncertainties are magnified by the fact that this Alleged Contract Extension is substantially different from the previous Contract in terms of the time frame and scale as it was set to determine a contract extension for two years instead of a year extension and on top of that, for a 35% price increment each year instead of 15% which was unprecedented.[85] With such uncertainties clouding the current state of affairs between both Parties and having so much at stake, a head nod cannot suffice to mean an unequivocal acceptance.

b. <u>The practices established between both Parties leave no room for uncertainties</u>

64. The prior Contract extensions agreed by both Parties have always signified their clear intention to be bound, leaving no room for any doubt. <u>*Firstly*</u>, it was by way of a written agreement where both parties carefully revised and signed the Contract.[86] <u>*Secondly*</u>, the first extension was sealed with a handshake after both Parties verbally agreed to extend the Contract.[87] <u>*Thirdly*</u>, the Contract was again extended via email correspondences.[88] Although forms of previous practices vary, none of the above forms left any gap of

[83] Facts, ¶28.
[84] Facts, ¶24.
[85] Facts, ¶34.
[86] Facts, ¶13.
[87] Facts, ¶22.
[88] Facts, ¶24.

ambiguity for interpretation. Hence, the side-way head nod – which was ambiguous, cannot be said to be a practice established between both Parties.

c. The Claimant's subsequent conduct is consistent with the Contract not being extended

65. If a party wishes to rely on subsequent conduct to prove the validity of contract, the party must perform the term of the contract exactly as agreed as propounded by the *Leather goods case* in Germany.[89] In that case, although both parties had agreed to a discounted payment arrangement, the buyer was not entitled to reduce the purchase price because the buyer was otherwise in breach of the contract. As the buyer had no reasonable excuse for the failure to do so, the arrangement was not valid.[90]

66. Similarly, if there was a valid acceptance by way of the side-way head nod, it was agreed by both Parties in the last round of negotiation that the 35% bonus to be paid at the end of the year would be effective immediately.[91] Since the negotiations occurred in November 2016, the bonus payment of 35% should be paid by the Claimant in December 2016. However, no payment was made by the Claimant in 2016 or even afterwards.[92] Hence, the conduct of the Claimant in breaching the Alleged Contract Extension is consistent with the Respondent's belief that the Contract was not extended.

ii. Objectively, the head nod is not an acceptance

67. The objective test provides that the contract shall be interpreted in accordance with the meaning which reasonable persons of the same kind as the parties would give to it in the same circumstances. The relevant factors to satisfy the objective test are namely (a)

[89] Leather goods case [1997] 7 U 2070/97 (Germany Appellate Court München) <http://cisgw3.law.pace.edu/cases/970709g1.html> accessed 30 August 2018.
[90] *Leather goods case* (n89).
[91] Facts, ¶34.
[92] Facts, ¶42.

the nature and purpose of the contract; (b) the meaning commonly given to terms and expressions in the trade concerned; and (c) usages.[93]

a. <u>The nature and purpose of the Contract is of great significance</u>

68. This Contract involves the delivery of 2.4 billion bricks that would last for two years, twice the amount and time frame compared to previous deliveries.[94] Moreover, the bricks are made of state-of-the-art technology, tailor-made, colour coated and special sized, unlike any other bricks out there in the market.[95] A contract that involves huge quantities should require a more concrete form of acceptance rather than a culturally distinctive sideway head nod which Mr. Parades, a Mexican is unfamiliar with.

b. <u>Meaning commonly given to a sideway head nod is easily misunderstood</u>

69. Karen Mills, a Chartered Arbitrator, opines that a head nod is an easily misunderstood gesture.[96] In the West, it is known that an up and down head nod signifies assent. In contrast, an Indian sideway head nod signifies nothing to other cultures, and may even be construed in a negative response. Similarly, the meaning of head nod varies in different regions of the world. Thus, concluding the contract with a practice that is exclusively associated with the Indian culture is not an effective indication of assent to the Respondent as represented by Mr. Parades, a Mexican.

c. <u>Both Parties are not bound by the usage of the sideway head nod</u>

70. Parties are bound by two types of usages namely (1) those that they have agreed to and established among themselves and (2) those that are widely known to and regularly

