C1808 -C

THE 13TH LAWASIA INTERNATIONAL MOOT COMPETITION, 2018

SIEM REAP, CAMBODIA

ARBITRATION PROCEEDINGS BETWEEN

CHUIZI LEISHEN'S LLC

(CLAIMANT)

AND

ROBUSTESSE ESPACIAL SOLUCION CORP

(RESPONDENT)

at the

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION – SIEM REAP, CAMBODIA

MEMORIAL FOR THE CLAIMANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Treatises

Journal

Statutes and Principles

Articles

International Publications

STATEMENT OF JURISDICTION

- To ensure an expeditious resolution of the dispute, Chulizi Leishen's LLC ["Claimant"] and Robustesse Espacial Solucion Corp ["Respondent"] have agreed to submit this dispute to arbitration.

- Further, the parties have also agreed to resolve their dispute in accordance with the Kuala Lumpur Regional Centre for Arbitration Rules 2017 ["KLRCA Rules"] at Cambodia.

- The parties do not dispute the validity and enforceability of the arbitration agreement, and any award rendered by the Tribunal is acknowledged to be final and binding upon the Parties as per Rule 12 of the KLRCA Rules.

- Further, the Claimant seeks joinder of a party to the arbitration proceedings as per Rule 9 of the KLRCA Rules.

QUESTIONS PRESENTED

The issues to be decided in the present arbitration are as follows:

I. **WHETHER THE AGREEMENT TO ARBITRATE IS CAPABLE OF BEING HONOURED DESPITE THE IMPECUNIOSITY OF THE RESPONDENT?**

II. WHETHER THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION SHOULD BE GRANTED BY THE TRIBUNAL?

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

IV. WHETHER SPECIFIC RELIEF BE AWARDED AS A RELIEF?

STATEMENT OF FACTS

I: The Parties

- The Clamaint,Chuizi Leishen's LLC (CL) is a commercial company based in China which has been developing construction projects in regions of China. Ms Lee Qiang Bi is the Chief Executive Officer ["CEO"] and Mr Kalai Deewarvala is the representative of the Claimant.
- The RESPONDENT, Robustesse Espacial Solucion Corp (RES) is a wholly owned subsidiary of Vader Ltd ["Vader"]. It is limited company based in Cambodia. It is involved in production and selling of bricks. Mr Auld Chap is the CEO of Vader. Mr Armando Parades is the Managing Director of the Respondent

II: Timeline

- **February 2013**: the CEO's contacted a business agent to set up a meeting with potential commercial partners.
- **29th May, 2013:** CEO's met over dinner at the "Privacy and confidentiality in Arbitration" talk. On finding a mutual business opportunity they came to accord on most of the terms of the contract.
- Mr Kalai Deewarvala was made the representative of the Claimant. Mr Armando Parades was made the managing director of the Respondent. Both of which were authorised to execute all agreements.
- **September 2013:** Representatives drafted, revised and signed an exclusive distribution agreement.
- Terms of the contract signed mutually included production and delivery of tailor made bricks, terms of total amount of delivery, no of delivery and place of delivery.

- The agreement contained an dispute resolution mechanism as arbitration in case of any dispute. Seat of arbitration is Cambodia; arbitration to be governed by the KLRCA Rules and the law applicable is UNIDROIT Principles 2016.
- First 3 deliveries of 2014 were made successfully.
- **November 2014:** Representatives again met to fix deliveries for 2015 (First Incentive) by shaking hands.
- **November 2015:** Further, deliveries till 2016 were fixed via email.
- **2016:** Price of bricks was increasing in Asia. The Respondent being an offshore company has been operating without profits for a long time. Therefore, has decided to renegotiate the agreement.
- Due to Brexit, Vader has withdrawn its support to the Respondent.
- **23 November 2016:** Skype call between the representatives to fix deliveries for 2017 and 2018. Both took tea breaks in between to keep calm.
- Mr Parades promised 8 more deliveries provided 15% increase in 2017 and 35% bonus at the end of each year. When confirmed "Yes or No?", Mr Deewarvala did an Indian head nod to convey acceptance.
- **March 2017:**The Claimant contacted the Respondent to confirm the date of delivery. However, the Respondent had not confirmed the acceptance.
- **15th August 2017:**The Claimant served the Respondent with a Notice of Arbitration.
- The Claimant is seeking relief: to declare the contract as existent and enforceable; to order Respondent's performance (first two deliveries of 2017) and to set the contract in writing.
- **15th September 2017:**The Respondent denied the Claimant's claim.

- **15th December 2017:** Arbitral Tribunal was constituted and parties continued with the proceedings.
- Since no claim amount was decided, KLRCA fixed a non-specific security deposit which the Respondent refused has refused to pay.
- **February 2018:** Preliminary meeting took place. Tribunal, both parties and their counsels were present.
- The Claimant's claim value was set.
- The Respondent counter claimed that the contract was terminated on 23November 2016 and the agreement to arbitrate is null because they do have funds to perform the same.
- The Respondent listed their counter claims but they claim since they are impecunious, they cannot bring them.
- Now, the Respondent is trying to bring the claims in the national court. They also claim to have tried procuring third party funding.
- Further, the Claimant denies the Respondent's claim and has requested its intention for Vader to join as party so that the Respondent has the requisite support.
- Joinder request has to be decided by the Tribunal and therefore it has continued further.

Hence, this matter before the Arbitral Tribunal.

SUMMARY OF PLEADINGS

PLEADING I: AGREEMENT TO ARBITRATE IS CAPABLE OF BEING HONOURED DESPITE THE IMPECUNIOSITY OF THE RESPONDENT.

The agreement is capable of being honoured since payment of deposit is a mandatory compliance. Alternatively, compliance with the payment being a form requirement cannot hinder the proceeding's continuance. The Respondent is contending discontinuity on the basis of impecuniosity. However, the burden falls on the party claiming the same. Therefore, until the Respondent discharges its burden to prove the same, it cannot be made a criterion for discontinuing the proceedings.

Furthermore, under Cambodian Law, a claim can be brought before a national court when the agreement to arbitrate is null and void, inoperative or incapable of performance. Impecuniosity cannot be made a ground to apply these conditions. Therefore, proceedings shall continue in arbitration only.

PLEADING II: VADER SHOULD BE JOINED TO THE ARBITRATION AS A PARTY.

Even though Vader did not sign the contract as a party, its conduct signified implied consent to be a party to the agreement. Vader's involvement in the negotiation also settled the major terms of the contract. Vader played a pivotal role in the negotiation highlighting its implied consent to be a party. Further, the group of companies doctrine can used to extend the arbitration agreement to Vader. The doctrine is one of the leading legal principles used for joining non-signatories to an agreement. Its application is contingent on two criteria that are fulfilled in the present factual scenario. Vader and the Respondent shared close corporate and financial ties and were thus, part of a single economic entity. Vader's active role in the negotiation and conclusion of contract further attracts the application of the doctrine.

