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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 RESPONDENT

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STATEMENT OF JURISDICTIONS

- 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.
- 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 of the Rule 12 of KLRCA Rules.

QUESTIONS PRESENTED

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

I. WHETHER THE AGREEMENT TO ARBITRATE SHOULD BE DISCONTINUED IN THE PRESENT MATTER?

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 A VALID ACCEPTANCE OF THE RESPONDENT'S OFFER?

IV. WHETHER SPECIFIC RELIEF SHOULD BE AWARDED AS A RELIEF?

STATEMENT OF FACTS

I: The Parties

- Chuizi Leishen's LLC ['Claimant"] 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.
- Robustesse Espacial Solucion Corp ["Respondent"] 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 KalaiDeewarvala 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 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.
- Due to Brexit, business of Vader has been suffering in EU. In order to concentrate upon EU business, Vader has declared operations of Respondent to be independent.
- **November 2014:** Representatives again met to fix deliveries for 2015 (1st 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 declared that, no further financing shall be provided to the Respondent thereon.
- **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. The parties then realised the misunderstanding
- **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 Claimant's claim because the respondent took the nod as a refusal of the agreement.
- **15th December 2017:** Arbitral Tribunal was constituted and parties continued with the proceedings.
- Since no claim amount was decided, AIAC fixed a non-specific security deposit which the Respondent due to its impecunious constitution 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 Respondents 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. However, no national court would assume jurisdiction until the arbitration proceedings are discontinued.
- The Respondent has not been able to receive third party funding as well.
- 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: ARBITRATION PROCEEDING MUST BE DISCONTINUED IN THE PRESENT MATTER.

Compliance with the payment of non-security deposit being a form requirement, cannot hinder the proceedings in the light of the form over substance approach of the institutional rule. The Respondent is in an impecunious condition and therefore, is incapable of paying the non-security deposit required for continuing the proceedings.

Moreover, if the proceeding is not discontinued, the Respondent cannot bring a claim in national court. This denies justice to the Respondent. The national court can intervene in the matters governed by the Cambodian Law. Therefore, a claim can be brought before the national court in the present matter.

PLEADING II: VADER SHOULD NOT BE JOINED AS A PARTY TO THE ARBITRATION AGREEMENT

Arbitration is based on consent and Vader did not give its consent to be a party to the agreement. Neither was there any intention on part of either parties to include Vader in the agreement as a party. Further, the group of companies doctrine cannot be used to extend the arbitration agreement to a non-signatory. The doctrine is a very controversial legal principle and should not be applied in the present factual matter on account of its questionable legal validity. Even if the doctrine applied, the criteria required to be met for the extension of an agreement to a non-signatory are not met. Vader and the Respondent did not constitute a single economic entity. Further, Vader was only involved in pre-contractual negotiation and did not play an active role in the performance or termination of the contract.

PLEADING III:THERE WAS NO VALID ACCEPTANCE OF RESPONDENT'S OFFER.

The conduct of the Claimant was insufficient to show valid acceptance. This is proved by applying the mirror image rule that offeree's terms of acceptance must be in consonance with the agreed and standard terms of the offer. That is to say, that Claimant must accept the offer in terms of Respondent's conditions constituting the offer. This led to the formulation of the theory of last shot approach, which can be excluded by conduct, which the Claimant clearly done so, by serving a notice of arbitration, not making payments according to agreed terms. Moreover, there was no common intention because subsequent contractual conduct by virtue of non-payment, and non-willingness to revisit the negotiations.

PLEADING IV: THE TRIBUNAL SHOULD NOT GRANT SPECIFIC PERFORMANCE AS A RELIEF AGAINST THE RESPONDENT.

Assuming but not conceding that the contract is enforceable, imposing performance upon the Respondent would be unreasonably burdensome and expensive. The Respondents incurred heavy operational costs and failed to make profits and their finances were further strained due to Brexit. In case the Claimant seeks specific performance, the Respondent would humbly ask the tribunal to direct the claimant to complete their monetary obligations towards it

PLEADINGS

I. ARBITRATION PROCEEDING MUST BE DISCONTINUED IN THE PRESENT MATTER.

1. In the present mater, a dispute has arisen between the two parties regarding the acceptance of a contract.[1] In accordance with the contract signed between them, any dispute arising out of the contract is to be solved by way of arbitration.[2] However, the Respondent lacking the requisite funds to participate in arbitration, counter claims that the arbitration proceedings must be discontinued in the present matter because: Payment of non-specific security deposit being a form requirement, can hinder the continuance of arbitration proceeding [**A]**; The Respondent is incapable of paying the non-specific security deposit **[B]**; Right of access to justice must not be compromised; **[C]** and national court can intervene in the matters governed by Commercial Arbitration Law of Kingdom of Cambodia **[D]**.

