T1809-C

THE 13TH LAWASIA INTERNATIONAL MOOT COMPETITION 2018

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Between

CHUIZHI LEISHEN'S LLC

…. Claimant

And

ROBUSTESSE ESPACIAL SOLUCION CORP

… Respondent

MEMORIAL FOR CLAIMANT

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1. The parties, Chuizhi Leishen’s LLC (“CL”) and Robustesse Espacial Solucion Corp (“RES”) have agreed to submit the present dispute to arbitration in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules (“KLRCA i-

Arbitration Rules").

A

2. Article 35, paragraph 1 of the KLRCA i-Arbitration Rules states that the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. The arbitration clause of the contract between CL and RES[1]

B

stipulates that the seat of arbitration shall be the Kingdom of Cambodia while the law applicable to the contract shall be the UNIDROIT Principles.

C

3. Accordingly, the law of Cambodia will apply to the arbitration clause while the UNIDROIT Principles will apply to the rest of the contract.

III. QUESTIONS PRESENTED

D

4. Whether the agreement to arbitrate is incapable of being performed due to impecuniosity of the Respondent.

E

5. Whether the request of the Claimant to join Vader as a party to the Arbitration should be granted by the Tribunal.

   a. Whether a relationship of agency exists between Vader and RES

   b. Whether Vader and RES belonging to the same group of companies justifies joinder.

6. Whether there was a valid acceptance of the Respondent's offer:

[1] [15(f)], Moot Problem

a. Whether the Claimant's side-nod constitutes valid acceptance.

A

b. Whether the contract between the parties, properly construed, includes a payment for the Second Incentive in December.

B

7. Whether the Tribunal should grant the Respondent's requested relief:

a. Whether the Tribunal can declare the contract existent and set it in writing.

C

b. Whether the Tribunal can order specific performance.

IV. STATEMENT OF FACTS

D

The Parties and Representatives

E

8. The claimant, CL, is a company incorporated under the laws of the People's Republic of China.

9. The respondent, RES, is a company incorporated under the laws of Cambodia. RES is the wholly owned subsidiary of Vader Ltd, a commercial company incorporated under the laws of the United Kingdom. Both companies' predominant business involves producing and selling bricks.

10. Mr. Kalai Deewarvala, a Malaysian-Indian construction specialist, was CL's representative. CL authorized him to execute all agreements in relation to CL's Belt & Road Initiative (B&R) projects and to communicate with RES on behalf of CL.

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11. Mr. Armando Paredes, a Mexican specialist, is the Managing Director of RES. He was authorized to execute all agreements in Cambodia and ASEAN on behalf of RES.

Formation of the Contract

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12. The seller and the buyer arranged a meeting between the CEO of Vader and the CEO of CL. During their meeting on 29 May 2013, the CEOs identified a common business opportunity and agreed on most of the venture's terms. However, it was decided that a formal contract would only be executed by their representatives after review by their legal counsels.

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D

13. The representatives successfully completed and signed the contract in September 2013. The contract was an exclusive distribution agreement for the production and sale of custom, tailor-made bricks, stipulating for 4 deliveries in 2014.

E

Execution of Contract

14. In 2014, the first three deliveries and corresponding payments were successfully made before the parties met again in November at CL's request.

15. CL communicated that they wished to extend the contract and offered RES a 15% price increase ("First Incentive"). RES accepted their offer and they shook hands afterwards. No written contract was made, and the last delivery of 2014 was made without the 15% price increase.

16. In October 2014, Vader decided that RES' operations should remain independent.

A

17. In November 2015, the parties agreed to extend the contract again with a second 15% price increase. This was done via email, and there was no formal contract executed by them.

B

18. Subsequently, Vader's Board of Directors passed a motion that essentially gave Mr. Parades full control over RES, and that Vader would no longer play a direct role in managing RES.

C

Final Negotiations & Second Incentive

D

19. In July 2016, the parties began negotiating for a new contract while maintaining a very good relationship.

E

20. On 23 November 2016, the parties had a final Skype call. CL first proposed to continue the 15% price increment per year and to give a bonus to RES at the end of that year ("Second Incentive") in exchange for 4 new deliveries.

21. In response, RES demanded that the price increase must be substantial and to set the Second Incentive at 35% of the price.

