C1810-C

THE 13TH LAWASIA INTERNATIONAL MOOT COMPETITION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION 2018

Chuizi Leishen's LLC

(CLAIMANT)

vs

Robustesse Espacial Solucion Corp

(RESPONDENT)

MEMORIAL FOR CLAIMANT

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TABLE OF ABBREVIATIONS

Abbreviation	Full Text
Art.	**Articles**
Arbitration Rules	**KLRCA Arbitration Rules 2017**
B&R	**Belt & Road Initiative**
Cambodia	**Kingdom of Cambodia**
CEO/CEOs	**Ms. Lee Qiang Bi and Mr. Auld Chap**
China	**People's Republic of China**
CISG	**United Nations Convention on Contracts for the International Sale of Goods**
CLAIMANT/CL	**Chuizi Leishen's LLC**
Contract	**The agreement executed by CLAIMANT and the Robustesse Espacial Solucion Corp**
e.g.	**For example**
EU	**European Union**

First Incentive	**A 15% price increase in exchange for 4 future deliveries**
ICC	**International Chamber Of Commerce**
KLRCA	**Kuala Lumpur Regional Centre for Arbitration**
Ltd.	**Limited**
Para.	**Paragraph**
Parties	**CL and RES**
Representatives	**Mr. Kalai Deewarvala & Mr. Armando Paredes**
RESPONDENT/RES	**Robustesse Espacial Solucion Corp**
Sec.	**Section**
Second Incentive	**A 35% bonus for successful completion of 4 deliveries**
TPF	**Third-Party Funding**
UK	**United Kingdom**
UNIDROIT	**The International Institute for the Unification of Private Law**
UNIDROIT Principles	**UNIDROIT Principles of International Commercial Contracts 2016**

Vader **Vader Ltd**

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STATEMENT OF JURISDICTION

The Chuizi Leishen's LLC and the Robustesse Espacial Solucion Corp jointly submit the present dispute to the Kuala Lumpur Regional Centre for Arbitration ('KLRCA'), Cambodia, pursuant to the KLRCA arbitration Rules ('KLRCA Rules'). This Tribunal, therefore, has the jurisdiction to adjudicate the dispute.

QUESTIONS PRESENTED

A) Is the agreement to arbitrate incapable of being performed due to impecuniosity of the Respondent?

B) Should the request of the Claimant to join Vader as a party to the Arbitration be granted by the Tribunal?

C) Was there a valid acceptance of the Respondent's offer?

D) What relief should the Tribunal grant?

STATEMENT OF FACTS

CLAIMANT, Chuizi Leishen's LLC [hereinafter referred to interchangeably as "CLAIMANT", "CL" OR "Buyer"] is a private entity and a commercial company incorporated under the laws of the People's Republic of China that specializes in construction.

RESPONDENT, Robustesse Espacial Solucion Corp [hereinafter referred to interchangeably as "RESPONDENT", "RES" or "Seller"] is a wholly owned subsidiary of Vader and a limited company incorporated under the laws of Cambodia, which specializes in production and selling of bricks.

In February 2013, both the Buyer and the Seller [hereinafter referred to individually as a "Party" and jointly as the "Parties"] contacted a business agent to set up meeting with CEOs and to make further arrangements to discuss business.

On 29th May 2013, the CEOs of both parties met at the KLRCA and decided that a formal contract should be executed.

For the purpose of drafting and negotiating the contract between the CL and RES, both parties employed legal representatives. The Buyer employed Mr.Kalai Deewarvala as the representative of CL and the Seller employed Mr.Armando Paredes to execute agreements on behalf of RES in Cambodia and ASEAN.

In September 2013, Mr.Paredes and Mr.Deewarvala [collectively, the "Representatives"] had drafted, revised and signed the "Contract". It was the "FIRST" contract signed by the Buyer

outside of China and the “FIRST” contract signed by the Seller since its incorporation. The contract contained an arbitration clause.

The first three deliveries of 2014 were performed successfully.

In October 2014, Vader started to be affected by the possibility of an upcoming ‘BREXIT’ and its Board of Directors decided that the operations of the RES should remain independent.

In November 2014, at Mr.Deewarvala’s request the Representatives met in Paris. The Buyer offered to pay a 15% price increase-the “FIRST INCENTIVE”, if the Seller committed to perform 4 more deliveries during 2015. Seller accepted the offer.

The fourth delivery and the four deliveries of 2015 were performed.

In November 2015, the Representatives crossed emails and decided to extend the agreement throughout 2016 for four more deliveries and a second 15% price increase. No formal agreement was executed.

During the first half of 2016, the Seller realised that the price of bricks in ASIA had risen and was aware that greater profits would be attainable if an agreement was entered into with another counterpart; yet, relied on the strength of the relationship with the Buyer. The Seller was on the top of the enormous sunken costs and loss profits; yet, hired a team of local Cambodian in-house-counsels.

On 23rd June 2016, UK left the EU and it annIhilated the business of Vader in the EU. Vader’s Board of Directors passed a motion saying that no directives would be given by Vader to RES.