A. PAYMENT OF DEPOSIT BEING A FORM REQUIREMENT CAN HINDER THE CONTINUANCE OF THE ARBITRATION PROCEEDING.

2. The Respondent submits that non-compliance with the non-security deposit will affect the continuance of arbitration proceeding. In *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc*[3] the arbitration was set aside because a form requirement of appointment of

[1]Moot Proposition, ¶39.
[2]Moot Proposition, ¶15.
[3]*Yearbook Commercial Arbitration*, 30 (2005) (United States no. 520) pp.1136–1143, ¶ 10.

a third arbitrator was not fulfilled, hence exalting form over substance doctrine. Similarly, if the parties have decided on a procedure, it should be respected to proceed with arbitration.[4] While, the Respondent does not contest the validity of the aforementioned principles of procedure, it however, submits that this approach would allow discontinuance of the arbitration proceedings due to the impecunious condition of the Respondent. In the present matter, the KLRCA Rules are the procedural rules guiding the arbitration.[5] Therefore, it will be said to be procedural issue or a form.

3. As already stated that the aforesaid compliance is a technical aspect or a form and the Respondent submits that arbitration proceedings depend on the form over substance approach of the institutional rule.[6] It is desirable that the form requirement must be complied with. Since in the present matter, the payment cannot be complied with, arbitration must be discontinued.

B. THE RESPONDENT IS INCAPABLE OF PAYING THE NON-SPECIFIC SECURITY DEPOSIT.

4. The KLRCA Rules being the procedural rules will govern the conduct of the parties in the present matter. [7] Under Rule 14(1) of the KLRCA Rules, each party to arbitration is supposed to pay equal shares of the deposit. And,pursuant to Rule 14(3) of the KLRCA Rules if the required deposit is not paid in full, director can terminate the arbitration proceeding. The impecuniosity of a party renders the arbitration agreement incapable of

[4]Donald Francis, *Donovan, Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.,* United States Court of Appeals for the Second Circuit, 04-0288-cv, 31 March 2005, *cited inGary B. Born* , International Arbitration: Cases and Materials, Kluwer Law International, 2015, pp. 1189 – 1266.
[5]Moot Proposition, ¶ 15; Moot Proposition, ¶ 59.
[6]Claimant Memorial, ¶ 5.
[7]Moot Proposition, ¶15; *Smith Ltd v H&S International* [1991] 2 Lloyd's Rep 127.

being performed.[8] If the arbitration agreement is incapable of being performed, thereafter, a party can validly commence proceedings before state courts.[9]

5. In the present matter, the Respondent has been working without profits, with a huge sunken cost since its incorporation.[10] Further, Vader, the Respondent's holding company has cancelled any further financing to the Respondent.[11] The Respondent has also tried procuring third party funding to incur the deposit cost, but due to their tense financial condition, they have failed.[12] In spite of having many counter claims, the Respondent is unable to raise them due to its impecunious condition.[13] Owing to the foregoing observations, the Respondent is not in a condition to pay the non-specific security deposit. Hence the agreement is incapable of being performed.

C. ***RIGHT OF ACCESS TO JUSTICE MUST NOT BE COMPROMISED.***

6. In arbitration friendly jurisdictions, (eg. Cambodia, Germany, Spain, Honk Kong,) if an arbitral tribunal is prevented from rendering an award enforceable due to impecuniosity of a party, it is State Court's duty to ensure access to justice.[14] This even happens at the early stage of scrutiny of the agreement when due to impecuniosity it is incapable of being performed.[15]

7. Furthermore, the French Arbitration law states that the national court can assume jurisdiction in the cases where the agreement is manifestly void or manifestly not

[8] *Tillman v. Tillman*, 2016 WL 3343785 9th Cir. III ZR 33/00.
[9] Ibid.
[10] Moot Proposition, ¶ 26.
[11] Moot Proposition, ¶ 27.
[12] Moot Proposition, ¶ 61.
[13] Moot Proposition, ¶ 57.
[14] Detlev Kühner, The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany, *Journal of International Arbitration*, Kluwer Law International 2014, Volume 31 Issue 6, pp. 807 – 818.
[15] Ibid.; Higher Regional Court of Cologne, decision of 5 Jun. 2013 – 18 W 32/13.

applicable.[16]In the present matter, considering its impecunious condition, the Respondent tried to bring claims in local court.[17] However, given that arbitration proceedings are already underway between the parties, no court would assume jurisdiction and the Respondent would, be left defenceless.[18] Therefore, when the Respondent lacks the fund to pay the non security deposit and if arbitration is continued anyway, right to access to justice through the local court shall be denied.[19] In the light of the above reasoning, it is imperative that arbitration proceedings should be terminated.