22. The conversation continued for 4 hours but remained cordial.

23. Before the Skype call was terminated, the parties had one final exchange. RES restated

their intention to continue with the contract and reiterated their request for maintaining the First Incentive and adding the Second Incentive for 2017. Moreover, they offered 8 additional deliveries if CL accepted these terms.

24. CL responded by clarifying these terms, which RES then confirmed. RES then asked whether CL was willing to accept these terms by asking "Yes or No", to which CL communicated their acceptance via a side-nod. However, this was incorrectly interpreted by RES as a refusal to their proposal.

25. Notwithstanding the misunderstanding, the parties ended the Skype call cordially by thanking each other for their time.

Post Negotiations and start of disagreement

26. CL believed parties had reached an agreement while RES had believed they had mutually consented to the termination of the contract.

27. CL had no reason to revisit the negotiation and only realized there was a misunderstanding in mid-March 2017. In 15 August 2017, CL initiated arbitration proceedings.

28. On 15 December, the tribunal was constituted and parties continued proceedings. RES refused to pay its share of the non-specific security deposit and CL paid 50% of the Security Deposit on the first week of January 2018.

29. On Februay 2018, CL set its claim's value at USD$456,262,500.00. RES claimed the

contract had been terminated on 23 November 2016 and that RES was unable to pay costs of arbitration due to its tense financial situation.

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30. However, it counter-claimed USD$ 1,049,403,752.00 if proceedings continued.

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31. CL denied RES's counter claims and requested for RES's parent company, Vader to be joined in this arbitration.

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V. SUMMARY OF PLEADINGS

A

A. This tribunal should find the arbitration agreement capable of being performed

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B. This tribunal should allow the claimant's request for joinder as a relationship of agency exists between Vader and RES.

C

C. In the alternative, this tribunal should allow the claimant's request for joinder as Vader & RES belong to the same group of companies thus providing a justifiable basis for the joinder.

D

D. There was valid acceptance of the Respondent's offer via the Claimant's side-nod.

E

E. The Claimant's failure to make payment in December 2016 is not indicative of their rejection of the Respondent's offer.

F. The Tribunal should declare that the contract between the Claimant and Respondent is existent and set it in writing.

G. The Tribunal must order specific performance as the Respondent is unable to rely on any of the exceptions under UNIDROIT Article 7.2.2

VI. PLEADINGS

A

A. This tribunal should find the arbitration agreement capable of being performed

B

1. The Law of Cambodia should be the governing law of the arbitration agreement

C

32. The parties, CL and RES are engaged in arbitral proceedings with respect to a dispute which has arisen between then concerning whether the Respondent, RES's impecuniosity should render the arbitration agreement incapable of being performed.

D

33. The seat of arbitration is the Kingdom of Cambodia, which is governed by The Commercial Arbitration Law of the Kingdom of Cambodia.

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34. The parties have chosen the KLRCA Arbitration Rules 2017, which is made of two parts: the KLRCA Arbitration Rules 2017 and the UNCITRAL Arbitration Rules 2013, as the procedural rules applicable in this arbitration.

35. An issue has arisen in these proceedings as to the identification of the law governing the arbitration agreement. Since the parties' agreement does not contain a choice of law clause governing the arbitration agreement, the tribunal is required to identify the governing law.

36. The claimant's position is that the law of the Kingdom of Cambodia should apply.

a) The tribunal has jurisdiction to determine the appropriate governing law in accordance with Art. 35(1) UNCITRAL Rules 2013

37. Pursuant to Art. 35(1) UNCITRAL Rules 2013[2], the tribunal has wide discretion in identifying the governing law. Pursuant to that provision, the tribunal is free to apply 'the law which it determines to be appropriate' in circumstances where the parties have failed to designate the rules of law applicable to the arbitration agreement. As such, the tribunal has the discretion to directly choose the governing law.

a) The tribunal should hold that the law of Cambodia is of the closest connection

38. The Claimant submits that in applying Art. 35(1) UNCITRAL Rules 2013[3] and in resolving the parties' conflict of laws, the Arbitral tribunal should apply the close connection test. Application of the close connection test, in turn, leads to the application of the law of Cambodia.

39. The closest connection test is an internationally recognized conflict of laws rule that is widely applied in the context of deciding the law governing arbitration agreements. The close connection test will provide valuable help in structuring this tribunal's discretion.

