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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 RESPONDENT

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II. STATEMENT OF JURISDICTION

A

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").

B

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] 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

D

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

E

III. QUESTIONS PRESENTED

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

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

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

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

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

A

a. Whether the Tribunal can declare the contract terminated retroactively.

b. Whether the Tribunal should allow the Respondent's counterclaims.

B

IV. STATEMENT OF FACTS

C

The Parties and Representatives

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

D

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.

E

10. Mr. Kalai Deewarvala was CL's representative. CL authorized him to execute all agreements in relation to RES and to communicate with RES on behalf of CL.

11. Mr. Armando Paredes 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

12. The seller and the buyer arranged a meeting between the CEOs of Vader and CL.

During their meeting on 29 May 2013, the CEOs identified a common business opportunity and agreed on some terms regarding the venture. However, they decided that the formal contract would be further negotiated, executed and reviewed by their legal counsels and representatives.

13. The representatives successfully completed and signed the contract by September 2013.

14. The contract was specifically for the production and sale of custom, tailor-made bricks, and stipulated for 4 deliveries in 2014.

Execution of Contract

15. In 2014, the first three deliveries and corresponding payments were successfully made in March, June, and September.

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

17. The parties met again in November at CL's request. They agreed to extend the contract at a 15% price increase ("First Incentive").

18. In November 2015, the parties agreed to extend the contract again with a second 15% price increase.

19. Subsequently, RES realised that they could obtain an increase in income by looking for a new counterpart due to the increase in the price of bricks in Asia. However, they did

not do so due to the solid relationship of trust and good faith between the parties.

A

20. RES continued rely on their good relationship with CL to generate an income despite their operating with no profits since 2013. RES' income from their contracts with CL allowed them to barely break even.

B

21. Subsequently, Vader gave Mr. Parades full control over RES, and communicated that Vader would no longer play a direct role in managing RES.

C

Final Negotiations & Second Incentive

22. In July 2016, the parties began to seek a new round of negotiations but were unable to come to terms for 4 months.

D

23. On 23 November 2016, the parties had a final Skype call where they negotiated for more than 4 hours. CL first proposed to continue First Incentive and to give an additional bonus to RES ("Second Incentive") in exchange for 4 new deliveries.

E

24. In response, RES explained that the price increase must be substantial for them to extend the contract, and that they intended to set the Second Incentive at 35% of the price.

25. 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. In exchange, they offered

8 additional deliveries.

A

26. 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 responded with an Indian head nod, a side-ways nod. As a result, RES interpreted this as a refusal to their proposal, and the parties ended their communications soon after.

B

Post-negotiations and start of disagreement

C

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

D

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

E

29. On 15 December, the tribunal was constituted and parties continued proceedings.

30. On February 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 costs of arbitration due to its tense financial situation.

31. However, it counter-claimed USD$ 1,049,403,752.00 if proceedings continued. Due to its state of impecuniosity, despite attempting to seek funding from third-party sources, RES did not have enough funds to defend CL's claims or advance any counter-claims

in arbitration.

A

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

B

C

D

E

V. SUMMARY OF PLEADINGS

A

A. The arbitration agreement should find the arbitration agreement not capable of being performed

B

B. This tribunal should not permit the request for joinder given the lack of definitive evidence indicating the respondent's desire to be bound by the KLRCA and by extension, the joinder provision.

C

C. Even if the KLRCA Rules are deemed to be applicable to Vader, the request for joinder should not be granted given the respondents' impecunious state.

D

D. Further, the joinder should not be granted given that Vader is not prima facie bound to the agreement as there is no relationship of agency between Vader and RES.

E

E. There was no valid acceptance of the Respondent's offer as the Claimant rejected the offer via his 'side-nod'.

F. Even if there was acceptance, there was an error in expression on the part of the Claimant, which should allow the Respondent to avoid the contract

G. Alternatively, the Claimant should be estopped from claiming that the contract is existent as they caused the Respondent to understand that they

rejected the Respondent's offer.