D. COURT CAN INTERVENE IN THE MATTERS GOVERNED BY COMMERCIAL ARBITRATION LAW OF KINGDOM OF CAMBODIA.

8. The Commercial Arbitration Law of Kingdom of Cambodia [**"Cambodian Law"]** is the *lex arbitri* which governs this arbitration.[20] The Cambodian Law states that a substantive claim can be brought before National court if the arbitration agreement is incapable of being performed.[21]

9. Under Article 113 of the Constitution of Kingdom of Cambodia ["Constitution"], the constitutional council has the power to interpret any law before its promulgation. Article 5 of the Cambodian Law states that "court can intervene in the matters governed by this law". The Constitutional Council of Cambodia has interpreted Article 5 as giving jurisdiction to the national court to try a case relating to the Law on Commercial Arbitration when

[16]Article 1448, *French International Law on Arbitration*, 2011.
[17]Moot Proposition, ¶ 60.
[18]Ibid.
[19]Nancy Thevenin , *Baker & McKenzie International Arbitration Yearbook*, 2010-2011., pp. 258.
[20]Moot Proposition, ¶15; *Gary Born*, International Commercial Arbitration 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, Issue 9, ICCA Congress Series, pp. 336.
[21]Article 8, *The Commercial Arbitration Law of Kingdom of Cambodia*, 2006; Article 8, *UNCITRAL Model Law on International Commercial Arbitration,1985*; Article 6, *European Convention on Human Rights,1953*; Aron Broches, *Commentary on the UNCITRAL Model Law* (1990),*cited in Jan Paulsson and Lise Bosman*, ICCA International Handbook on Commercial Arbitration Kluwer Law International 1984, pp. 1 – 202.

requested by either of the parties.[22] Additionally, it mentions that Article 5 can be used as a basis for intervening in arbitral proceedings.[23]

10. When a party seeks the intervention of a National court of a State whose statute is based on the Model Law, the first step is to see whether the situation is covered by the express words of the law, which can be found in the domestic legislation.[24] Matters not dealt expressly in the model law are outside the jurisdiction of the national courts.[25]

11. In the present matter, the Respondent has approached the national court for deciding the dispute.[26] Article 8 of the Cambodian Law talks about "substantive claim before the court". This fulfils the condition of domestic legislation covering the situation by express words. Hence, in the light of above reasoning, a claim can be brought before the National court under Article 5 of the Cambodian Law.

CONCULSION: Therefore, the arbitration proceeding shall be discontinued due to the impecunious condition of the Respondent. A claim can be brought before the national court.

II. THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION CANNOT BE GRANTED.

12. The Respondent was a wholly owned subsidiary of Vader, however, the Respondent was an independent entity post Brexit.[27] Hence, contrary to the Claimant's claim, the arbitration

[22] *The Constitutional Council of Cambodia*, Case No. 103/003/2006.
[23] *The establishment of commercial arbitration services in Cambodia*,1st September, 2009, International Finance Corporation., World Bank Group, pp. 12.
[24] *Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration*, Doc. A/CN.9/263/Add.2, 21 May 1985, United Nations Commission on International Trade Law ¶ 21.
[25] Article 32, *UNCITRAL Model Law on International Commercial Arbitration, 1985cited in Howard M. Holtzmann and Joseph E. Neuhaus* , A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Kluwer Law International 1989, pp. 866 – 887.
[26] Moot Proposition, ¶ 60.
[27] Moot Proposition, ¶ 27.

clause cannot be extended to Vader only by the virtue of it being the parent company as it was a not a party to the contract **[A]**. Further, the group of companies doctrine is not applicable in the present matter. **[B]**.

A. VADER WAS NOT A PARTY TO THE CONTRACT.

13. The cornerstone of arbitration is based on consent.[28] The importance of consent in arbitration proceedings may be gauged by the adumbration of the United States Supreme Court in Stolt-Nielsen S.A. v. Animal Feeds International Corp,[29] wherein it stated that arbitration is a matter of consent, not coercion. The extent to which arbitration agreements are extended to non-signatories is very limited as the consent of parties to arbitrate is a crucial factor.