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

The conduct of the Claimant was sufficient to show valid acceptance. This is proved by applying subjective test, wherein the preliminary negotiations conducted between parties was used as its standard. When a contract was formulated between both parties in September 2013, the Claimant and the Respondent committed to subsequent negotiations by virtue of incentives on the existing terms of that contract. Further, the Respondent choosing to have an exclusive distribution agreement with the Claimant, impliedly binds him, and precludes him from acting inconsistently. The principle of *venire contra factum proprium* precludes the Respondent from violating principle of good faith and fair dealing. Now, since the Respondent in the given moot proposition has done so, he would be liable by way of specific performance for negotiating in bad faith.

PLEADING IV: SPECIFIC PERFORMANCE SHOULD BE AWARDED AS A RELIEF.

Under the UNIDROIT Principles on International Commercial Contracts,2016 [UNIDROIT 2016] specific performance is granted until certain exceptions are met. The exceptions are fulfilled when the performance of the obligation is impossible in law and fact, it can be procured from another source reasonably, it is burdensome, it is of exclusive personal character or reasonable time is not provided to complete the performance. In the present matter, none of the exceptions were met. Therefore, specific relief can be awarded.

PLEADINGS

I. AGREEMENT TO ARBITRATE IS CAPABLE OF BEING HONOURED DESPITE THE IMPECUNIOSITY OF THE RESPONDENT.

1. In the present mater, a dispute has arisen between the two parties regarding the acceptance of the contract related to delivery of bricks.[1] In accordance with the contract, any dispute arising out of the contract is to be solved by way of arbitration.[2] The Respondent being impecunious alleges that the proceedings should be discontinued and is willing to approach the national court instead.[3] The Claimant, however, maintains that the agreement to arbitrate is capable of being honoured because: impecunious condition of the Respondent cannot hinder the continuance of the arbitration proceeding **[A]**; and a substantive claim cannot be brought before the national court under Article 8 of the Commercial Arbitration Law of Kingdom of Cambodia ["Cambodian Law"]**[B].**

A. IMPECUNIOUS CONDITION OF THE RESPONDENT CANNOT HINDER THE CONTINUANCE OF THE ARBITRATION PROCEEDING.

2. The Respondent seeks to discontinue the arbitration proceedings on the ground that they are impecunious and cannot pay their share of non-specific security deposit.[4] Therefore, the Claimant submits that the impecunious condition of the Respondent cannot hinder the continuance of arbitration proceeding because: payment of deposit is a mandatory procedure to be fulfilled under the Kuala Lumpur Regional Centre for KLRCA Rule**[i]**;

[1]Moot Proposition, ¶39.
[2]Moot Proposition, ¶15.
[3]Moot Proposition, ¶60.
[4]Moot Proposition, ¶57.

alternatively, payment of deposit being a form requirement cannot hinder the arbitration proceeding **[ii]**; and the burden of proving impecuniosity lies upon the Respondent. **[iii]**

i. Payment of deposit is a mandatory procedure to be fulfilled under KLRCA Rules.

3. The KLRCA Rules being the procedural rules will govern the conduct of the parties in the present matter. [5] Under Rule 13 (7) of the KLRCA Rules, the calculation of the amount in dispute includes the value of any counterclaim or set-off. Furthermore, Rule 14(6) of the KLRCA Rules provides for a mandatory requirement that "....provisional advance deposit shall be paid by the parties…" It is a settled position that words like 'may' and 'shall' are interpreted in the light of object of the provision.[6] However, when the same statute or set of rules use both "may" and "shall", then they are construed in their normal meaning.[7] The normal meaning of shall as intended in the drafts is in the mandatory sense.[8]

4. In the present matter, KLRCA Rules uses both the phrases and hence, is to be construed as a mandatory requirement. Therefore, by the bare perusal of the provision, "shall" seems to indicate the mandatory nature of the provision. Further, object of the same is to ensure that the cost of arbitrator and rendering the final award is covered.[9] Thus, payment of advance deposit of USD$25,000.00 as a non-specific security deposit is a

[5]Moot Proposition, ¶15; *Smith Ltd v H&S International*, [1991] 2 Lloyd's Rep 127.
[6]*Lombard Commodities Limited v. Alami Vegetable Oil Products SDN BHD*, 1CLJ137 [2010] *cited in* Albert Jan van den Berg, Yearbook Commercial Arbitration , Volume 35, Kluwer Law International (2010), pp. 420 – 422.
[7]*Photopaint Technologies, LLC (US) v. Smartlens Corporation (US), Steven Hylen (US)*, [2002] 207 F. Supp. 2d 193 *cited inAlbert Jan van den berg*, Yearbook Commercial Arbitration, Volume 29 , Kluwer Law International (2004) pp. 1026 – 1037.
[8]*Bryan A. Garner*, Black Law's Dictionary, 9th edition, pp. 1449.
[9]Dirk De Meulemeester and CedericVeryser, *Failing to pay the advance on costs and the risk of inoperability of the arbitration clause – Remedy?*, pp 1.

mandatory requirement.[10] Therefore, the Respondent is under an obligation to advance the deposit.

ii. <u>Alternatively, payment of deposit being a form requirement cannot hinder the continuance of arbitration proceedings.</u>

5. Assuming but not conceding, the payment of deposit is not a mandatory requirement, even in that scenario proceedings will not be affected by its non-compliance. The Claimant contends that in the case of non-payment of deposit, the preferred approach to be adopted is substance-over-form approach, which is well-recognised in international commercial arbitration. The approach entails, that the arbitration proceeding or award does not depend on terminology used in the institutional rules[11], but should derive from its contents.[12] The arbitration should not be caught in technical sufficiency.[13]Moreover, if the rules do not provide procedure in case of noncompliance, substance over form is a better approach.[14]

6. While the Claimant does not contest the validity of the aforementioned principles of procedure, it however, submits that this approach would not allow discontinuance of the arbitration proceedings due to the impecunious condition of the Respondent. Substantive

[10]Moot Proposition, ¶ 48.
[11]*Publicis SA v. True North Communications Inc*., [2000] 206 F.3d 725 *cited in Albert Jan van den berg,* Yearbook Commercial Arbitration,Volume 25, Kluwer Arbitration Law International (2000), pp. 1152–1157.
[12]Philipp Peters, Chapter II: The Arbitrator and the Arbitration Procedure - Presiding Arbitrator, Deciding Arbitrator: Decision-Making in Arbitral Tribunals cited in Nikolaus Pitkowitz , Alexandre Petsche, *Austrian Yearbook on International Arbitration* (2011), pp. 129 – 160; Philipp Peters and Christian Koller, *The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion cited in Gerold Zeiler, Irene Welser*, Austrian Yearbook on International Arbitration (2010), pp. 137 – 169.
[13]*Jeffrey Waincymer*, Procedure and Evidence in International Arbitration, Part II: The Process of an Arbitration, Chapter 4: Written Notices, Submissions and the Articulation of Claims and Defences, Kluwer Law International (2012), pp. 217 – 254.
[14]*Marc J. Goldstein*, Note - Publicis Communications and Publicis S.A. v. True North Communications, Court of Appeals for the Seventh Circuit 206 F.3d 725 (7th Cir. 2000); Kluwer Law International(2000), Volume 18, Issue 4, pp. 830 – 837; Philipp Peters and Christian Koller, Chapter III: *The Award and the Courts – The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion*, *cited in Gerold Zeiler* and *Irene Welser*, Austrian Yearbook on International Arbitration (2010), pp. 137 – 169.