40. An analysis of the connecting factors in this dispute supports the conclusion that the law of Cambodia should apply. The connecting factors which support this conclusion

[2] Article 35(1) UNCITRAL Rules 2013, Kuala Lumpur Regional Centre for Arbitration Rules 2017
[3] ibid

are that the place of performance, the location where the goods are loaded and the Respondent's place of business and incorporation are in Cambodia. Furthermore, parties have agreed for the seat of arbitration is that of Cambodia, lending weight to the conclusion that the applicable law should be that of the Law of Cambodia.

41. As such, this tribunal should find that the law of Cambodia applies as it is the law most closely connected to the parties' case.

2. The tribunal should have jurisdiction as to whether the arbitration agreement is incapable of being performed

a) <u>The tribunal may rule on its own jurisdiction and the validity of the arbitration agreement</u>

42. The Commercial Law of Arbitration of Cambodia ("LCA") allows the tribunal to rule over the validity of the agreement where a party fails to advance its share of the costs under Art. 24(1): "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[4]

43. However, it seems that Art. 8 of the LCA only permits a court to intervene when "an action is brought in a matter which is the subject of an arbitration agreement shall, …, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."[5] The same provision is found in Art.

[4] Article 24(1), Commercial Arbitration Law of the Kingdom of Cambodia
[5] Artice 8, Commercial Arbitration Law of the Kingdom of Cambodia

II(3) of the New York Convention[6] and Art. 16(1) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law")[7].

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44. Multiple jurisdictions have interpreted this provision. The Canadian Supreme Court in *Dell* interpreted this provision and adopted Professor François Bachand's interpretation: the competence-competence principle enshrined in Art. 16(1) of the Model Law requires that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator[8].

B

C

45. Even if the principle of competence-competence is not applicable, the courts are restricted to a *prima facie* standard of review. The French courts apply this standard of review of the arbitration agreement by holding that courts are precluded from performing in-depth analysis of the arbitration agreement and must refer the parties to arbitration unless the agreement is found to be manifestly null and void[9]. The Indian Supreme Court too held that restricting the court's scope to prima facie analysis "better served the purpose of the New York Convention, which was to enable expeditious arbitration without avoidable intervention by judicial authorities". Hence, the court when engaged, has to limit itself to a prima facie analysis of the application before referring the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable.[10]

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[6] Article II(3), New York Convention 1958
[7] Article 16(1), UNCITRAL Model Law on International Commercial Arbitration
[8] *Dell Computer Corp. v. Union des consommateurs* [2007] 2 S.C.R. 801
[9] *Copropriété Maritime Jules Verne (France) v American Bureau of Shipping* (US) [2006], 32 YB Comm Arb 290 at para 2 (Cour de Cassation [Supreme Court], First Civil Chamber).
[10] *Shin-Etsu Chemical Co Ltd v M/S. Aksh Optifibre Ltd*, 12 August 2005

b) Even if the court has jurisdiction, arbitration proceedings may still proceed pursuant to Art 23(3) of the UNCITRAL Rules 2013

46. Practically, even if a court finds that the arbitration agreement invalid, Art. 23(3) of the UNCITRAL Rules 2013 allows for the tribunal to "continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court". As such, the tribunal still has jurisdiction to arbitrate on the Respondent's impecuniosity.

3. The arbitration agreement is capable of being performed

a) On a true construction of the term, the Respondent's impecuniosity does not render the arbitration agreement "incapable of being performed".

47. The term "incapable of being performed" is derived from Art. II(3) of the New York Convention and has been interpreted by many jurisdictions around the world. Professor Albert Janus Van den Berg, a widely respected commentator on the New York Convention, suggests that having regard to the "pro-enforcement bias" of the New York Convention, interpretation of the term would suggest that it would apply to narrow and manifest cases where the arbitration cannot take place even though the parties are willing to go forward with it[11]. This narrow application has been adopted in

[11] "The New York Convention of 1958: An Overview" in Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice (E Gaillard and D Di Pietro eds) (Cameron May, 2008).

the majority of jurisdictions, and was further refined in *Paczy*, where the English Court of Appeal held that "the agreement only becomes incapable of being performed if the circumstances are such that it could no longer be performed – even if parties were ready, able and willing to perform it. Impecuniosity is not a circumstance of that kind."[12]

48. Hence, an arbitration agreement could be deemed "incapable of being performed" "(i) when the arbitration agreement is unclear and does not provide sufficient indication to allow the arbitration to proceed and (ii) when the arbitration agreement designates an inexistent arbitral institution", scenarios where the arbitration agreement could not be performed despite the readiness, ability and willingness of parties. These examples illustrate that the incapacity must "render it permanently impossible for the arbitration to be set in motion".[13]

49. On our facts, the Respondent has applied for the arbitration agreement to be invalidated due to its inability to continue to pay costs and as such does not fall under the definition of "incapable of being performed". Practically, there are available alternatives such as application for a joinder or allocating the costs in the final award, pursuant to Art. 42 of the UNCITRAL Rules 2013[14]. As such, proceedings are not rendered "permanently impossible".