14. A non-consenting party will only be joined to arbitral proceedings as an ultima ratio and under exceptional circumstances.[30]Courts and tribunals have taken the stand that arbitration agreements should be extended to non-signatories only if it is shown that the non-signatory, by reference to the common intention of the parties, was a genuine party to the contract.[31]

15. Vader's involvement in the contract was very factual and its involvement in the negotiation process is not sufficient to consider it a party to the contract or imply its consent to be bound by arbitration. The tribunal in ICC case no. 10578, stated that it found no evidence of consent to arbitrate merely because the non-signatory participated in the contract negotiation, noting that if the claimant had intended the non-signatory to be a party to either the Contract it could have so insisted at that time.Therefore, the mere fact

[28]Andrea Marco Steingruber, *Notion, Nature and Extent of Consent in International Arbitration, Thesis for Doctor of Philosophy,* Queen Mary University of London, pp. 3.
[29]*Stolt-Nielsen S.A. v. Animal Feeds International Corp.,* [2010] 559 U.S. 662.
[30]ICC case no. 5721 [1990].
[31]Anna Kombikova, *Extension of the Arbitration Agreement to Third Parties Based on the "Group of Companies" and "Piercing the Corporate Veil" Doctrines LL.M. Short Thesis* supervised by Professor Tibor Várady March 2012, Central European University, pp. 22.

that a non-signatory participated in the contract negotiation is no conclusive evidence for its consent to arbitrate.[32]

16. It is important to note that there was no involvement of Vader officials in the performance of the contract. Mr. Paredes was appointed as the Managing director to execute actions on behalf of the Respondent and not Vader. Mr. Parades signed the contract, and not Mr. Chap, as the managing director of the Respondent. Hence, it is unreasonable to state that the common intention of the parties to include Vader as a party to the contract.

B. THE GROUP OF COMPANIES DOCTRINE IS NOT APPLICABLE IN THE PRESENT MATTER.

17. The group of companies doctrine is not a valid legal doctrine**[i]**; Even if the doctrine is applicable, the criteria required for the application of the group of companies doctrine are not met in the present factual scenario. Vader and the Respondent do not constitute a single economic reality **[ii];** and Vader did not play an active role in the contract.**[iii].**

i. The group of companies doctrine is not a valid legal doctrine

18. The group of companies doctrine though accepted under French Law, is rejected, more or less explicitly in most legal systems and has been described as infamous.[33] The doctrine, since its inception, has generally been rejected and has found very limited support in both arbitral and judicial case law.[34] One of the main reasons that major arbitral jurisdictions reject the notion of the group of companies doctrine is that it deviates from the traditional approach of lifting the corporate veil only in cases of fraud.[35]

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[32]*Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors* (India) [2013], 1 SCC 641.
[33]Karim Youssef, *Observations on Judgment by Egypt"s Court of Cassation in Case No. 4729 in SIAR 2007: 3,p p.110.*
[34]Werner Müller and Annette Keilmann r, *beteiligung am Schiedsverfahren wider Willen?, Schieds VZ,*2007, pp118.
[35]S.P woolhouse, *Group of Companies Doctrine and English Arbitration Law,* 20 Arbitration International (2004) pp. 435.

19. The doctrine has been rejected in most of the major jurisdictions. The English courts have expressly rejected the group of companies doctrine and held that it is not part of English law.[36] The courts in the United States have accepted the notion of extension of arbitration to non-signatories but have refused to do so on the basis of the group of companies doctrine.[37]In total, a majority of 24 legal systems do not recognize the doctrine.[38]

20. Further, the law applicable to the arbitration agreement is a codified national law. The tribunal in the Dow chemical award based its decision on the needs of international commerce and thus on *lex mercatoria*. But the application of a-national law such as *lex mercatoria* completely bypasses the notion that arbitration always depends on its recognition in national laws.[39]

21. The extension of the arbitration agreement based on *lex mercatoria* although the parties never agreed on such a-national law is flawed.[40] *Lex mercatoria* is mere transnational substantive trade usage[41]. Further, trade usages are unpredictable by nature and cannot be relied on to compel a party to arbitrate or to impose a duty to arbitrate on a non-signatory.[42]It is also pertinent to highlight that procedural matters of an arbitration cannot be determined by *lex mercatoria.*[43] Therefore, the application of the group of companies doctrine has to be determined on the basis of national law. Barring the exception of French courts, as mentioned above, most national jurisdictions have rejected the doctrine.