issues are those which are elements of the decision on the case and the reasoning behind it.[15] Procedural issues deal with the process by which that decision has been reached.[16] Another method of determining the distinction between substance and procedure is to consider whether a norm has autonomous substantive content or relates to the application of another norm.[17] In the present matter, the KLRCA Rules are the procedural rules guiding the arbitration.[18] Moreover, the payment of deposit as mentioned in Rule 13(7) of the KLRCA Rules does not relate to any elements of decision or reasoning behind it, whereas, it just relates to following a procedure. Hence, non-compliance of the same cannot affect the reasoning behind giving an award at the end. Therefore, it will be said to be procedural issue or a form.

7. Since, the aforesaid compliance is a technical aspect or a form,[19] the Claimant submits that arbitration proceedings depend on the substance over form approach of the institutional rule.[20]It is desirable that arbitration should not be hampered by technical debates about noncompliance of the payment of deposit.

iii. <u>The Respondent bears the burden of proving its impecuniosity.</u>

8. Since the Respondent is alleging discontinuance of the arbitration proceedings on the basis of its inability to pay the non-security deposit, it becomes imperative to contend the burden of proving impecuniosity which lies on the Respondent in the present matter.

[15]*Jeffrey Waincymer* , Procedure and Evidence in International Arbitration, Kluwer Law International(2012), pp. 1 – 46.
[16]Ibid.
[17]Andrew D. Mitchell & David Heaton, The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function, *Michigan Journal of International Law* Volume 31, (2010), pp. 568, 574.
[18]Moot Proposition, ¶ 15.
[19]Claimant Memorial,¶ 6.
[20]Claimant Memorial, ¶ 5.

9. The party relying on its impecunious condition to challenge the proceedings bears the burden of proving its impecuniosity.[21]The party is required to satisfy the evidential burden i.e. production of documents which prove the impecunious condition like financial statements, tax returns and bank statements, among others.[22] The ground of impecuniosity is refused when the requirement of providing an explanation for party's refusal to pay the deposit is not fulfilled.[23]

10. Therefore, until, in the present matter, the Respondent discharges its burden to prove its impecunious condition along with requisite evidence, the same cannot be considered to discontinue the arbitration proceeding and a claim cannot be brought before the national court.

B. SUBSTANTIVE CLAIM CANNOT BE BROUGHT BEFORE THE NATIONAL COURT UNDER ARTICLE 8 OF THE CAMBODIAN LAW.

11. Pursuant to seat of arbitration being Cambodia, The Cambodian Law is the *lex arbitri* governing the arbitration.[24] The Cambodian Law states that a substantive claim cannot be brought before the Court unless the arbitration agreement is null and void, inoperative and incapable of being performed.[25] In accordance with Article 8 of the Cambodian Law, the Claimant submits, that a claim cannot be brought before the national court in the present matter because the arbitration agreement is not null and void **[i]**; the arbitration agreement is operative **[ii]** and is capable of being performed. **[iii]**

---

[21]Mauricio Pestilla Fabbri, *Inapplicability of the arbitration agreement due to the impecuniosity of the party cited in* João Bosco Lee and Daniel de Andrade Levy, *Revista Brasileira de Arbitragem*, Kluwer Law International (2018), Volume XV, Issue 57, pp. 67 – 96.
[22]*William Bojczuk*, Evidence Textbook, 6th edition, HLT Publication (1994) ,pp. 57.
[23]*Société TRH Graphics v. Société Offset Aubin*, [1992] 3 Rev. Arb. 462, 463.
[24]Moot Proposition, ¶15; *Garry Born*, International Commercial Arbitration , 2nd edition, Kluwer Law International (2014), pp 1530–1531; Kaufmann-Kohler, *Identifying and applying the law governing the arbitral procedure: The role of the law of the place of arbitration*, (1999) 9 ICCA Congress Series 336.
[25]Article 8, *The Commercial Arbitration Law of Kingdom of Cambodia*, 2006.

i. <u>The agreement to arbitrate is not null and void.</u>

12. The arbitration agreement is null and void if it is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.[26]

13. In the present matter, however, the CEO's of the two companies met to discuss the business opportunity of their own volition.[27] When they found a mutual business opportunity, the contract was signed only after revising the same.[28] The dispute resolution mechanism clause was the part of the above signed contract, with mutual consent.[29]The fact situation also does not pose any scope of fraud as the contract was revised by both the parties and thereafter, was signed.[30]Moreover, the recognition of arbitration agreement is subject to limited and exhaustive grounds which cannot be expanded by national courts.[31]

14. Therefore, situations like duress, *inter alia*, cannot be imported in the case. Additionally, inability to meet the cost of arbitration cannot be made a ground for non-recognition of the agreement. Hence, the arbitration agreement is not null and void in the present matter.

ii. <u>The agreement to arbitrate is operative.</u>

15. The arbitration agreement is inoperative if has ceased to have effect.[32]It ceases to have effect only by the circumstances outside the contract and not because party is not in a

[26]Albert Jan Van Den Berg, *The New York Convention of 1958*, pp. 11.
[27]Moot Proposition, ¶10.
[28]Moot Proposition, ¶13.
[29]Moot Proposition, ¶ 15.
[30]Moot Proposition, ¶13.
[31]*Gary B. Born* , International Arbitration: Cases and Materials, 2nd edition, Kluwer Law International (2015), pp. 335 – 516.
[32]Albert Van Den Berg, *The New York Arbitration Convention of 1958*, pp.151.

condition to resort to arbitration.[33] Furthermore, the agreement can be made inoperative only by intrinsic factors which are in the control of the parties.[34]

16. In the present matter, the parties had of their own volition signed the contract in which they had resorted to arbitration as the dispute resolution method.[35] The Respondent is an offshore company which is suffering due to sunken cost. [36] This clearly shows that financial factors are external factors not in the control of parties.[37] The Respondent is not able to raise its counter claim in arbitration only because of its impecunious condition.[38] Therefore, inability to pay advances on the costs of the arbitration should not mean that an arbitration clause is inoperative.[39] Hence, the impugned arbitration agreement is operative.