[93] UNIDROIT Principles 2016, Article 4.3 Comment ¶2.
[94] Facts, ¶34
[95] Facts, ¶15.
[96] Karen Mills (2006), *Cultural Differences & Ethnic Bias in International Dispute Resolution An Arbitrator/Mediator's Perspective.* Chartered Institute of Arbitrators, Malaysia Branch International Arbitration Conference (pp 5 – 7) accessed 26th August 2018.

observed in international trade except where the application of such a usage would be unreasonable.[97]

1. Sideway head nod is not a practice established between both Parties

71. According to the UNIDROIT Principles, behaviour on only one previous transaction between the parties does not normally suffice as an established practice.[98] A sideway head nod was never employed to mean acceptance, nor as a formal business gesture in their past dealings. If anything, both Parties only communicated once a year during negotiations, and such infrequency does not qualify as an established practice.[99]

2. Sideway head nod is of a local nature

72. A party is not bound by such a usage if that usage is of a local nature. The fact that the usage must be "*widely known to and regularly observed in international trade by the parties in the particular trade concerned*" is a condition for the application of any usage, be it at international or merely at national or local level. The additional qualification "*in international trade*" is intended to avoid usages developed for, and confined to, domestic transactions also being invoked in transactions between multinational corporations.[100] Here, a sideway head nod is exclusive to the Indian culture. Hence, the Respondent cannot be said to be bound by it.

B. In any event, the Contract is void on the ground of mistake

73. Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.[101]

[97] UNIDROIT Principles 2016, Article 1.9.
[98] UNIDROIT Principles 2016, Article 1.9 Comment, ¶2.
[99] Facts, ¶¶22, 24,28,42.
[100] UNIDROIT Principles 2016, Article 1.9 Comment, ¶4.
[101] UNIDROIT Principles 2016, Article 3.2.1.

i. *The Contract can be avoided on the ground of mistake*

74. There are 2 requirements for a contract to be avoided on the grounds of mistake. *Firstly*, it must be a serious mistake and *secondly*, it must fall under any of the 4 circumstances laid down in Article 3.2.2 of the UNIDROIT Principles.

75. A contract may be avoided on the ground of serious mistake if, it had been discovered by the mistaken party, then they would not have concluded the contract. The mistake is serious when a reasonable person in the same situation as the mistaken party would only have concluded the contract on materially different terms or would not have concluded it at all if the mistake was discovered.[102]

76. Here, both parties have materially different understandings of the sideway head nod. if the true understanding of the sideway head nod was perceived correctly by both Parties, the status of the contract will be fundamentally changed as both Parties would either agree to proceed or to discontinue with the contract consensually. [103]

77. For a contract to be avoided for mistake, the mistake must fall under any of the four circumstances, namely (a) both parties laboured under the same mistake; (b) the error of the mistaken party is caused by the other party; (c) the other party knew or ought to have known of the error of the mistaken party and that it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or (d) the party other than the mistaken party had not acted in reliance of that mistake.[104] The mistake falls under the latter three circumstances.

a. *The mistake was caused by the Claimant*

78. The mistake is one that is caused by the Claimant when the mistake is due to specific representations made by the Claimant. Under the UNIDROIT Principles, no matter the

[102] UNIDROIT Principles 2016, Article 3.2.2.
[103] Facts, ¶¶36,37.
[104] UNIDROIT Principles 2016, Article 3.2.2.

circumstances of the conduct, it was made by the Claimant Be it express, implied, negligent or innocent, the conduct was made by the Claimant and it amounted to a representation which is sufficient to say that the mistake was caused by the Claimant.[105]

79. When given a yes or no question, the Claimant gave the specific representation by way of the sideway head nod. Had the claimant answered it with 'yes' or 'no', no confusion would arise.[106]

80. The Claimant could have also answered in a more concrete manner that would clearly signify his intention to be bound by the contract instead of responding via an unusual manner. Even if such conduct was done negligently, it does not matter so long as the mistake in this case was caused by the Claimant.

b. Binding the Respondent of such mistake would be contrary to the reasonable commercial standards of fair dealing