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[36]Peterson Farms Inc. v. C & M Farming Ltd., [2004] EWHC 121.
[37]*Sarhank Group v. Oracle*, 404 F.3d 657; *Thomson CSF v. AAA*, 64 F.3d 773.
[38]*Moses, Margaret L*, The Principles and Practice of International Commercial Arbitration, Cambridge University Press, Cambridge 2008, pp..38.
[39]Goode, Roy, *The Role of the Lex Loci Arbitri in International Commercial Arbitration* International, Volume 17, No. 1LCIA 2001, pp.37.
[40]Supra Note 35.
[41]Supra Note 37 at pp.65.
[42]*Howard M. Holtzmann, Joseph E. Neuhaus, A* Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Kluwer Law, Boston, 1989, p.300.
[43]Philipp Habegger, *Extension of Arbitration Agreements to Non-Signatories and Requirements of* Form, ASA Bulletin (2004/Vol. 22), pp .398.

ii. Vader and the respondent do not constitute a single economic reality.

22. A tight corporate structure is not established merely by the fact that a subsidiary is a wholly owned by the parent company. The shareholding pattern of a company is not the only relevant factor to be looked at while determining the existence of a single economic reality.

23. A parent company holding 90% of the subsidiary company does not necessarily constitute a single economic reality.[44] On the same hand, a parent company holding 51% of shares of the subsidiary company has been compelled to arbitrate on the grounds that it constituted a single economic reality.[45]Therefore, the fact that Respondent was a wholly owned subsidiary of Vader is irrelevant.

24. Rather, the existence of a tight corporate structure is evidenced by the sharing of assets, human and financial resources.[46]Therefore, the sharing of corporate names, officers, offices and premises, bank accounts and trademarks would point to the existence of a single economic reality.[47]

25. The lack of sharing of any assets or financial resources is evident from the fact that all financing and monitoring of the Respondent's' activities by Vader was stopped after a motion passed by the board of directors.[48] This coupled with the fact that Mr. Paredes was completely authorized to take all decisions and calls for the Respondent clearly echo the position that there was no control exhibited by Vader on the Respondent. [49]

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[44]ICC case no. 7155 [1993].
[45]ICC case No. 8910 [1998].
[46]Ibid.
[47] *Stavros L Brekoulakis.*, Third Parties in International Commercial Arbitration Oxford University Press, Oxford 2010, pp. 155.
[48]Moot Proposition, para 27.
[49]Moot Proposition, para 12.

iii. Vader did not play an active role in the performance of the contract.

26. The threshold for considering an active role played by a non-signatory is usually high and has no set criteria. The Dow Chemical case, however, seems to suggest a formula which was widely accepted; namely, the participation in the negotiation, performance and termination of the contract.[50] An arbitration agreement can be extended to a non-signatory only if its involvement in the negotiation, performance and termination of the contract is significant.[51]

Vader's conduct and its role in the negotiation of the contract would have been considered significant if it had entered into the pre-contractual negotiations and then established the Respondent as a subsidiary.[52] Vader has exhibited no such conduct that would point towards its active role in the contract. It was only involved in the negotiation in the contract and post negotiation, the execution and performance of the contract was done exclusively by the Respondent.

27. All further negotiations of the contract were done by Mr. Parades, the Respondent's representative. Vader was not involved in any capacity after the initial pre-contractual negotiations. Further, there are no factual statements regarding the involvement of Vader in the performance of the contract. There were no direct communications between Vader and the Claimant and all communications were handled by the representative of the Respondent indicating that the contract was solely performed by the Respondent. Therefore, apart from being a separate legal entity, it was also functioning as a completely independent commercial entity. The lack of any involvement of Vader justifies the non-extension of the

[50]Interim Award, *ICC case no, 4131 [1982]*.
[51]Supra Note 30.
[52]ICC case no. 11160 [2002].

arbitration agreement as Vader can hardly be even considered a third-party to the contract itself.

CONCLUSION: Therefore, Vader did not play any role that was significant enough to echo that there was implied consent on its part to be a party to the agreement.