iii. <u>The agreement to arbitrate is capable of being performed.</u>

17. The agreement is incapable of being performed if the arbitration cannot be effectively set into motion due to practical aspects.[40] This may happen where the arbitration clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate.[41]

18. In the present matter, the agreement is perfectly worded and parties had the intention to solve the dispute by arbitration.[42]There is no practical difficulty that the agreement

[33]*Dyna Jet Pte Ltd v. Wilson Taylor Asia Pacific Pte Ltd*, [2016] SGHC 238.
[34]Mauricio Pestilla Fabbri, *Inapplicability of the arbitration agreement due to the impecuniosity of the party cited in* João Bosco Lee and Daniel de Andrade Levy, Revista Brasileira de Arbitragem, Kluwer Law International (2018), Volume XV, Issue 57, pp. 67 – 96.
[35]Moot Proposition, ¶15.
[36]Moot Proposition ¶26.
[37]Supra Note 34.
[38]Moot Proposition ¶ 57.
[39]Supra Note 34.
[40]*Michael Hwang and Rachel Ong, Heartronics Corporation v. EPI Life Ptd Ltd and Others*, [2017] SGHCR 17.
[41]*Gary B. Born* , International Arbitration: Cases and Materials, 2nd edition, Kluwer Law International (2015), pp. 335-516; *K.V.C. Rice Inter trade Co Ltd v. Asian Mineral Resources Pte Ltd*, [2017] SGHC 3.
[42]Moot Proposition, ¶ 15.

cannot be set in motion. Therefore, the impugned arbitration agreement is capable of being performed.

19. Moreover, the exceptions of null and void, *inter alia*, to the enforceability of arbitration agreement, provided in Article 8 of Cambodian Law similar to the clause in Model Law, *inter alia*[43], have been construed narrowly[44]due to the objective of these laws being pro-arbitration treatment of an arbitration agreement.[45]Therefore, it is further established that a claim cannot be brought before the national court in the light of the objective of Article 8 of the Cambodian Law.

CONCULSION: Therefore, the arbitration proceeding shall not be discontinued despite the impecunious condition of the Respondent.

II. THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION BE GRANTED BY THE TRIBUNAL.

20. The Respondent is a wholly owned subsidiary of Vader, a commercial company incorporated in United Kingdom.[46] The Claimant contends that Vader should be joined as a party to this arbitration in pursuance to Rule 9 of KLRCA Rules because: The arbitration agreement intended Vader to be a party to the dispute **[A]**; The arbitration agreement can be extended to Vader by virtue of the group of companies doctrine**[B]**; and the third party beneficiary doctrine.**[C]**

[43]Article 8, *UNCITRAL Model Law on International Commercial Arbitration*, 1985; Article II(3), *New York Convention*, 1958.
[44]*Riley v. Kingsley Underwriting Agencies Ltd*, [1992] 969 F.2d 953, 960.
[45]*Khan v. Parsons Global Servs. Ltd*, [2007] 480 F.Supp.2d 327, 339.
[46]Moot Proposition, ¶ 8.

A. *THE PARTIES INTENDED VADER TO BE A PARTY TO THE AGREEMENT BETWEEN THE RESPONDENT AND THECLAIMANT.*

21. It is a settled position of law that arbitration agreements can be extended to non-signatories who can be joined as a party to the arbitration.[47]In ICC Case No. 5721, the tribunal observed that where a company or an individual appears to be the pivot of the contractual relations in a particular matter, one should carefully examine if the parties' legal independence should be disregarded in the interests of making a global decision.

22. Even though there was no express consent in the form of a signature by Vader to be a part of the agreement, its conduct signified implied consent. Impliedconsent is established when a reasonable third person in the shoes of one party would interpret the other party's behaviour as consent to the arbitration agreement.[48]This intention to consent to arbitration can be inferred when the activities of a group are conducted in such a way that led the contracting party to a confusion or a misunderstanding as to who the true parties to the agreement were.[49]

23. Vader initiated the negotiation with the Claimant when the CEO's of the two companies met on 29 May, 2013 in the KLRCA.[50] These negotiations even concluded the terms of their future ventures which formed the basis of the contract.[51] Further, it is reasonable to assume that the Claimant was well aware about the financial situation of the Vader. The Respondent was incorporated as a fully owned subsidiary of Vader to further its financial

[47]William W Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*,2 Dispute Res. Int'l 84(2008), ¶ 1.02.
[48]*Bernhard Berger and Franz Kellerhals*, International and Domestic Arbitration in Switzerland, 2nd edition, Stampfli 2010, ¶ 414-415.
[49]*Fouchard, Gaillard and Goldman* on International Arbitration (1999), pp. 284.
[50]Moot Proposition, ¶10.
[51]Moot Proposition, ¶10.

gains and opportunities.[52] Vader's CEO, Mr. Chap, entered into negotiation with the Claimant and even formalised the terms that formed the basis for the contract between the Respondent[53] and the Claimant, thereby giving an impression that Vader, along with the Respondent, was a party to the agreement.

24. Given that the Respondent had recently been incorporated and was not rich in resources, it is reasonable to assume that the Claimant expected Vader to be involved in the performance of the contract, at least, financially. This coupled with the fact that the CEO of Vader was actively involved in the negotiations, the Claimant would interpret Vader's behaviour as a consent to the agreement.

B. THE GROUP OF COMPANIES DOCTRINE IS APPLICABLE IN THE PRESENT CASE.

25. The group of companies doctrine can be applied by the Tribunal in the present case as it is an established principle in international commercial arbitration**[i];**The application of the group of companies doctrine is contingent on the fulfillment of two criteria. In the present case, both these conditions have been fulfilled as Vader and the Respondent are asingle economic entity**[ii]**; and Vader played an active role in the transaction. **[iii]**.

i. The group of companies doctrine is an established principle in international commercial arbitration.

26. Since its introduction in the Dow Chemical case, the group of companies doctrine has "prospered in arbitration case law".[54]Arbitrators and tribunals have long accepted and

[52]Moot Proposition, ¶ 6.
[53]Moot Proposition, ¶10.
[54]*Poudret, Jean françois And Besson, Sébastien*, Droit comparé de l'arbitrage international (Zurich:Schulthess Médias Juridiques, 2002), pp. 229.

applied the test of implied consent to bind non-signatories to an arbitration agreement.[55] Therefore, this doctrine follows the test of implied consent as its basis. The doctrine does not undermine consent but rather helps facilitates the assertion of the implied consent of the non-signatory. [56]

27. The acceptance of the doctrine by tribunal is evidenced by its application in jurisdictions all over the world. The ICC Tribunal first introduced the doctrine in the landmark case *of Dow Chemical vs. Isover Saint Gobain.*[57]This sentiment echoed in ICC case no. 5103, where the tribunal held that the security of international commercial relations requires that the amount must be taken of these economic realities and that all companies of the corporate group must be held jointly and severally liable for the debts of which they have.