50. This conclusion is further reinforced considering the "pro-enforcement bias" of the Convention, which Cambodia adopted through the integration of the Model Law into

[12] *Paczy v. Haendler & Natterman GmbH* [1981] 1 Lloyd's Rep 30
[13] *Heartronics Corporation v EPI Life Pte Ltd* [2017] SGHCR 17
[14] Article 42, UNCITRAL Rules 2013

the LCA – the tribunal should maintain a similarly narrow interpretation (as courts in Bermuda[15], Australia[16] and Alberta[17] have done) and enforce the arbitration agreement since it is not a manifest case. Furthermore, since the factual matrix does not fall within the criteria of a "manifest" and clear case, the tribunal should find that the arbitration agreement is capable of being performed.

b) <u>The Respondent's impecuniosity does not frustrate the arbitration agreement</u>

51. The UNCITRAL Guide on the New York Convention expressly affirms the International Chamber of Commerce decision in *Ramasamy Athappan*[18] that the term signifies "in effect, frustration"[19].

52. The English Courts have also equated the operation of "incapable of being performed" with the doctrine of frustration, which enables a contract to be discharged when an event occurs after contract formation which renders the contract physically or commercially impossible to fulfil the contract or radically transforms the nature of the obligation.

53. The doctrine of frustration requires that there must have been two requirements: an "outside event or extraneous change of situation, not foreseen or provided for by parties at the time of contracting, which either makes it impossible for the contract to be

[15] *Dupont Scandinavia AB v Coastal (Bermuda) Limited* [1988] Court of Appeal of Bermuda
[16] *Bakri Navigation Co Ltd v Glorious Shopping SA* [1991] Federal Court of Australia
[17] *Kaverit Steel and others v Kone Corporation and others* [1991] Alberta Court of Appeal
[18] *Ramasamy Athappan and Nandakumar Athappan v Secretariat of Court*, International Chamber of Commerce A No 2670/2008
[19] Article II, UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

performed at all or renders it performance radically different from what the parties contemplated when they entered into" and "this event … must have occurred without the fault or default of either party"[20].

54. These requirements were considered in the House of Lords case of *Hannah Blumenthal*, where the court held that it cannot properly be said that a party's inability to perform is a change of circumstance extraneous to the contract making it "impossible for the contract to be performed at all or at least [rendering] its performance something radically different"[21] as the arbitration agreement itself is capable of performance irrespective and independent of the parties' ability or willingness to finance the arbitration. The agreement can also be performed through a post-award allocation of costs.

55. Similarly, it is submitted that the Respondent had known of its "loosened financial situation" since it had been operating with no profits since its incorporation and its impecuniosity cannot be said to be without fault. Therefore, the present circumstances do not satisfy the high threshold of frustration and the arbitration agreement is capable of being performed.

[20] *Paal Wilson and Co v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854
[21] ibid

B. This tribunal should allow the claimant's request for joinder as a relationship of agency exists between Vader and RES.

1. As per the KLRCA Rules, joinder must be permitted when a party is prima facie bound to the arbitration agreement.

56. The KLRCA rules stipulate that in the absence of express consent, an additional party may be joined as a party to the arbitration process "provided that such Additional Party is prima facie bound by the arbitration agreement."[22].

a) Cambodian arbitration law allows for application of KLRCA as opposed to Cambodian arbitration standards.

57. The application of the KLRCA Rules to govern the issue of joinder is justified by Cambodian arbitration practice itself. Cambodia's Law on Commercial Arbitration is deemed to merely put forth arbitration standards and can be deviated from, specifically with regards to procedure, when a specific set of arbitration rules have been identified for application by the parties[23]. Hence, given that the joinder issue is a procedural one and the KLRCA rules were expressly chosen by the parties, Rule 9 of the KLRCA rules on joinder applies.

b) Further, consent to the joinder provision is evinced through the

[22] Asian International Arbitration Centre, Arbitration Rules 2018, Rule 9
[23] Hor Peng, Kong Phallack, Jorg Menzel, *Introduction to Cambodian Law* (Konrad-Adenauer-Stiftung 2012)

adoption of the KLRCA Rules.