81. The Claimant is under a duty to inform the Respondent of its error.[107] Here, by concluding the Contract with a sideway head nod that is exclusive to the Indian culture, the Claimant ought to have known of the mistake he had caused. Furthermore, binding the Respondent for such an unusual gesture is contrary to reasonable commercial standards of fair dealing.

c. Claimant did not act in reliance of the Contract

82. Claimant did not reasonably act in reliance of the Contract as the Claimant remained silent and inactive after the conversation ended on 23 November 2016. If indeed there was a contract between both Parties, the Claimant should have acted in reliance of the terms of the Contract. However, this was not the position since the Claimant has clearly

[105] UNIDROIT Principles 2016, Article 3.2.2 Comment, ¶2
[106] Facts, ¶35.
[107] UNIDROIT Principles 2016, Article 3.2.2 Comment, ¶2.

chosen not to pay the 35% bonus as proposed by the Respondent and this has led to the conclusion that no contract existed.[108]

ii. *No valid obstacles to prevent the avoidance of the Contract*

83. Respondent may not avoid the contract if (a) it was grossly negligent in committing the mistake and (b) the mistake relates to a matter to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.[109]

a. *The Respondent was not grossly negligent*

84. The Respondent was not grossly negligent in this case as the Respondent is not reasonably expected to do an extensive cultural research on foreign culture to understand the sideway head nod in the meaning assumed by the Claimant.

b. *The risks were not assumed by both Parties*

85. Assumption of risks is often found in speculative contract such as investment contract.[110] It involves expectation of gain shall the assumption of fact be proven right. However, this Contract is not of speculative nature and both parties have not assented to such risks.

C. Assuming *arguendo* that there was a valid Contract, the Contract should be terminated or renegotiated on the ground of hardship

86. The UNIDROIT Principles provide for the principle of hardship, whereby if hardship is proven, the disadvantaged party is entitled to renegotiation. If renegotiation fails, court can order termination or adaptation of the contract.[111] To prove hardship, the following conjunctive elements must be proven namely (i) there was an occurrence of hardship that fundamentally altered the equilibrium of the contract; (ii) the hardship

[108] Facts, ¶42.
[109] UNIDROIT Principles 2016, Article 3.2.2.
[110] UNIDROIT Principles 2016, Article 3.2.2 Comment, ¶3.
[111] UNIDROIT Principles 2016, Article 6.2.3.

occurred after the conclusion of the contract; (iii) the hardship is beyond the control of the disadvantaged party; and (iv) the risk of the hardship was not assumed by the disadvantaged party.[112]

87. The hardship experienced by the Respondent fulfils all the conjunctive elements enumerated by the UNIDROIT Principles. Hence, the Respondent is entitled to renegotiation with the Claimant.

i. *The Respondent's financial difficulty fundamentally altered the equilibrium of the Contract*

88. To execute the contract now, the Respondent would have to bear production costs that have risen after 2016.[113] Considering the Respondent's precarious financial state, it will pose an unfair burden to the Respondent as the Respondent would be contracting on terms that were decided two years ago. According to the UNIDROIT Principles, the principle of hardship is generally more relevant in long-term contracts such as the current one.[114]

ii. *The hardship occurred after the conclusion of the Contract*

89. The hardship arose because of the lengthy arbitration proceedings which occurred after the conclusion of the purported contract.

iii. *The hardship was beyond the control of the Respondent*

90. The arbitration proceeding is beyond the control of the Respondent as the Claimant insists to continue despite the Respondent's clear refusal to engage in arbitration.

[112] UNIDROIT Principles 2016, Article 6.2.2.
[113] 'Building Firms Waiting More Than A Year For Bricks As Raw Material Costs Rocket, Study Shows' (The Independent, 2018) <https://www.independent.co.uk/news/business/news/brick-shortage-supply-building-firms-raw-material-costs-a8312746.html> accessed 19 September 2018.
[114] UNIDROIT Principles 2016, Article 6.2.2 Comment, ¶5.

iv. *The risk of the hardship was not assumed by the Respondent*

91. Such assumption of risks is generally featured in a speculative contract where the hardship caused by fluctuation in stock or funds should be expected. However, the Contract today was a sales and purchase contract with fixed time and price. It was not assumed by the Respondent that a misunderstanding could occur that would delay the contract execution for two years.