28. The doctrine has been accepted in national jurisdictions as well such as France, Canada, Spain.[58]The relevance of this doctrine can be understood from deviating jurisdictions where such deviations have been based on traditional interpretation of a procedural and constitutional right for parties to seek justice from the courts.[59]

ii. <u>Vader and the Respondent constitute a single economic entity.</u>

29. For the application of the group of companies doctrine, mere membership of a corporate group does not suffice; the existence of the same economic reality or a tight group

[55] Bernard Hanotiau, *Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law cited in Albert Jan van den Berg, International Arbitration 2006: Back to Basics?,* Kluwer Law International, 2007), pp. 343.
[56]B Stavros L. Brekoulakis., *Arbitration and Third Parties, Thesis for the Degree of Doctor of Philosophy* (2008), pp. 92.
[57]*Dow Chemical v. Isover Saint Gobain*, ICC case no. 4131 [1982]
[58]*KIS France SA v. SA Societegenerale*[1989], 1992 Rev Arv 90; *ITSA v. Satcan& BBVA* [2005] SSC; *Xerox Canada Ltd. v. MPI Technologies ltd.* [2006] OJ No. 4895 153 A.C.W.S (3d) 1029.
[59]Samuel Adams, *International Problems in International Commercial Arbitration: A study of Belgium, English, French, Swedish, Swiss, US and West German Law (Zurich: SchulthessPolygraphischerVerlag* (1989), pp.92.

structure is necessary.[60]The notion of the group is defined, besides formal independence arising from the creation of separate legal entities, by the unity of the financial orientation deriving from a common power.[61]The doctrine mandates the presence of a close corporate links within the signatory and the non-signatory.[62]

30. A parent and a subsidiary can be considered a single economic entity when there exists a tight group structure and strong organizational and financial links.[63]A parent company is usually involved in the decision-making processes related to budget, strategy and day-to-day activities of the subsidiary[64]and quite often the parent and subsidiary companies act as parts of one bigger business.[65]

31. A factual scenario where "the parent finances the subsidiary", "the parent caused the incorporation of the subsidiary",or the parent "pays or guarantees debts of the dominated corporation" further establishes the presenceof such financial links.[66]Further the fact that the finances of one company are being used to support another company in the same group, is an indicator of the existence of a single economic entity.[67]

32. The Respondentis a wholly owned subsidiary of Vader, signifying that Vader owns 100% of the shares of the Respondent. The Respondent's incorporation was caused due to Vader's plan to expand its business in the Asian market[68]. It also has to be noted that

[60]*Stavros L. Brekoulakis*, Third Parties in International Commercial Arbitration,Oxford University Press (2010), ¶ 5.15.
[61]*Mauro Rubino-Sammartano*, International Arbitration: Law and Practice Ccommercial, Investment, Online, State-Individual, Interstate, Commodities, U.S Iran, UNCITRAL and Sports Arbitration (2014), pp. 371.
[62]Alexandre Meyniel, *That Which Must Not Be Named: Rationalizing the Denial of US Courts With Respect to the Group of Companies Doctrine* (2013) 3 Arb. Brief 18, 50.
[63]Supra note 60, ¶ 5.15.
[64]Phillip I Blumberg, *Limited Liability and Corporate Groups*, (1985) 11 J. Corp. L. 573, 623.
[65]Ibid.
[66]*Bridas S.A.P.I.C., et al. v. Government of Turkmenistan and Turkmenneft*, ICC Case no. 9058/FMS/KGA, footnote 11.
[67]Supra note 60, ¶ 5.21.
[68] Moot Proposition, ¶6.

Vader provided the Respondent with resources and finances after its incorporation toundertake establishment costs and to allow for the starting of operations.[69]

33. Further, the contract negotiation with the Claimant was done on behalf of the Respondent by the CEO of Vader, Mr. Chap. which signified the extent of control exerted by Vader on the Respondent and the presence of a single economic entity.

iii. <u>Vader played an active role in the contract.</u>

34. The extension of an arbitration agreement is a question of the non-signatory's participation in the negotiation, execution or performance of the contract, or its conduct towards the party that seeks the non-signatory's inclusion in the arbitration.[70]An active role played by the non-signatory is an important criterion that needs to fulfil for the application of the doctrine. In the *Dow Chemical* case[71], the arbitration agreement was extended to the parent company on the basis that it was actively involved in the contract.[72]

35. An active role played by the non-signatory can manifest itself in various ways. Different types of conduct can attract the extension of an arbitration agreement to a non-signatory and the participation in the negotiation or execution of the contract is merely one of the forms of such conduct.[73] An active involvement in the negotiation stage by a non-signatory is one of the most relevant factors to determine the role of a non-signatory.[74]In ICC Case No. 6519, the Tribunal extended the doctrine to a third party on the grounds

[69] Clarification, ¶ 3.
[70]Final Award ICC Case No. 10758 [2000], ¶19.
[71]Supra Note 57.
[72]Final Award ICC Case No. 11160 [2002], ¶25.
[73]SupraNote 65.
[74]Supra Note 60.

that the third party had actively participated in the negotiations which lead to conclusion of the contract and was at the centre of these negotiations.

36. Mr. Chap, Vader's CEO, was the first person to negotiate with the Claimant on behalf of the Respondent.[75] The agreement between the Respondent and the Claimant, even though not formally written down, was formulated between the CEO of Vader and CEO of the Claimant. That is to say, that the terms of a contract between the Respondent and the Claimant, were formalised by the CEO of the Respondent's parent company, i.e., Vader, and the CEO of the Claimant. Thus, Mr Chap's negotiation with Mr. Lee point to the degree of control exerted by a parent company on the negotiation and conclusion of a contract to which its subsidiary was a party to. Therefore, the active role played by Vader in the contract is quite apparent on the basis of the facts.

C. VADER CAN BE COMPELLED TO ARBITRATE AS A BENEFICIARY OF THE CONTRACT IN PURSUANCE TO THE DOCTRINE OF ESTOPPEL.

37. According to the doctrine of estoppel, a party is precluded from enjoying rights and benefits under the contract while at the same time avoiding its burdens and obligations.[76]Estoppel represents the extension of an arbitration agreement to create a right based, not on being a party, but by conduct that resembles undertaking contractual obligations.[77]If a party has knowingly accepted direct benefits of the contract containing an arbitration agreement, whether signed or not, the party is estopped.

38. National jurisdictions also have recognised the third-party beneficiary doctrine as a valid ground of extending arbitration to non-signatories. In *Mississippi Fleet Card v. Bilstat*

[75]Moot Proposition, ¶ 9.
[76]*IntergenN.V.v. Grina*, 344 F.3d 134.
[77]Hosking James, The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent *Pepperdine Dispute Resolution Law Journal* 4, Issue 3, (2004), pp.469-587.