A

58. It is justified to infer consent to the joinder provision given that the KLRCA Rules, containing the said provision, was selected by the parties[24]. Consent to the set of rules thus amounts to consent to the specific provision. Hence, it is well within the scope of this arbitration tribunal to assess the possibility of a joinder.

B

c) Fulfillment of the condition of 'prima facie' necessarily involves a low threshold.

C

59. The test to establish what constitutes 'prima facie' entails a relatively low threshold as there is only a need to evince "reasonable possibility"[25] that the arbitration agreement was intended to cover all parties, inclusive of the non-signatory. Hence, it is sufficient that this common agreement "might be found to exist"[26]; there is no need for the conclusion to be definitive. While this assessment pertains specifically to the ICC Rules, it is apposite to note that the wording of the rules is similar to the KLRCA Rules, particularly in relation to the inclusion of the term 'prima facie'. Thus, an extension of interpretation is useful given the lack of assessment of the KLRCA provision, specifically.

D

E

60. Further, such a reading of 'prima facie' makes commercial sense in the context of arbitration. A key concern of arbitrators is to ensure efficiency and efficacy in the

[24] Gordon Smith, 'Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules', in Maxi Scherer (ed), Journal of International Arbitration
[25] Andrea Meier, 'Commentary on the ICC Rules, Introduction to Articles 7–10 ICC Rules, in Arbitration in Switzerland: The Practitioner's Guide', in Manuel Arroyo (ed), Kluwer Law International 2013
[26] *Ibid*

arbitration process[27] and such a reading would be in line with this common concern of arbitration tribunals.

A

B

2. An agency relationship, which scope encompasses the arbitration agreement, naturally supports the finding of a party being prima facie joint to an arbitration agreement.

C

a) <u>Agency constitutes a legitimate means through which to facilitate a joinder, via application of Cambodian law.</u>

61. It is trite that orthodox contractual principles such as agency have been, and continue to be, applicable to facilitate joinders in the context of arbitration[28]. Contention, if any, arises with regards to the applicable choice of law for this procedural issue. It is submitted that in the case of agency, Cambodian law, the law of the seat, would be most appropriate to apply.

D

E

b) <u>A relationship of agency exists between Vader and RES as a result of implied authority which amounts to actual authority.</u>

62. The Cambodian Civil Code recognises the concept of agency, both as a result of contract and at law[29], thus confirming its applicability to the issue at hand.

63. Implied authority necessarily manifests when the acts of the principal and agent

[27] Smith (n 24)
[28] Gary B. Born, *International Commercial Arbitration (Second Edition)*, Kluwer Law International 2014
[29] Cambodian Civil Code, Section IV. Agency

elucidate that the principal has consented to the agent being afforded some measure of authority which the agent agrees to. Agreement can be deduced from parties' conduct and the circumstances of the case[30].

64. The appointment of Mr. Armando Paredes as Managing Director of RES thereby empowering him "to execute any and all agreements on behalf of RES in Cambodia and ASEAN"[31] necessarily gives rise to implied authority. This is because authority is effectively granted to RES to complete and execute the contract with CL, which contains the arbitration agreement. Hence, a relationship of agency is manifest, and Vader thus impliedly authorised the agreement by allowing RES to execute the formal contract following its negotiation of the terms of the said contract.

65. Further, given that RES was given the express authority to execute the contract, implicit in this authorization is to do whatever is reasonably incidental to fulfilling the mandate. Hence, it is arguable that the inclusion of the arbitration agreement is necessarily incidental to the finalizing of the contract. This is specifically given the context which is that of multinational corporations negotiating a transnational agreement – arbitration is a commonly employed dispute-resolution mechanism given the cross-jurisdictional nature of such transactions.

c) <u>In the alternative, the relationship of agency arises from apparent authority.</u>

66. Apparent authority necessarily manifests when the principal makes a representation, by

[30] Born (n 28)
[31] [12], Moot Problem

words or conduct, to a third party who believes this representation, without negligence and contracts with the agent, who appears to have actual authority.[32]

67. Mr Chap, Vader's CEO, meeting Ms Lee and negotiating and coming to accord on the vast majority of the contractual terms during the meeting in Kuala Lumpur amounts to a representation that RES has authority to conclude the contract containing the arbitration agreement with CL. This is because at the end of the meeting, Mr Chap and Ms Lee came to a consensus that while most terms had been agreed upon, that a formal agreement will be executed by their representatives. This thus suggests a mere continuation of what was already concluded by Vader and CL and by extension, that RES had actual authority to conclude the contract, as it did, with the arbitration agreement included.