IV. ASSUMING BUT NOT CONCEDING THAT THE CONTRACT IS VALID AND ENFORCEABLE, SPECIFIC PERFORMANCE CANNOT BE GRANTED AGAINST THE RESPONDENT

92. Specific performance is the primary relief under the UNIDROIT Principles in the event the contract is valid and enforceable. However, the grant of specific performance will be rendered unenforceable if the Respondent falls under any one of the 5 exceptions provided under the UNIDROIT Principles.[115]

A. The performance will be unreasonably burdensome or costly for the Respondent

93. For the performance to be unreasonably burdensome, the threshold is that although still the performance is still possible, such performance may have become so onerous that it would run counter to the general principle of good faith and fair dealing.[116]

i. *The Respondent does not have the capacity to produce the bricks*

94. The performance of two full deliveries amounting to 600 million bricks[117] would counter the general principle of good faith and fair dealing given the financial state of the Respondent.[118] The Respondent have been facing excessive debts and have not been making profit since their incorporation. The Respondent have also sought for a third-party funding but it was to no avail due to the Respondent's precarious financial position.[119]

95. To require full deliveries of 600 million bricks would, even if possible, deeply affect Respondent's financial stability and liquidity necessary for a corporation to survive. Further, its holding company, Vader has halted financial support to the Respondent rendering the performance of the deliveries unreasonably burdensome and costly.[120]

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[115] UNIDROIT Principles 2016, Article 7.2.2 Comment, ¶2.
[116] UNIDROIT Principles 2016, Article 7.2.2 Comment, ¶3(b).
[117] Facts, ¶15.
[118] UNIDROIT Principles 2016, Article 1.7.
[119] Facts, ¶61.
[120] Facts, ¶27.

ii. *The commercial relationship between both Parties have been tainted by mistrust*

96. An entry level negotiation with a new counterpart would significantly increase the income of the Respondent.[121] However, due to the relationship of good faith and trust between the parties, the Respondent did not look for another counterpart.[122] Nevertheless, the Claimant has refused, neglected and failed to pay the 35% bonus as agreed at the end of 2016, and even up until today.

97. There is no assurance that the Claimant will fully uphold its part of the bargain if the acceptance is valid.[123] Even if the Claimant does not fulfil its promised payment, the only legal recourse of the Respondent to recover payment is through this arbitration, which has proven to be financially inaccessible to the Respondent.

B. The Claimant may reasonably obtain performance from another source

i. *Slight delay is reasonable*

98. In *Societe des Industries,* it was held that the fact that the buyers have to wait between nine to twelve months for a replacement delivery does not of itself establish that the goods were irreplaceable and cannot be reasonably obtain from another source.[124] Hence, even if the Claimant might take a far longer time to obtain the bricks from another source, that does not justify the necessity of specific performance.

ii. *Bricks are reasonably obtainable*

99. Firstly, the Claimant's options are not region-restricted as reasonably inferred by the Claimant's choice to the get bricks from Cambodia despite the Claimant's base is in China. Thus, the Claimant has the entire Asia as a pool of supply. Furthermore, the

[121] Facts, ¶25.
[122] Facts, ¶25.
[123] Facts, ¶58.
[124] *Societe des Industries Metallurgiques SA v. The Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465.

Claimant has been in operation since 2000.[125] It is an established construction company for which bricks are essential materials for operation for the past 18 years. Surely, the Claimant must have alternative supplier that collaborated with the Claimant before the Respondent was established in 2013.

[125] Facts, ¶1.

PRAYER OF RELIEF

The Respondent respectfully requests this Tribunal to declare that:-

(a) the Arbitration Agreement is incapable of being performed and the arbitration proceedings should be terminated;

(b) the Claimant's request to join Vader into this arbitration is not allowed;

(c) there was no valid acceptance via the Indian head nod; and

(d) in any event the Contract was valid and enforceable, specific performance should not be granted to the Claimant.