H. The Tribunal should declare that the contract was terminated on 23 November 2016.

I. In the alternative, the Tribunal should allow the Respondent's counterclaims a) and b), if specific performance is ordered.

VI. PLEADINGS

A. The arbitration agreement should find the arbitration agreement not capable of being performed

33. 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.

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

35. 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.

36. 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.

A

37. The Respondent's position is that the law of the Kingdom of Cambodia should apply.

B

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

C

38. The legal framework setting out the parameters for the tribunal's jurisdiction is contained within the KLRCA Rules 2017 (UNCITRAL Rules 2013). 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.

D

E

2. The tribunal should hold that the law of Cambodia is of the closest connection

39. The Respondent submits that in applying Art. 35(1) UNCITRAL Rules 2013 and in resolving the parties' conflict of laws, the tribunal should apply the close connection test, which is an internationally recognised conflict of laws rule, assisting the tribunal to

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

identify the appropriate law.[3] Application of the close connection test, in turn, leads to the application of the law of Cambodia.

A

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 are that the place of performance, the location where the goods are loaded[4] 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.

B

C

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.

D

3. The court has full jurisdiction to review whether the arbitration agreement is incapable of being performed

E

42. Art. 8 of the Commercial Law of Arbitration of Cambodia ("LCA") states that "a Court before which 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 … incapable of being performed." The provision is derived from Art. II(3) of the New York Convention[5] and has attracted varied interpretations.

43. The principle that a court has the jurisdiction to opt for a full review of the validity of

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[3] Benjamin Hayward, Conflict of Laws and Arbitral Discretion: The Closest Connection Test, (Oxford: Oxford University Press, 2017) at 295 - 299
[4] *ibid*
[5] Article II(3), New York Convention 1958

the arbitration agreement and is fully in line with the New York Convention was first laid out in Fouchard, Gaillard and Goldman on International Commercial Arbitration[6]. This right has since been endorsed by certain jurisdictions. The Italian Court of Cassation[7] held that Art. II(3) of the New York Convention grants inherent power of the domestic court to review the validity of the arbitration agreement. The German Federal Supreme Court, in interpreting Section 1032 of the Code of Civil Procedure, a provision modelled after the New York Convention has held, notwithstanding the principle of competence-competence, held that the lower court had erred in limiting its scrutiny of the arbitration agreement and proceeded to thoroughly examine the agreement's formal and substantive validity.

44. On a plain reading of Art. 8 of the LCA[8], only a court may refer the parties back to arbitration on a finding that the arbitration agreement is "incapable of being performed". Since the court has the full jurisdiction to review, until the court has referred parties to arbitration, this tribunal has no jurisdiction to assess the validity of the arbitration agreement.

4. The arbitration agreement is incapable of being performed

45. The term 'incapable of being performed' refers to a contingency that has "the quality of permanence" and not "more than mere difficulty or inconvenience or delay in performing the arbitration" to prevent an arbitration agreement from being effectively

[6] Fouchard, Philippe. (1999). Fouchard, Gaillard, Goldman on international commercial arbitration. The Hague; Boston: Kluwer Law International.
[7] *Heraeus Kulzer GmbH v Dellatorre Vera SpA* [2007] Court of Cassation, Italy, 35
[8] Article 8, Cambodia

set in motion and hence rendering it "incapable of being performed"[9].

A

46. The German Bundesgerichtshof (BGH)[10] considered section 1032(1) of the German Code of Civil Procedure in deciding whether impecuniosity was sufficient to incapacitate an agreement. Its assessment was that to protect the impecunious claimant's right of access to justice, given that impecuniosity would prevent proper arbitral recourse, the court would allow the claimant to seek recourse from the courts while the agreement was rendered 'incapable of being performed'.

B

C

47. On our facts, Art. 14(7) of the KLRCA Rules 2017, the tribunal may "order the suspension or termination of the arbitral proceedings or any part thereof" if deposits of the fees, expenses and administrative costs of the arbitration are not paid in full. Given that the Respondent is unable to procure funds through third-party funding[11] and there is no legal obligation for the Claimant to pay the Respondent's share of the arbitration fees, the arbitration proceedings are practically impossible to continue, thereby rendering the arbitration agreement "incapable of being performed".