III. THERE WAS NO VALID ACCEPTANCE OF THE RESPONDENT'S OFFER.

28. Contrary to the Claimant's assertion there is no valid acceptance of the offer. The conduct of the two parties in terms of communication by way of Indian head nod which Mr.Kalai Deewarvala, representative of the Claimant interpreted as a side-ways nod and Mr. Armando Paredes, Managing Director of the Respondent interpreted the side-ways nod as a refusal to his proposal. Hence, the Respondent submits that conduct was insufficient to show that there was a valid acceptance **[A]**; and there was no common intention between the parties. **[B]**

A. CONDUCT WAS INSUFFICIENT TO SHOW THAT THERE WAS A VALID ACCEPTANCE.

29. A contract is said to be formulated either by way of acceptance of an offer, or by conduct that shows the sufficiency in agreement.[53] Mr. Deewarvala communicated via a head nod which led to misinterpretation of acceptance by Mr. Paredes,[54] thereby leading to insufficiency in communication of the agreement.

30. A rule stipulates that the offeree's terms of acceptance in the contract must be brought in mind of the offeror that the very existence of such terms must be consistent with the terms of the offer, this is called as mirror image rule.[55]This principle has been affirmed in

[53]Article 2.1.1, *UNIDROIT Principles, 2016.*
[54] Moot Proposition ¶ 34.
[55]*A. Burrows, J.Beatson, J.Cartwright*, Anson's Law Of Contract, 30th Edition.

UNIDROIT Principles on International Commercial Contracts, 2016 ["UNIDROIT Principles"] that the acceptance is the mirror image of the offer.[56]

31. In a slew of cases,[57] courts have applied the mirror-image rule by placing reliance on conclusion of the contract which would be subjected to the seller's conditions, and propounded the last shot approach. The current application of this approach to UNIDROIT Principles, is construed in a way that if this approach was not applied, and general rules of offer and acceptance were applicable, then there would have been no contract at all, and all purported acceptances would have amounted to a counter offer.[58] Hence, it is appropriate for the parties to indicate the adoption of last shot approach as it leads to an understanding that the parties adopted standard terms as essential condition for the conclusion of the contract.[59] A theory stemming out from this approach is called knock out doctrine which essentially states that despite the general rules of offer and acceptance, if parties reach an agreement except on their standard terms solely, a contract is formulated on the basis of agreed terms and standard terms, if any, which are common in substance.[60] However, the operation of knock out doctrine by virtue of last shot approach can always be excluded, if a party clearly indicates in advance, or later, without undue delay, by conduct that it does not intend to be bound by a contract which is not based on its own standard terms.[61]

32. In the present matter, a contract was signed between the Claimant and the Respondent, which explicitly contained the terms and conditions that the deliveries will take place on the

[56]Comment 2, Article 2.1.11, *UNIDROIT Principles, 2016.*
[57]*Butler Machine Tool Co. Ltd v. Ex-cell-o Corporation* (England) Ltd. [1979] 1 WLR 401,406,407; *Rawlings* (1979) 42 MLR 715; *British Road Services v. Arthur Crutchley Ltd.* [1968] 1 All ER 811; *A Davies & Co. (Shopfitters) v. William Old* (1969) 67 LGR 395; *Tekdata Interconnections Ltd. v. Amphenol Ltd.* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep 357*cited in* A.Burrows, J.Beatson, J.Cartwright, Anson's Law of Contract, 30th Edition, pp. 41.
[58]Comment 2, Article 2.1.22, *UNIDROIT Principles, 2016.*
[59] Comment 3, Article 2.1.22, *UNIDROIT Principles, 2016.*
[60] Supra Note 58.
[61] Ibid.

last working day of March, June, September, and December of 2014 respectively.[62]The payment of consideration for each delivery was decided to be at least 5 days before the delivery date through online deposit to the Respondent's bank account.[63] Accordingly, deliveries were completed.[64] This was continued through 2015,[65] and through 2016.[66]

33. The issue arose with the Second Incentive whereby the Respondent wanted to extend the deliveries through 2017 and 2018,[67] by way of Second Incentive.[68] Before the delivery was to be completed according to the date of first instalment, there was a misunderstanding pertaining to the very existence of the contract.[69] Despite the misunderstanding, the Claimant served a notice of arbitration on 15th August, 2017,[70] during which, two delivery dates had already passed and still no payment was made towards the same by the Claimant. This clearly shows conduct contrary to the agreement to claim the existence of contract.[71] Therefore, the Claimant has not performed his side of the agreement either by furthering any advance money, or starting the work towards the fulfillment of the contract. Therefore, the Claimant's conduct was insufficient to show valid acceptance.