68. Additionally, the change in the character of the relationship when Vader "resolved that the operations of RES should remain independent"[33] on October 2014 and "passed a motion such that no further financing, compliance monitoring, or directives would be given by Vader to RES."[34] in 2016, if deemed to be a termination of agency, does not affect the finding of apparent authority as per orthodox agency principles. Hence, Vader is estopped from claiming that it is not covered by the arbitration agreement.

C. In the alternative, this tribunal should allow the claimant's request for joinder as Vader & RES belong to the same group of companies thus providing a justifiable basis for the joinder.

[32] Born (n 28)
[33] [19], Moot Problem
[34] [27], Moot Problem

69. A company part of a corporate group which has, under its control, another company and which engages in the negotiation or performance of the contract in question, may be found to be part of the same group of companies and thus subject to the arbitration agreement even though it did not partake in execution of the contract[35].

1. The 'group of companies' doctrine constitutes a legitimate means through which to facilitate a joinder, via application of international standards.

70. The 'group of companies' doctrine is an arbitration-specific theory which is applicable to facilitate joinders[36]. Contention, if any, arises with regards to the applicable choice of law for this procedural issue. In the case of the 'group of companies' doctrine, international standards (or *lex marcatoria*) in terms of general principles of international commerce and ICC case law would be most appropriate to apply given that it is a non-contractual, arbitration-specific theory for which there is little basis in Cambodian law or any national law, for that matter[37]. Conversely, international principles have far more applicability[38] and should thus accordingly govern this issue.

2. A group of companies is necessarily evinced when a tight group structure, an active role in the contract in question & a common

[35] Stavros L. Brekoulakis, 'Chapter 8: Parties in International Arbitration: Consent v. Commercial Reality', in Stavros L. Brekoulakis, Julian D. M. Lew, et al. (eds), The Evolution and Future of International Arbitration, International Arbitration Law Library, Volume 37
[36] Born (n 28)
[37] *Ibid*
[38] Interim Award in ICC Case No. 4131

intention to arbitrate is elucidated.

A

a) <u>A tight group structure between RES and Vader exists.</u>

B

71. The signatory and non-signatory parties "should have strong organisational and financial links with each other"[39]. Focus typically turns to the amount of control the parent company has over its subsidiary.

C

72. RES is a wholly-owned subsidiary of Vader thus signifying a level of corporate cohesion on a macro level. However, more specifically, a tightness in group structure in terms of control is conceded to by Vader when it "resolved that the operations of RES should remain independent"[40]. This was long after the conclusion and execution of the contract with CL thus indicating that at the time of the contract, Vader did in fact have a high degree of control over RES – a notion that is further reinforced by the fact that all initial contractual negotiation was carried out by the CEO of Vader.

D

E

b) <u>Vader was actively involved in negotiating the contract.</u>

73. A non-signatory's participation in "negotiation, execution and performance of contract or its conduct towards the party that seeks its inclusion in arbitration"[41] is more crucial to note than merely the general corporate structure[42]. The tribunal must ascertain if the parent company was thus sufficiently active before allowing a joinder.

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[39] T Hadden, 'The Control of Corporate Groups', Institute of Advanced Legal Studies, University of London, 1983
[40] [19], Moot Problem
[41] Final Award No.10758 [2000] ICC
[42] *Ibid*

74. A non-signatory's involvement at an early stage in the contract formation process, particularly the negotiation stage, is the most relevant factor to consider when assessing the possibility of extending the arbitration agreement[43]. It is particularly crucial that the group exists at the time when the contract containing the arbitration agreement is concluded[44].

75. There is undeniable proof that Vader was actively involved in the negotiation of the contract. From its inception, Mr Chap discussed and came to accord on the vast majority of the contract's terms with Ms Lee before the contract was merely formalized by Mr Paredes on behalf of RES.

c) <u>There is a strong common intention to arbitrate.</u>

76. The tribunal needs to examine if the group has led the contractor to genuinely assume that the non-signatory party is actually a party to the contract containing the arbitration agreement. To ascertain this, the conduct of the parties must be assessed[45].