D

E

[9] *Heartronics Corporation v EPI Life Pte Ltd* [2017] SGHCR 17
[10] BGH 146, 116
[11] Moot Problem, [61]

A

5. The arbitration agreement should be held incapable of being performed to allow the Respondent right to recourse and access to justice

B

a) <u>The parties' intentions to attain legal recourse should be respected</u>

C

48. An arbitration agreement can be perceived as a contract where the parties' intentions were to resolve future disputes through a different mechanism of enforcement – arbitration. It is unlikely that both parties would have agreed to the arbitration agreement if the right to dispute resolution would be lost if a party lacks the funds to pay for the proceedings. When parties are still bound to an arbitration agreement despite a party's impecuniosity, the impecunious party's right to enforce its underlying substantive rights to recourse are foreclosed. In effect, rendering the arbitration agreement "capable of being performed" seems to have implicitly introduced a waiver of a party's right to enforce claims when the party is impecunious. This is certainly not the intention of parties when entering into an arbitration agreement and the tribunal should respect the real intentions of parties – to attain the legal enforcement of its rights. As such, the arbitration agreement should be rendered "incapable of being performed" so as to allow for parties' intentions to be respected.

D

E

A

b) The Respondent's inability to enforce counterclaims would result in a loss of access to justice

B

49. The French case of *Pirelli*[12] saw the tribunal render an award only with respect to the claimant's claims without dealing with the impecunious respondent's counterclaims as practically they were unable to fund the hearing of counterclaims. The Court of Cassation confirmed that a tribunal's refusal to review claims can affect the right of access to justice and the principle of equal treatment of the parties. The Court hence quashed the tribunal's award.

C

50. On the facts, the Respondent's impecuniosity would prevent the Respondent from being able to enforce counterclaims due to an inability to fund the counterclaims. The tribunal should hence invalidate the arbitration agreement so as to allow the Respondent a fair hearing of the counterclaims within local courts and ensure a right to due process.

D

E

c) The tribunal should render the arbitration agreement "incapable of being performed" to uphold the Respondent's constitutional right of access to justice

51. The Portugese Constitutional Court[13] held that the fundamental right of access to justice enshrined in the Constitution of Portugal, where "justice shall not be denied to anyone due to lack of financial means", prevailed over the enforcement of the

[12] *Pirelli v. LP*, Court of Cassation, Civ. 1re, 28 March 2013, n° 11 - 27.770
[13] *Wall Street Institute de Portugal v Centro de Ingles Santa Barbara, Lda*

arbitration agreement.

52. On our facts, Article 2 of the Cambodian Code of Civil Procedure also guarantees to all persons "right of access to the courts in a civil dispute".[14] Hence, the tribunal should hold the agreement "incapable of being performed" so as to allow the Respondent the same right to access legal recourse in the courts.

B. This tribunal should not permit the request for joinder given the lack of definitive evidence indicating the respondent's desire to be bound by the KLRCA and by extension, the joinder provision.

53. Arbitration is premised on the principle of "*autonomie de la volonte*"[15]. Hence, it is crucial to ascertain consent, either express or implied, before forcing a non-signatory to arbitrate. Consent has been described as the "first principle"[16] of arbitration further emphasising its vitality. Accordingly, any doubt as to a party's provision of consent to the arbitration itself or any aspect of the arbitration must be accorded due weight of consideration by this tribunal.

54. It is thus crucial to note the lack of evidence indicating that the respondent either had a party to play in the adoption of the KLRCA Rules or even expressly or impliedly agreed to it. This is vital for the tribunal to consider as while it has been accepted that adoption of a specific set of institutional rules amounts to consent to the enclosed

[14] Article 2, Chapter 1, Cambodia Code of Civil Procedure 2006
[15] M.P. Bharucha, Sneha Jaisingh & Shreya Gupta, 'The Extension of Arbitration Agreements to Non-Signatories – A Global Perspective', (2016) Vol. 5 Issue 1, Indian Journal of Arbitration Law 35 at 35
[16] Steelworkers v American Mfg. Co., 363 U.S. 564 (1960)

joinder provision[17], there is doubt as to whether Vader even consented to the adoption of the KLRCA rules.