Inc.[78], a federal United States court compelled the non-signatories to arbitrate as they were third-party beneficiaries of a contract containing an arbitration clause. The Swiss Supreme Court also extended an arbitration awards to a non-signatory shareholder on the grounds that he had played an important role in the execution of the contract. The court reasoned that he was aware of the terms of the agreement, and consequently it would be contrary to the principle of good faith not to consider him a party to the agreement.[79] In the case of *International paper v. SchwabedissenMaschinen& Anlagen Gmbh*[80], the court held that "to allow a party to claim the benefit of the contract and simultaneously avoid its burden would both disregard equity and contravene the purposes underlying the enactment of the Arbitration Act."[81].

39. The presence of the intention for the third-party to be beneficiaries in an important factor. Vader established the Respodent as a wholly owned subsidiary in Cambodia in light of the possibility of Brexit and to expand its business in Asia and remain financially stable.[82] The existence of the Respondent as a separate legal entity itself came about with an intention to provide Vader with some amount of stability in the off chance of a Brexit. It is quite evident that Vader was a beneficiary and was intended to be a beneficiary of the contract between the Respondent and the Claimant.

CONCLUSION: Therefore, the arbitration agreement can be extended to the Respondent's parent company, Vader, by the virtue of the group of companies doctrine. Vader and the Respondent constituted a single economic entity and Vader played an active role in the contract between the Claimant and the Respondent. Alternatively,

[78]*Mississippi Fleet Card v. Bilstat Inc.*,175 F.Supp. 2d 894.
[79]ATF 129 III 727 (Switzerland).
[80]*International paper v. Schwabedissen Maschinen & Anlagen Gmbh*, 206 F.3d.411.
[81]*Alex Redfern and Martin Hunter*, Law and Practice of International Commercial Arbitration, London Sweet & Maxwell [2004], pp 418.
[82] Moot Proposition, ¶6.

Vader can also be estopped under the third-party beneficiary doctrine and made a party to the arbitration.

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

40. The issue arises due to misinterpretation of conduct between the two parties in terms of communication by way of Indian head nod which Mr. Deewarvala, representative of the Claimant interpreted as a side-ways nod and Mr. Armando Paredes, Managing Director of the Respondent interpreted as a refusal to is proposal. .The Claimant contends that there was a valid acceptance of the Respondent's offer because: The conduct of the Claimant was sufficient to show valid acceptance **[A]**; Implied contractual obligations bind the Respondent**[B]**; and Respondent did not act in accordance with the good faith and fair dealing principle. **[C]**

A. THE CONDUCT OF THE CLAIMANT WAS SUFFICIENT TO SHOW VALID ACCEPTANCE.

41. A contract is said to be formed by way of acceptance or by way of conduct of the parties, which is sufficient to show agreement.[83] To show conduct, two tests have to be satisfied which are either subjective test or reasonable person test.[84]

42. In accordance with the first test, a contract term is given a meaning based on the subjective interpretation of various contractual terms used and from the meaning which a reasonable person would attach to it, provided that such an understanding was common to both the parties at the time of agreement.[85]The relevant standard to determine the

[83]Article 2.1.1, *UNIDROIT Principles*, 2016.
[84]Article 4.1, *UNIDROIT Principles*, 2016.
[85]Comment 1, Article 4.1,*UNIDROIT Principles*, 2016.

application of subjective test is by preliminary negotiations conducted between both the parties.[86]

43. It was decided in a slew of cases that to ascribe common intention between parties the preliminary contractual negotiations between the parties are important.[87] Furthermore, in one instance, an arbitral Tribunal enforced the agreement by way of ordering the resumption of negotiations which were stalled at a preliminary so as to reach a consensus.[88]

44. In the present matter, the preliminary negotiations between the parties show that an agreement to continue the contract was successfully drafted, revised, and signed by September 2013.[89] Accordingly, the Claimant offered the first incentive (15% increase) on the existing terms of the contract if the Respondent committed to perform 4 more deliveries during 2015,[90] which were agreed by both parties in Paris.[91]

45. Though, both the parties decided to extend this agreement with the first incentive through 2016, no formal contract was executed between the parties for the same.[92] Even though the Respondent knew about an increase in price of bricks in Asia which could have led to greater profits if a contract was formulated with other counterparts, the Respondent chose to keep this an exclusive distribution agreement with the Claimant.[93]

---

[86]Comment 2, Article 4.3, *UNIDROIT Principles*, 2016.
[87]*Joseph Charles Lemire v. Ukraine*, No ARB/06/18; IIC 424 (2010) (Available at: http://www.unilex.info/case.cfm?id=1533); *Svenska Petroleum Exploration AB, Government of the Republic of Lithuania, AB Geonafta*, 2004 Folio 272 (Available at: http://www.unilex.info/case.cfm?id=1122); *Arbitral Award ICC International Court of Arbitration, 9875*(Available at:http://www.unilex.info/case.cfm?id=697);*IoannisKardassopoulos& others v. Republic of Georgia ARB/5/18; ARB/07/15*(Available at: http://www.unilex.info/case.cfm?id=1666).
[88]*Arbitral Award Number: 8540 ICC*(Available at:http://www.unilex.info/case.cfm?id=644).
[89]Moot Proposition, ¶ 13.
[90]Moot Proposition, ¶ 21.
[91]Moot Proposition, ¶ 23.
[92]Moot Proposition, ¶ 24.
[93]Moot Proposition, ¶ 25.

46. Hence, a strong relationship continued between the parties as the Respondent did not look for alternate counterparty.

B. IMPLIED CONTRACTUAL OBLIGATIONS BIND THE RESPONDENT.

47. The contractual obligations can be construed as express or implied.[94] The standards to determine implied contractual obligations, are- the nature and purpose of the contract and reasonableness.[95] In terms of reasonableness, the test provides that a contract shall be interpreted in accordance with the meaning a reasonable person of the same kind would give as the parties would, given the same circumstances.[96] This test is not general or requires an abstract criterion to determine reasonableness; however, the standards of the reasonable man to be met can be looked from the parameter of same linguistic knowledge, technical skill, or business experience as the parties.[97] The nature and purpose of the agreement between both the parties were to strengthen their relationship.[98]

48. In the present matter, the incentives and respective obligations was mutually intended to be performed by both parties during the negotiations for second incentive (35% as bonus).[99] Through this course of negotiation, it is submitted that the intention between the parties was to be kept at a higher pedestal as compared to the misinterpretation in the communication of acceptance between both the parties.[100]

49. In accordance with Article 5.1.4 of the UNIDROIT Principles there is a degree of responsibility required of a party in the performance of an obligation, resulting from which two duties prescribed- duty of best efforts and duty to achieve a specific result.