77. Further, the intention of all the parties for the non-signatory to be bound by the arbitration agreement needs to be ascertained. In other words, the true intention of the parties is crucial to deduce. Consent thus plays an important role in facilitating a joinder and to infer consent, the involvement of non-signatories in negotiation, execution and termination of the contract can be considered[46].

[43] ICC Case No. 6519 of 1991
[44] ICC Case No. 7155 of 1993 in J. Arnaldez, Y. Derains and D. Hascher (eds.), 'ICC Collection of Arbitral Awards 1996—2000' (Kluwer 2003) 454-456
[45] Brekoulaskis (n 35)
[46] ICC Award No. 11405

78. Vader's conduct of being so heavily involved in finalising the contract, almost in totality, during the initial meeting in Kuala Lumpur, arguably elucidates, via conduct, a clear intention to be bound by the arbitration agreement within the contract. Moreover, their conduct would have most certainly led CL to believe that they intended to be bound by the arbitration agreement given that it was enclosed in the very contract Vader so extensively negotiated.

D. There was valid acceptance of the Respondent's offer via the Claimant's side-nod.

1. In face-to-face transactions, acceptance may be indicated by actions like a nod of the head

79. Acceptance of a contractual offer is defined in the *UNIDROIT Principles of International Commercial Contracts 2016* ("*UNIDROIT"*) in Article 2.1.6 as being capable of communicated through "other conduct" of the offeree indicating acceptance of the offer.

80. A side-nod falls under this category of "other conduct" according to Voganauer's Commentary on the UNIDROIT Principles of International Commercial Contracts[47] ("*Voganauer*"), which provides examples of non-verbal acceptance like a "nod of the head".

[47] Page 286, Vogenauer, S. (2015). Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) (Second ed.).

E. There was valid acceptance of the Respondent's offer via the Claimant's side-nod.

1. A reasonable person in the Respondent's position would have interpreted the Claimant's side-nod as an acceptance of the offer.

81. The Respondent was neither aware of the Claimant's intention behind the side-nod nor was he incapable of being unaware of the Claimant's intention. As such, Article 4.2(1) of *UNIDROIT* is not applicable, and Article 4.2(2) should be applied to interpret the Claimant's side-nod instead.

82. Therefore, the side-nod should be interpreted according to a reasonable person in the Respondent's position in those circumstances. In doing so, Articles 4.3(a) and 4.3(c) of *UNIDROIT* allow the examining of preliminary negotiations between the parties and the conduct of the parties subsequent to the conclusion of the contract respectively.

83. The Claimant made it clear that they wanted to extend the contract throughout the preliminary negotiations. This is evinced by their starting of negotiations with the Respondent since July 2016. In turn, the Respondent was fully aware that the Claimant wanted to extend the contract.[48]

[48] [32], Moot Problem

84. Moreover, after the meeting between the Claimant and the Respondent concluded, the Claimant made no effort to explain their decision to discontinue the contract and put the parties' 'very good relationship'[49] to a proper conclusion.

85. With all these in consideration, it is submitted that a reasonable person in the Respondent's position would have interpreted the Claimant's side-nod as an acceptance, particularly this was given without qualification or clarification. At the very least, a reasonable person would have clarified just what the side-nod meant, given the Claimant's clear interest in extending the contract.

F. The Claimant's failure to make payment in December 2016 is not indicative of their rejection of the Respondent's offer.

1. The Respondent's offer should be construed as constituting only two payments of the Second Incentive: once in 2017 and once in 2018.

86. Upon a proper construction of the contract, the Claimant should not have been required to make any payment of the Second Incentive in 2016.

87. The contract should be construed according to the parties' common intention, according to *UNIDROIT* Article 4.1(1), and Article 4.3(a) and 4.3(b) allow us to look at preliminary negotiations and established practices between the parties to determine what their common intention was.

[49] [28], Moot Problem

A

88. It was stated that the Claimant's intention all along throughout the preliminary negotiations was to have the Second Incentive paid out after "4 complaint and timely new deliveries"[50]. In this context, the Claimant's references to paying the 35% bonus "at the end of each year" should be interpreted as referring to the end of a new year with new deliveries and a new contract, as opposed to the end of the year on the existing contract.