A

55. Correspondingly, it is submitted that there is an insufficient basis to conclude that Vader is covered by the KLRCA Rules and thus the joinder provision. Hence, it may very well but out of this tribunal's scope to assess the applicability of the joinder provision to Vader.

B

C

C. Even if the KLRCA Rules are deemed to be applicable to Vader, the request for joinder should not be granted given the respondents' impecunious state.

D

1. Rule 9 of the KLRCA expressly stipulates a need for consideration of 'any relevant circumstances'.

E

56. As stipulated by Rule 9 of the KLRCA Rules, when entertaining a request for joinder, an arbitration tribunal must "consult all Parties and any Additional Party and shall have regard to any relevant circumstances"[18]. This stipulates a need for a comprehensive examination of the situation at hand, including recognition of the third-party's position on the matter.

2. Vader has made expressly clear its dire financial state and desire to be

[17] Gordon Smith, 'Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules', in Maxi Scherer (ed), Journal of International Arbitration
[18] Asian International Arbitration Centre, Arbitration Rules 2018, Rule 9

detached from RES.

A

57. In compliance with this requirement, this tribunal must pay heed to the impecunious state of the respondent. The respondent's financial state is incredibly parlous following Brexit and their intentional severance of ties with RES reinforces the severity of their financial state.

B

58. Further, it is necessary that this tribunal assess the efficiency and cost-effectiveness of such a joinder[19]. It would be antithetical to commercial sense to obligate a commercial entity in a dire financial state to monetarily support RES in this arbitration. It is submitted that this will only further hinder the arbitration process given the increased complications such a joinder will entail.

C

D

D. Further, the joinder should not be granted given that Vader is not prima facie bound to the agreement as there is no relationship of agency between Vader and RES.

E

59. 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[20]. Contention, if any, arises with regards to the applicable choice of law for this procedural issue. It is submitted that the law to be applied to determine if a non-signatory ought to be bound by an arbitration agreement via joinder should be the law of the seat of arbitration. Hence, Cambodian law is applicable.

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[19] Smith (n 4)

[20] Gary B. Born, *International Commercial Arbitration (Second Edition)*, Kluwer Law International 2014

A

1. There was no implied authority granted by Vader to RES to justify the finding of an agency relationship.

B

60. The Cambodian Civil Code recognises the concept of agency, both as a result of contract and at law[21], thus confirming its applicability to the issue at hand.

C

61. Implied authority necessarily manifests when the acts of the principal and agent 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[22].

D

62. On the facts, there are no indications that Vader granted RES the implied authority to contract in a manner which included Vader as well. If anything, empowering Mr Paredes "to execute any and all agreements on behalf of RES in Cambodia and ASEAN"[23] indicates a desire on the part of Vader to distance themselves from RES and elucidates express indication that the scope of RES' authority is merely to contract for itself as a singular corporate entity. This can be contrasted, for instance, with Mr Kalai Deewarvala's position as "representative of CL"[24], a position which empowered him to "execute any and all agreements regarding CL's B&R projects and CL's communications with RES."[25]. The clear expression that Mr Deewarvala was contracting on behalf of CL contrasted with the authority granted to Mr Paredes on behalf of RES vividly illustrates the lack of implied authority. Hence, an agency

E

[21] Cambodian Civil Code, Section IV. Agency
[22] Born (n 7)
[23] [12], Moot Problem
[24] [11], Moot Problem
[25] *Ibid*

relationship is not manifest.

A

2. Further, there was no apparent authority to justify the finding of an agency relationship.

B

63. Apparent authority necessarily manifests when the principal makes a representation, by words or conduct, to a third party who relies on this representation, without negligence and contracts with the agent, who appears to have actual authority[26].