B. BOTH THE PARTIES HAD NO COMMON INTENTION TO BE BOUND BY THE CONTRACT.

34. For the purposes of determination of parties' intention to be bound by a contract, the conduct has to be interpreted in accordance with the stipulations laid down in Article 4.1 et seq.[72]A contract is to be interpreted in accordance to the common intention between the

[62]Moot Proposition ,¶ 15.
[63]Ibid.
[64]Moot Proposition ,¶ 23.
[65]Ibid,.
[66]Moot Proposition, ¶ 42.
[67]Supra Note 54.
[68]Moot Proposition, ¶ 31.
[69]Moot Proposition .,¶ 43.
[70]Moot Proposition ,¶ 44.
[71]Moot Proposition, ¶ 45.
[72] Comment 2, Article 2.1.1,*UNIDROIT Principles, 2016.*

parties,[73] and in absence of such intention regard will be place on reasonable person, who would place in same circumstances.[74]

35. To determine the common intention, all the relevant circumstances listed in Article 4.3 of the UNIDROIT Principles needs to be satisfied,[75] the nature and purpose of the contract, pre-contractual negotiations, and subsequent contractual conduct of the parties.[76]This means violation of any, would lead to lack of common intention, leading to violation of Article 4.3 of the UNIDROIT Principles. In construction of a contract, the court must primarily look at the words in the contract itself, and direct evidence needs to be placed to show the contrary.[77] The terms of a contract should be interpreted holistically,[78] along with the principle that there is no hierarchy among the contractual provisions, during contractual conflicts specific provisions prevails over general provisions.[79]

36. From the illustrative list of circumstances, conduct of the parties subsequent to the conclusion of contract is to be noted.[80]

37. In the present matter, there was clearly a lack of common intention, because both parties were of conflicting views. The Claimant purported that there was an agreement formulated, whereas the Respondent was of the view that there was a failure in the reaching of an agreement.[81] From the seller's perspective, the parties had intended to terminate the contract and as such no deliveries were to be made to the Claimant after the last instalment delivery

[73] Article 4.1(1), *UNIDROIT Principles, 2016.*
[74] Article 4.1(2), *UNIDROIT Principles, 2016*.
[75]Comment 3, Article 4.1, *UNIDROIT Principles, 2016.*
[76]*ICC International Court of Arbitration 11295(available at:*http://www.unilex.info/case.cfm?id=1070).;*Franklins PTY Ltd. v. Metcash Trading Ltd. (available at:*http://www.unilex.info/case.cfm?id=1520); *Joseph Charles Lemire v. Ukraine ARB/06/18 IIC 424 (2010), ICSID (available at:* http://www.unilex.info/case.cfm?id=1533).
[77]*Hansalaya Properties and Anr. v. Dalmia Cement (Bharat) Ltd. RFA (OS) No. 26/1986* High Court of Delhi *(available at:* http://www.unilex.info/case.cfm?id=1454) ; *International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (available at:* http://www.unilex.info/case.cfm?id=857).
[78]Article 4.4, *UNIDROIT Principles, 2016.*
[79]Comment 2, Article 4.4, *UNIDROIT Principles, 2016.*
[80] Article 4.3(c), *UNIDROIT Principles, 2016.*
[81]Moot Proposition, ¶ 39.

for 2016.[82] From the Claimant's perspective, the parties intended to extend the contract for the next two years.[83] The payment was not provided, subsequent to which no delivery was done. Therefore, there was no evidence of acceptance by way of overt conduct on part of the Claimant.[84]

38. Furthermore, regard has to be placed also on the rapidity of communication during electronic communication especially oral offer in terms of its reasonability.[85] In the present case, both the parties decided Skype as prescribed mode for electronic communication to discuss the further prospects of their relation.[86] Consequently, none of the parties affirmed on the rapidity of communication, by way of revisiting the negotiation for the next few months, till a point that no communications were sent or received by and between parties until the middle of March before the first delivery.[87] Hence, no contract was concluded wherein an agreement has not reached on the matters that needs to be decided during the course of negotiations.[88]

39. Therefore, common intention cannot be ascertained since a subsequent contractual conduct between the parties' conditions have not been proved.

CONCLUSION: Therefore, the contract has not been formulated because there was no valid acceptance of the Respondent's offer.