[94]Article 5.1.1, *UNIDROIT Principles*, 2016.
[95]Article 5.1.2, *UNIDROIT Principles*, 2016.
[96]Comment 2, Article 4.1, *UNIDROIT Principles*, 2016.
[97]Ibid..
[98]Supra Note 85.
[99]Moot Proposition, ¶ 30.
[100]Moot Proposition, ¶ 15.

Under the former duty prescribed, the party is obligated to put in the best effort as would a reasonable person of the same kind would exert in the same circumstances, but no way leads to any guarantee that the specific result can be achieved.[101] Under the latter duty prescribed, the party is obligated to achieve a specific result which is promised and this is burdensome.[102]

50. In the present matter, relevance is to be given to the former duty to bind the Respondent. On assessing the non-performance of an obligation of best efforts, are the efforts a reasonable person of the same kind would have made in similar circumstances.[103] When the Claimant knew the Respondent would want to terminate the contract he made a proposal to maintain the first incentive and to give a bonus as second incentive.[104] As the Respondent knew the Claimant would want to extend the contract, he set the second incentive to be at 35% of the price.[105]

51. Hence, impliedly the Respondent is bound by contractual obligations by virtue of his duty of best efforts, because not only he chose to remain in an exclusive distribution agreement with the Claimant, his conduct also shows that he wants to be contractually bound towards the same.

C. THE RESPONDENT DID NOT ACT IN ACCORDANCE TO GOOD FAITH AND FAIR DEALING PRINCIPLE.

52. According to Article 1.7 of UNIDROIT Principles, every party must act in accordance to good faith and fair dealing principle in international trade. This requirement is mandatory

[101]Comment 1, Article 5.1.4, *UNIDROIT Principles*, 2016.
[102]Comment 1, Article 5.1.5, *UNIDROIT Principles*, 2016.
[103]Comment 2, Article 5.1.4, *UNIDROIT Principles*, 2016.
[104]Moot Proposition, ¶ 31.
[105]Moot Proposition, ¶ 32.

in nature which the parties cannot exclude or limit.[106] Despite the prices of bricks rising due to simultaneous increase in demand, and the Respondent being aware that an agreement with a new counterpart could significantly increase the income, the Respondent chose not to look for alternate counter party on the pretext that a strong relationship had been established.[107]

53. Therefore, this principle of good faith and fair dealing is expounded with further sub-delegation because: agreement deterred the Respondent to act inconsistently **[i]**; and the Respondent was liable for negotiating in bad faith. **[ii]**

i. <u>Agreement deterred the Respondent to act inconsistently.</u>

54. A party is precluded from acting inconsistently with the knowledge that it has led the other party to act reasonably in reliance to its detriment.[108] Further, in one instance,[109] the respondent breached its obligations on a joint venture agreement by preventing the claimant to conclude its proceedings against a tender and which was improperly awarded to a third party, the Court ruled in favour of the claimant by relying on the agreement between the parties.

55. In the current proposition, an understanding was created between both the parties by way of conduct.[110] The Respondent was aware of the willingness of the Claimant to extend the contract,[111] as the Claimant had proposed to give bonus as second incentive after 4 compliant and timely deliveries.[112] When the Respondent asserted their position that

[106]Article 1.7(2), *UNIDROIT Principles*, 2016.
[107]Supra Note 93.
[108]Article 1.8, *UNIDROIT Principles*, 2016.
[109]*Arbitral Award, Ad Hoc Arbitration, San Jose, Costa Rica*(Available at:http://www.unilex.info/case.cfm?id=1100).
[110]Moot Proposition, ¶ 35; Moot Proposition, ¶ 36.
[111]Supra Note 105.
[112]Supra Note 104.

there was no contract post 23rd November 2016,[113] despite, completing timely deliveries, on the last working day of December 2016,[114] it chose to act inconsistently by not providing any communication of misinterpretation. From the Claimant's point of view, the Respondent had assured the supply and fixed the price for a long period of time.[115] In considering prohibition of inconsistent behavior as paramount to international trade law[116] cognizance has to be given to the general principle *venire contra factum proprium*,[117]i.e.,no one should contradict on one's prior conduct.[118]

56. Applying to the current proposition, the Respondent was aware of the consequence of Brexit on the price of bricks,[119] as well as the intention of the Claimant wanting to extend the contract.[120] Further, there is a clear supposition that no meeting was conducted to remedy the situation post the misunderstanding that generated in mid-March 2017.[121] Hence, the Respondent contradicted on his own prior conduct, by choosing to deny any existence of a contract after the 23rd November, 2016 discussion[122] when the Claimant wanted to enforce the contract.[123]

57. A duty of co-operation is also established as an application of the general principle of good faith and fair dealing, wherein each of the parties shall cooperate with the other party when such co-operation is reasonably expected for the performance of that party's

[113]Moot Proposition, ¶ 57.
[114]Moot Proposition, ¶ 42.
[115]Moot Proposition, ¶ 41.
[116]*Novograd Isteit close corporation and others v Electroagregat joint stock company and others*, Russian Federation Case No. A45-6682/2013 (Available at: http://www.unilex.info/case.cfm?id=1872).
[117]Article 1.6, *UNIDROIT Principles*, 2016; Article 1.8, *UNIDROIT Principles*, 2016.
[118]Thiago Luiz Sombra, The Duty of Good Faith Taken to a New Level: An analysis of Good behaviour, *Journal of Civil Law Studies*, Volume 9, pp.29;Maria del Pilar Perales Viscasillas, The Formation of Contracts and the Principles of European Contract Law, *Pace International Law Review*, Volume 13, Issue 2, 2001, pp.385.
[119]Supra Note 98.
[120]Supra Note 90.
[121]Clarification , ¶ 10.
[122]Supra Note 94.
[123]Moot Proposition, ¶ 45.

obligations.[124] This is between parties to the extent of reasonable expectation for the performance of their respective obligations can be ascertained in the course of contract formation or contract acceptance.[125] In contrast, if parties engage in uncooperative acts to their own benefit at the expense of other parties, then it is clear violation and would run contrary to the aforementioned principle of good faith and fair dealing which is inherent in international contracts.[126]

58. In the present matter, the Respondent has clearly done so by refusing to consider the contractual obligations that were created on 23rd November, 2016 in the preliminary meeting[127] despite being aware of the misunderstanding with the Claimant.[128]

ii. <u>The Respondent was liable for negotiating in bad faith.</u>

59. According to Article 2.1.15 of the UNIDROIT Principles, a party is precluded from not negotiating in conflict with good faith and fair dealing principle. Therefore, any party is prohibited from entering and continuing negotiations with bad faith. This certainly allows the other party to recover losses by way of the other party losing opportunity to contract with third person, which becomes a negative interest for that party in the meantime.[129]Further, preclusion is created whereby the parties cannot break off negotiations in bad faith as it is subject to liability on part of the party who breaks it, because the expectation is positive outcome of the negotiations, and on the number of

[124]Article 5.1.3, *UNIDROIT Principles*, 2016.
[125]Comment 1, Article 5.1.3, *UNIDROIT Principles*, 2016.
[126]*Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*, Arbitral Award 9797 (Available at:http://www.unilex.info/case.cfm?id=668).
[127]Supra Note 122.
[128]Moot Proposition, ¶ 43.
[129]Comment 2, Article 2.1.15, UNIDROIT Principles, 2016.

issues relating to the future contract on which the parties have already reached an agreement.[130]

60. In the present matter, the Respondent knew the Claimant would want to extend the contract.[131] In pursuance to the strong relationship of trust and faith created in the opinion of the Respondent itself,[132] a preclusion is created on part of the Respondent to not break off the negotiations and not conclude on an agreement, as it creates negative interest[133] on part of the Claimant who could have made an agreement with another counterpart.[134] Additionally, the Respondent while refusing to consider any contract formulation on 23rd November, 2016[135] has forbidden the Claimant to rely on any scope of reason for a positive outcome of negotiations,[136] and on the future contract on which the parties have had a series of negotiations.