C

64. To effectively prove apparent authority, it must be sufficiently evinced that first, Vader had made a representation suggesting a willingness to be party to arbitration if

D necessary. Second, to prove reliance, there must be evidence, or at least a credible inference that the claimant would not have contracted if not for this representation. There is no indication, on the facts, that Vader made any representation suggesting that

E Vader would be involved in the arbitration process in any way, shape or form. Correspondingly, there is no indication that the claimants relied on any of the words or conduct of Vader, which suggested such a compliance to arbitration. If anything, it can be inferred that the claimant would have contracted anyway given that the contract was for unique, tailor-made bricks. In the absence of more definitive evidence, it cannot be concluded that there was apparent authority and accordingly, no relationship of agency arises.

E. Further, the joinder should not be granted given that Vader is not prima facie bound to the agreement as they do not belong to the same group of

[26] Born (n 7)

companies.

A

65. 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[27].

B

1. The threshold for finding a 'group of companies' must be high.

C

66. Being a non-consensual theory[28], the threshold for finding a 'group of companies' must necessarily be a high one.

D

67. As discussed above, the hallmark of arbitration is party autonomy and obtaining consent is thus of paramount importance. Hence, given the importance of consent, this tribunal should be especially circumspect of a non-consensual theory such as the 'group of companies' doctrine. Accordingly, the threshold before the theory can be successfully invoked must necessarily be a high one and this tribunal must exercise due caution so as to preserve the integrity of the arbitration process.

E

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

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[27] 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

[28] Born (n 7)

a) A tight group structure between Vader and RES does not exist.

A

68. The signatory and non-signatory parties "should have strong organisational and financial links with each other"[29]. Focus typically turns to the amount of control the parent company has over its subsidiary.

B

69. It is exceedingly clear on the facts that Vader exercises little to no control over RES as the two entities are operationally and financially detached. From the onset of the contract, no control was exercised over RES. Conversely, the execution of the contract and management of the relationship with the claimant were solely controlled by RES. This is evinced by the fact that all communication took place between RES and the claimant directly with no input from Vader whatsoever. Further, the terms of the contract indicate clearly that the two entities are operationally and financially different. This is evinced by the terms "d) Delivery of the bricks at the Seller's warehouse location in Cambodia; e) Payment of the consideration for each delivery (i.e., USD$150,000,000) at least 5 days before the delivery date through online deposit to the Seller's bank account;"[30] which indicate that RES wholly facilitated the entire transaction. Hence, a tight group structure is clearly absent.

C

D

E

b) Vader was not sufficiently involved in the contract to justify concluding that Vader and RES belong to the same 'group of companies'.

[29] T Hadden, 'The Control of Corporate Groups', Institute of Advanced Legal Studies, University of London, 1983

[30] [15], Moot Problem

70. A non-signatory's participation in "negotiation, execution and performance of contract or its conduct towards the party that seeks its inclusion in arbitration"[31] is more crucial to note than merely the general corporate structure[32]. The tribunal must ascertain if the parent company was thus sufficiently active before allowing a joinder.

71. On the facts, it is evident that besides the initial negotiation, Vader was completely un-involved in the contract itself. The conclusion of the contract was carried out by RES, the execution of the contract was solely carried out by RES and payment was made by the claimant directly to RES. It is apposite to note that the disproportionate involvement of the subsidiary vis-à-vis the parent company was contrasted similarly in the ICC cases 7604 and 7610 of 1998[33] where the parent company was consequently found to not have been sufficiently active for the purposes of making out a 'group of companies'. Hence, Vader was certainly not sufficiently involved for the purposes of this doctrine.

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

72. 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[34].

73. The only contact that Vader had with the claimant was in the preliminary negotiation stage and there is no evidence suggesting that there was any discussion regarding

[31] Final Award No.10758 [2000] ICC
[32] *Ibid*
[33] 7604 and 7610 of 1998
[34] Brekoulaskis (n 12)

arbitration or any dispute resolution mechanism for that matter. Following that, all communication was with RES alone; Vader was completely absent. Hence, it is clear that Vader did not in any case evince a strong intention to arbitrate and any allegation from the claimant of a genuine belief is to be regarded as a convenient development given the present financial state of RES.