IV. SPECIFIC RELIEF SHOULD NOT BE GRANTED BY THE TRIBUNAL

40. The tribunal should not grant specific performance as a relief against the respondent**[A]**; and in the eventuality of the Claimant seeking specific relief, the Respondent would raise a

[82]Moot Proposition,¶ 40.
[83]Moot Proposition,¶ 41.
[84]Supra Note 56.
[85] Article 2.1.7, *UNIDROIT Principles, 2016.*
[86]Moot Proposition, ¶ 30.
[87]Moot Proposition, ¶ 42.
[88] Article 2.1.13, *UNIDROIT Principles, 2016.*

counterclaim and ask the tribunal to direct the Claimant to complete its monetary obligations.**[B]**

A. SPECIFIC PERFORMANCE SHOULD NOT BE GRANTED AS RELIEF

41. Article 7.2.2 of the UNIDROIT Principles states, when a party who owes an obligation, other than one to pay money does not perform, the other party may require performance. This right, however, comes with exceptions. The claimants may take the stance that the respondent has an obligation to provide the claimant with the delivery of the remainder goods and thus may seek specific performance. However, specific performance should not be granted in the present factual scenario as performance is unreasonably expensive.

42. Performance is not required where it is unreasonably burdensome or unduly expensive for the debtor.[89] When there is a grave change in circumstances after the conclusion of the contract that makes the performance, though not impossible, but onerous or expensive to an extent where claiming it or enforcing it would be contrary to good faith and fair dealing, specific performance cannot be granted as a relief.[90]

43. There no clear definitions as to when an effort or expense would classify as burdensome or unreasonable, however, if the expenses the promisor would incur if it indeed performed would vastly exceed the value that performance has for the promise, the latter's right to performance of this obligation may be excluded in the particular circumstances.[91]

44. The respondent's financial situation has worsened manifold since its initial contract with the claimant. As a consequence of Brexit, all financing of the respondent by its parent company were halted. It is pertinent to note that the respondent had already incurred heavy

[89]Ingeborg Schwezner, *Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contract cited in European Journal of Law Reform* , Volume 1, (1999),pp. 289-303.
[90]Article,.7.2.2, *UNIDROIT Principles,* 2016.
[91]Comment 3(b), Article 7.2.2,*UNIDROIT Principles,* 2016.

operational costs and was barely allowed to break even against its immediate expenses. Enormous sunken costs coupled with financial strain that followed after Brexit, severely strained the respondent's financial leeway.

45. At a position when even making counterclaims in an arbitration proceeding adds to the financial strain of the company, it is extremely unreasonable to compel the respondent to perform. The grave change in financial circumstances after Brexit renders it incapable to do so. Therefore, specific relief cannot be granted for performance as it will be unreasonably expensive for the respondent.

B. CLAIMANT SHOULD COMPLETE ITS MONETARY OBLIGATIONS.

46. Article 7.2.1 of the UNIDROIT Principles states that where a party who is obliged to pay money does not do so, the other may require payment. This reflects the generally accepted principle that payment of money which is due under a contractual obligation can always be demanded.[92] As per the terms of the contract, the claimant had to pay the respondent a 35% incentive every December, starting from December, 2016. However, this not payment was not received by the respondent either. Therefore, before the claimant seeks to compel performance on part of the respondent, it must pay its monetary obligations.

47. The Respondent would as for monetary obligations as relief in the form of a counterclaim only in the event of the Claimant seeking for specific performance of the contract. A counterclaim can be raised in the course of arbitration if it falls within the scope of the arbitration agreement.[93]The Respondent seeks to raise a counterclaim for the recovery of

[92]Christopher Brunner, *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-performance in International Arbitration cited in Kluwer Law International*, 2009, *Volume 18 of International arbitration law library*, pp.364.
[93]Pavic, Vladimir, *Counterclaim and Set-Off in International Commercial Arbitration.* Annals International Edition, 2006. *(available at:* https://ssrn.com/abstract=1015713).

payments that were owed to it by the Claimant. If, the claimant's stance that the contract is enforceable is correct, then the Claimant owes monetary obligations to the Respondent. These obligations must be fulfilled by the Claimant before it can seek to enforce specific performance upon the Respondent.

Conclusion: Therefore, in light of the circumstances and facts of the case, granting specific performance as relief will be against good faith and justice. In the event of the Claimant seeking specific performance, the Respondent would raise a counter claim and ask the tribunal to direct the Claimant to complete its monetary obligations.

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PRAYER

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

- That the contract was non-existent and unenforceable; and
- That the Respondent's parent company is not a party to the arbitration agreement.

PLACE: **ON BEHALF OF THE RESPONDENT:**

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