61. Hence, the Respondent by virtue of violating the good faith and fair dealing principle, is not only precluded from acting inconsistently, further a duty of co-operation which was established, in light of which, was also held to be liable for negotiating in bad faith.

CONCLUSION: Therefore, there was a valid acceptance of the Respondent's offer by the Claimant. Hence, a contract was formulated.

[130]Comment 4, Article 2.1.15, *UNIDROIT Principles*, 2016.
[131]Supra Note 90.
[132]Comment 1, Article 4.1,*UNIDROIT Principles*, 2016.
[133]*V.Š. v. A.N.*, 3K-P-382/2006 (Available at: http://www.unilex.info/case.cfm?id=1185); *Vingio Kino Teatras v. UAB Eika* (Available at: http://www.unilex.info/case.cfm?id=1181).
[134]*Supreme People's Court Shaanxi Xianyang Nebula Machinery Ltd. v. Rainbow Electronics Group Inc*.,(2008) MinErZhongZi 8 (Available at: http://www.unilex.info/case.cfm?id=1740).
[135]Supra Note 92.
[136]Supra Note 94.

IV. SPECIFIC PERFORMANCE SHOULD BE AWARDED AS A RELIEF AS THE RESPONDENT HAS NOT PERFORMED ITS CONTRACTUAL OBLIGATIONS.

62. Under section 7.1.1 of UNIDROIT Principles, non-performance has been defined as the failure by a party to perform any of its obligations under the contract. In accordance with the general principle of the binding character of the contract,[137] each party should be entitled to require monetary as well as non-monetary performance.[138] A party is only relived of its contractual obligations if the situation comes under any of the exceptions listed in Article 7.2.2.[139]

63. In the present matter, none of the exceptions to non-monetary obligations are applicable: The performance of the contractual obligation is possible in law and fact [A]; the performance is not burdensome [B]; the performance cannot be procured reasonably from another source [C]; reasonable time was given to the Respondent to complete the deliveries [D]; and the exception of exclusive personal character does not apply in the present matter. [E]

A. THE PERFORMANCE OF THE CONTRACTUAL OBLIGATIONS IS POSSIBLE IN LAW AND FACT.

64. The Respondent owes an obligation to perform the contract since there was a valid acceptance of the Respondent's offer.[140] However, the Respondent has refused to perform the same.[141] As already proved in argument III, the offer was validly concluded. Hence, the performance is possible in law. Further, the Respondent has been completing

[137]Article 1.3, *UNIDROIT Principles*, 2016.
[138]Comment 1, Article, 7.2.2,*UNIDROIT Principles*, 2016.
[139]Chengwei Liu, *Specific Performance: Perspectives from CISG, UNIDROIT Principles, PECL and Case Law*, pp. 20.
[140]Claimant Memorial, (issue III)
[141]Moot Proposition, ¶46.

the deliveries in the past[142] and has the expertise of manufacturing the bricks as required by the contract.[143] Therefore, the performance is possible in fact as well.

B. ***THE PERFORMANCE OF CONTRACTUAL OBLIGATION IS NOT BURDENSOME.***

65. The normal course of business of the Respondent is selling and manufacturing bricks.[144] The Respondent has been completing the deliveries in the past[145] and has the expertise of manufacturing the bricks as required by the contract. Moreover, the performance is burdensome, if the condition has changed to that extent that it violated good faith and fair dealing under Article 1.7 of the UNIDROIT Principles.[146] However, in the present matter, the Respondent had from the beginning been in the same condition[147] and who was able to complete the deliveries even when Vader had been withdrawing its support in pursuance of Brexit. Therefore, it is not unreasonably burdensome for the Respondent to complete the first 2 deliveries of 2017.

C. ***THE CLAIMANT CANNOT REASONABLY PROCURE THE PERFORMANCE FROM ANOTHER SOURCE.***

66. The contract between the Claimant and the Respondent was an exclusive distribution agreement.[148] Moreover, it will be unreasonably burdensome, if not expensive, for the Claimant to procure the delivery from an alternative source as the delivery date was so near. Therefore, performance in the present matter cannot be procured from someone else.

[142]Moot Proposition, ¶18.
[143]Moot Proposition, ¶8.
[144]Moot Proposition, ¶8.
[145]Moot Proposition, ¶18.
[146]Comment 3(b), Article, 7.2.2 *UNIDROIT Principles*, 2016.
[147]Moot Proposition, ¶26.
[148]Moot Proposition, ¶14.

D. REASONABLE TIME WAS GIVEN TO THE RESPONDENT TO COMPLETE THE DELIVERIES.

67. The offer with respect to delivery of bricks in 2017 and 2018 concluded on 23rd November, 2018[149] and the delivery of bricks was to be made in March 2017.[150] This clearly shows that reasonable time was given to the Respondent to perform the obligation under the contract.

E. EXCEPTION OF EXCLUSIVE PERSONAL CHARACTER DOES NOT APPLY ON COMPANIES.

68. The exception of obligation being in nature of exclusive personal character does not apply on companies which are under an obligation to complete something.[151]

CONCULSION: Since none of the aforesaid exceptions are met, specific performance of the contract should be granted as a relief in the present matter.

[149]Moot Proposition, ¶30.
[150]Moot Proposition, ¶43.
[151]Comment 3(b), Article 7.2.2, *UNIDROIT Principles*, 2016.

PRAYER

On the basis of the above submissions and the Claimant's prior written pleadings, the Claimant respectfully requests the Tribunal, while dismissing all submissions by the Respondent, to **adjudge** and **declare:**

- That the contract was existent and enforceable;
- That the arbitration agreement be extended to the parent company of the Respondent;
- An order for the completion of the Respondent's performance; and
- That the terms of the contract must be set in writing.

DATE: 2nd November 2018 ON BEHALF OF **CLAIMANT:**

PLACE: SIEM REAP, CAMBODIA COUNSEL NO. **C1808**