74. 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[35].

75. Accordingly, it is salient to note that Vader "resolved that the operations of RES should remain independent"[36] on October 2014 and "passed a motion such that no further financing, compliance monitoring, or directives would be given by Vader to RES."[37] in 2016. It is evident that the steps taken by Vader in 2014 and 2016 elucidate a desire to distance themselves from RES through the complete transference of control to Mr Paredes. This further indicates an intention not to be bound to arbitration and to find to the contrary would be to completely disregard Vader's party autonomy.

[35] ICC Award No. 11405
[36] [19], Moot Problem
[37] [27], Moot Problem

F. There was no valid acceptance of the Respondent's offer as the Claimant rejected the offer via his 'side-nod'.

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

76. 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 the *UNIDROIT Principles of International Commercial Contracts 2016* ("*UNIDROIT"*) is not applicable, and Article 4.2(2) should be applied to interpret the Claimant's side-nod instead.

77. Therefore, the side-nod should be interpreted according to a reasonable person in the Respondent's position in those circumstances. In doing so, *UNIDROIT* Article 4.3 allows the court to look at "all" the circumstances surrounding the agreement, which are not necessarily limited to the factors listed in Article 4.3.

78. This is confirmed by Stefan Voganauer's Commentary on the UNIDROIT Principles of International Commercial Contracts[38] ("*Voganauer*"), which clarifies that the list in Article 4.3 is not exhaustive, and that the arbitrators should "take into account as many relevant circumstances as possible" without necessarily using the factors in Article 4.3.

79. According to the facts, this is the first time that the Claimant is using the side-nod in his

[38] Page 587-588, Vogenauer, S. (2015). Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) (Second ed.).

negotiations with the Respondent. There has been no established practice of the side-nod being used as acceptance, and taken at face value the side-nod would look more like a shaking of the head to indicate 'no' rather than yes.

80. Moreover, a reasonable person in the Respondent's shoes would not be familiar with the cultural significance of the Indian side-nod communicating acceptance. This is particularly so given Mr. Parades' unique background – that he spent most of his time in Cambodia and was raised in Mexico City. There is no reason to suggest that he or any reasonable person in his shoes would be familiar with Indian custom, given his lack of exposure to this custom.

2. The Claimant's failure to make payment for the Second Incentive in December 2016 confirmed that there was no valid acceptance.

81. The contract that the Claimant claims to have accepted would have included a 35% payment in December 2016 since the Respondent's final offer was for "35% every December"[39], the 35% referring to the Second Incentive. On a plain reading of these words, this would refer to the December of 2016 as well, meaning that the Claimant would have been contractually obliged to pay the Respondent an amounting equal to 35% of 2016's price (USD$277,725,000)

82. This interpretation is bolstered by the Respondent's initial offer, which was also for "a 35% bonus at the end of each year from now on". This is to be contrasted to the explicit mention of 2017 in the first part of the Respondent's sentence: "we increase the brick

[39] [34], Moot Problem

price in 15% for 2017". This suggests that it was very clear that the bonus should have begun to be paid in 2016.

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83. Moreover, the Claimant displayed a knowledge of this understanding when he clarified that the 35% is "to be paid at the end of each year", which again on a plain reading should also refer to 2016, which had yet to come to a conclusion.

B

84. Therefore, the Claimant's failure to pay the 35% Second Incentive in December 2016 would have bolstered the Respondent's impression that the Claimant did not accept their offer, as it would otherwise mean that the Claimant was in breach of the contractual terms.

C

D

G. Even if there was acceptance, there was an error in expression on the part of the Claimant, which should allow the Respondent to avoid the contract

E

1. The Claimant's intention in the side-nod diverges from the interpretation of the side-nod under UNIDROIT Article 4.2

85. The definition of 'error in expression' as defined in *UNIDROIT* Article 3.2.3 is supplemented by *Voganauer* which states that it covers a situation where the real intention of the declaring party (the Claimant, in this case) differs from the content of the declaration as interpreted under *UNIDROIT* Article 4.2. If there is such a divergence, then there has been an error in expression.