B

C

89. The Respondent shared this common intention as well since the terms 'each year' and 'from now on' was used in the context of discussing a new contract. It would be absurd for the Respondent to have taken it to mean the end of 2016, particularly when their established practices are considered.

D

90. In November 2014, the parties agreed on a 15% price increase, but this only applied to the deliveries in 2015. Similarly, another 15% price increase agreed upon in November 2015 was only applied in 2016. In this context, the Respondent should also have come to the understanding that the Second Incentive that was being discussed would have only been required to be paid out in 2017 and 2018, under the new contract.

E

91. Therefore, the Claimant's failure to make payment in December 2016 is consistent with their having accepted the Respondent's offer, as the contract properly construed would not have required them to make any payment in December 2016.

[50] [31], Moot Problem

A

G. The Tribunal should declare that the contract between the Claimant and Respondent is existent and set it in writing.

B

92. There is persuasive authority that this Tribunal should have the power to declare contracts existent and set them in writing. Although *UNIDROIT* is silent on this issue, Sigvard Jarvin argues in his article that "declaratory relief … is often perceived as an inherent power of the arbitral tribunal and there is, accordingly, no provision on the issue in institutional rules"[51].

C

93. Moreover, given that *UNIDROIT* mandates that specific performance be the default remedy for non-performance, it follows that they would also allow for Tribunals to grant similar remedies like declaratory relief.

D

94. Therefore, it should be trite law that the Tribunal has the power to provide declaratory relief to the Claimant, and this is consistent with *UNIDROIT*'s approach to remedies.

E

H. The Tribunal must order specific performance as the Respondent is unable to rely on any of the exceptions under UNIDROIT Article 7.2.2

95. The Tribunal must order that the Respondents deliver the amount of bricks equivalent to the 4 deliveries in 2017 and 4 deliveries in 2018 since none of the exceptions under *UNIDROIT* Article 7.2.2 applies. This happens by default as *Voganauer* states that "The remedy to require specific performance is a right, not a discretionary power of the

[51] Jarvin, S. (2008). Non-pecuniary remedies: The practice of declaratory relief and specific performance in international commercial arbitration. (pp. 167-184) at page 177.

court.”.

A

1. The Respondent’s performance is still possible.

B

96. The exception in Article 7.2.2(a) does not apply as there is nothing in law which stops them from delivering the bricks to the Claimant. Moreover, the Respondent cannot argue that it is impossible for them to deliver the bricks at a timing that has already passed, since the contract did not specify when exactly the bricks would be delivered, and is more concerned with the substance of the contract – that the bricks are delivered.

C

2. The Respondent’s performance of the contract will not be unreasonably burdensome or expensive as there have been no changes in their circumstances to make performance more onerous.

D

E

97. The exception in Article 7.2.2(b) does not apply as it requires an “unreasonable burden” to be one that renders the performance of the contract so “onerous that it would run counter to the general principle of good faith and fair dealing”.

98. On the facts, there is no indication that this is the case. Conversely, it is likely that performance would not be additionally onerous since the Respondent continues to make and deliver bricks to its other clients that it has presumably taken on since 2017.

3. The Respondent's performance is not easily replaceable.

A

99. The exception in Article 7.2.2(c) does not apply as it specifically refers to goods and services of a 'standard kind'. However, the goods in question here are neither staple or standard, as they are "special-sized" and "tailor-made" bricks which are also "state of the art" and "color-coated"[52]. The Claimant would not have been able to easily find another supplier to produce the exact same kind of brick that the Respondent provided.

B

C

4. The Respondent's performance is not of an exclusively personal character.

D

5. The Claimant's request comes within a reasonable time.

E

100. The exception in Article 7.2.2(e) does not apply as it only excludes requests that do not come within a reasonable time after the obligee (the Claimant in this case) has become aware of the non-performance.

101. Although it is now 2018, the Claimant brought the action at the earliest possible instance after knowing about the non-performance and immediately requested for its performance. The delay in time is procedural, and not the fault of the Claimant. The Respondent should therefore not be able to rely on this exception.

[52] [15(a)], Moot Problem

VII. PRAYER FOR RELIEF

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102. For the foregoing reasons, the Claimant respectfully requests the Tribunal's ruling that:

B

a. The contract between the Claimant and Respondent is existent and should be set in writing.

C

b. The Respondent's performance to be required (the 4 deliveries of 2017 and 4 deliveries of 2018)

Dated this 21st day of September 2018.

D

E

COUNSEL FOR THE CLAIMANT