86. As explained above, a reasonable person would have interpreted the side-nod to be a

rejection of the Respondent's offer. This clearly diverges from the Claimant's real intention to accept the Respondent's offer. On the face of it, there is an error in expression here.

A

B

2. The Respondent should be allowed to avoid the contract as the Claimant should bear the risk of using an ambiguous means of communication to accept the Respondent's offer.

C

87. Article 3.2.3 continues to provide that if the sender of the message knew or ought to have known that its method of transmission or communication was "unsafe" in the special circumstances of the case, then the risk of the error should be imposed on the sender.

D

88. *Vogenauer* clarifies that the term "unsafe" also refers to the method of communication being "unreliable". On the facts, the Claimant's method of communication was ambiguous and unreliable as a side-nod is neither a clear acceptance (like the nod of a head) or a clear rejection (like shaking one's head).

E

89. This is further fortified by the fact that the Indian side-nod is something that is known to be "deliberately vague". A BBC Travel article[40] wrote that "the head nod is a gesture meant to convey ambiguity and does so effectively."

90. Pradeep Chakravarthy, a writer from Chennai and a corporate behaviour consultant, adds that this gesture is the "Indian way of both dealing with grey areas and leaving the

[40] Charukesi Ramadura, (2018, 23 July). Cracking India's mystifying 'head nod'. *BBC Travel*. Retrieved from http://www.bbc.com/travel/story/20180722-cracking-indias-mystifying-nod-code

door open in all major and minor relationships."

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91. Therefore, given the Claimant's deliberate use of an ambiguous gesture, they should also assume the risk of this gesture being misunderstood, and should not be allowed to argue that they did accept the Respondent's offer.

B

H. Alternatively, the Claimant should be estopped from claiming that the contract is existent as they caused the Respondent to understand that they rejected the Respondent's offer.

C

92. This is laid out in Article 1.8 of *UNIDROIT*, which was explained by *Voganauer* to be a restatement of the essence of estoppel and *venire contra factum proprium*[41]. He continues to lay out four requirements for the provision to be applied:

D

a. One party must cause an understanding in another party.

E

b. The other party acted in reasonable reliance on that understanding.

c. There must be an inconsistent behaviour from the first party.

d. The other party must have reasonably acted in reliance, and to its detriment.

93. It is submitted that all four requirements are made out on the facts.

[41] *Voganauer* (n 38), page 226

A

1. The Claimant caused the Respondent to understand that they rejected the Respondent's offer.

B

94. The 'understanding' that the first party caused in the other party can include an understanding that the first party has agreed to an offer, according to *Voganauer*[42]. Moreover, it goes on to state that such an understanding simply needs to be 'caused' by the conduct of the first party, and a particular action like misrepresentation is not required.

C

95. This is made out on the facts, since it is not contended that the Claimant's side-nod did cause Mr. Parades to understand that the Claimant rejected the Respondent's offer.

D

2. The Respondent reasonably relied on this understanding to cease their supply of bricks to the Claimant

E

96. From November 2016 to mid-March 2017, the Respondent relied on the understanding that their contract with the Claimant had come to an end. According to Vogenauer's commentary and the Official Comment on the Article itself, whether this reliance is reasonable depends on:

a. The communications and the conduct of the parties

b. The nature and setting of the parties' dealings

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[42] *Ibid*

c. The expectations that each could reasonably entertain of the other.

A

97. Moreover, the standard is objective, so the test is whether a reasonable person in the shoes of the other party would have acted in a similar fashion.

B

98. On the facts, the Respondent was under no duty to check with the Claimant over these three months whether the contract had really been accepted or rejected. Based on their past practices, there was usually no communication between the parties between one negotiation to another.

C

99. However, this was a new contract based on a much larger amount and for a longer duration. It was reasonable for the Respondent to have expected the Claimant to put these terms in writing or to at least confirm it over email (as they did on the previous occasion), if the Claimant had indeed accepted the offer.

D

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100. Moreover, as explained above, a reasonable person in the Respondent's shoes would have reasonably relied on the Claimant's side-nod as the basis for their understanding that there was no new contract with the Claimant. There was no reason for the Respondent to believe that the Claimant's side-nod was a refusal, particularly given Mr. Parades' lack of familiarity with Indian culture

3. The Claimant subsequently behaved in a manner inconsistent with the understanding that they rejected the Respondent's offer

101. The Claimant behaved in an inconsistent manner by claiming later that they did in fact

accept the Respondent's offer. This is evinced in their serving the Respondent with the notice of arbitration in September 2017.

A

4. The Respondent acted in reliance of the understanding the Claimant caused to its detriment

B

102. The Respondent's reliance on the understanding which the Claimant caused led it to take on new clients and to move forward on the assumption that they would not be required to produce any more bricks for the Claimant. It was this that led to their non-delivery of bricks to the Claimant in 2017, which in turn led to the Claimant serving them with the notice of arbitration in September 2017.

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103. This is of great detriment to the Respondent, as they now have to incur legal costs in contending the arbitration and expend time and energy in settling this dispute in court.

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104. Therefore, because all four requirements have been fulfilled, the Claimant should be estopped from claiming that the contract is existent.

I. The Tribunal should declare that the contract was terminated on 23 November 2016.

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1. The Tribunal has the power to rule on whether there was valid acceptance of the Respondent's offer, which would render the contract terminated on 23 November 2016 if it found in favour of the Respondent.

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105. Since this would mean that there never was a contract to begin with, the court has nothing further to do apart from announcing its decision.

D

2. The Tribunal should also allow the Respondent's counterclaim c) if it rules in the Respondent's favour.

E

106. Counterclaim c) includes all the costs (including interest) incurred by the Respondent in fighting the arbitration proceedings and claims raised by the Claimant, which have been found to be unmeritorious.

J. In the alternative, the Tribunal should allow the Respondent's counterclaims a) and b), if specific performance is ordered.

1. The Claimant is obliged to pay the contract price for the Respondent's bricks before performance can be effected.

107. The specific performance that the Claimant is asking for involves the Respondent's delivery of the bricks. According to the terms of the original contract in 2013, the payment of the consideration for each delivery is to be deposited into the. Respondent's bank account at least 5 days before the delivery date. Therefore, the Claimant would be contractually obliged to pay the agreed upon price for each delivery of bricks before the Respondent is obliged to deliver.

108. This is fortified by *UNIDROIT* Article 7.1.3, which states that where the parties "are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.". Here, the party that is to perform later is the Respondent, and the Tribunal should accordingly allow counterclaims a)iv and a)v to be paid before the Respondent is required to deliver the bricks. This should also include counterclaim b)ii, which is for interest.

2. The Claimant is obliged to pay the Second Incentive payment in December 2016, which is a precursor to the contract's existence.

109. As explained above, the contract properly construed should include a payment of the

Second Incentive in December 2016. The Tribunal should therefore allow counterclaim a)i, which is the amount for this payment. Otherwise, the contract between the Claimant and Respondent would have already been breached.

3. The Claimant is obliged to pay the two payments for the "Second Incentive" after the Respondent's bricks are delivered.

110. *Voganauer's* commentary on Article 7.1.4 states that "once cure is properly effected, the aggrieved party has to comply with its obligations and is, for instance, obliged to pay the contract price."[43]

111. In this case, these obligations will be their contractual obligation to pay the price for the Second Incentive for 2017 and 2018.

VII. PRAYER FOR RELIEF

112. For the foregoing reasons, the Respondent respectfully requests the Tribunal's ruling that:

a. There was no valid acceptance of the Respondent's offer, and there is no contract between the Claimant and the Respondent.

b. In the alternative, that all the Respondent's counterclaims be allowed.

Dated this 21st day of September 2018.

COUNSEL FOR THE

RESPONDENT

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[43] *Ibid*, page 850