Since July 2016, the parties started to communicate and to seek a new round of negotiations; yet, they were unable to come to terms for more than four months.

While negotiations were continuing, the first three deliveries of 2016 were performed.

On 23rd November 2016, the Representatives had a final Skype call. The Buyer knowing that the Seller wanted to terminate the contract, proposed to maintain the FIRST incentive (15% price increase and four more deliveries) and to give a 'BONUS' to the Seller after four compliant and timely new deliveries as the "SECOND INCENTIVE". The Seller demanded to increase the price and intended to set the second incentive at a 35% of the price to be given at the end of each year. Mr.Deewarvala before the termination of the Skype call responded with an Indian head nod and accepted the Claimant's offer.

Since then no communications were sent/received by and between the parties.

In Mid-March of 2017, the Buyer contacted the Seller to confirm the deliveries.It was then brought to attention that there was a misunderstanding.

On 15th August 2017, the Buyer served the Seller with a notice of Arbitration and a copy of the said notice was filed with AIAC.

On 15th September 2017, the Respondent served its response and thereby, denied the Claimant's claim.

On 15th December 2017, a three-member Arbitral Tribunal was constituted.

In February 2018, a preliminary meeting was called via conference call.

SUMMARY OF PLEADINGS

A.RESPONDENT'S IMPECUNIOSITY DOES NOT RENDER THE AGREEMENT TO ARBITRATE INCAPABLE OF BEING PERFORMED

An arbitration agreement by its inherent nature is binding upon the parties, once the parties have consensually agreed upon it. Moreover, in instances, such as the case at hand, where the purported impecuniosity of the RESPONDENT was not caused by the loss of profit as a consequence of the contract itself or due to the conduct of the Claimant, impecuniosity does not render an agreement to arbitrate inoperable. In addition, the KLRCA rules provides for the Claimant to pay the fee in full and proceed with the arbitration, in the event the Respondent if unable to pay, and in as much as the Claimant has already made the initial advance deposit and facilitated the RESPONDENT to access the justice, the agreement to arbitrate stand valid in Law.

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

The parties involved are obliged to fulfill the requirements, in order to give effect to the agreement to arbitrate. Although, RESPONDENT's attempts had failed in seeking funding from third-parties, Claimant expressed its intention of filling a request for the RESPONDENT's parent company, Vader, to join the arbitration under Rule 9 of KLRCA Arbitration Rules. According to Claimant's point of view, Vader, though a non-signatory to

the contract, has played an active and significant role in the conclusion of the contract and even during the performance of the contract. Therefore, there is no any obstacle in extending the contract to Vader, thenon-signatory parent company, in view of the legal principle which holds that especially when there is a company who hides behind an artificially created veil and alleging that it cannot be considered to be responsible since it did not sign the contract containing the arbitration agreement (concerning the veil piercing theory), such parent company can be made parties to the agreement. Moreover, , since there is a demand for funding, Claimant holds that as an affiliate to the RESPONDENT, Vader shall exercise its duties as a third-party funder, by all means necessary.

C. THERE WAS A VALID ACCEPTANCE OF THE RESPONDENT'S OFFER.

The Respondent's offer was validly accepted in accordance with the Article 2.6(1) of Unidroit Principles. An indication of assent as required by the law was given to the Respondent's offer. An interpretation of the Claimant's conduct, in terms of Article 4.2(1)of the Unidroit Principles, during the final negotiations, further stabilizes its intention of contracting with the Respondent. In a cross cultural international contract the conduct of the parties should be interpreted in accordance with the context, i.e. "culture". Accordingly, the Claimant's head nod is an assent in the cultural context of the contract in view of the fact that the agent of the Respondent had contracted with the Claimant for over four years, and the duties the agent had in ASEAN gives way for an objective interpretation in understanding the acceptance. In consequence, it is reasonable to assume that the Respondent comprehended the acceptance given the experience the agent has had in South Asia which popularly uses the

Indian head nod as an affirmation and it is further substantiated by the fact that the Respondent made no indication of doubt or requested for clarification,.

D. THE TRIBUNAL SHOULD DECLARE THAT THE CONTRACT WAS EXISTENT AND ENFORCEABLE, ORDER RESPONDENT TO PERFORM THE FIRST TWO DELIVERIES OF 2017 AND ORDER THE TERMS OF THE CONTRACT TO BE IN WRITING.

Reliefs sought by the CLAIMANT, particularly a declaratory relief over the enforceability of the contract, specific performance of first two deliveries of 2017 and execution of a written, formal contract , if not otherwise jeopardize heaps of rights of the parties in respect of the contract.

PLEADINGS

A. RESPONDENT'S IMPECUNIOSITY DOES NOT RENDER THE AGREEMENT TO ARBITRATE INCAPABLE OF BEING PERFORMED

An arbitration agreement is binding upon the parties.[1]Even if a party to the arbitration agreement claims to be impecunious, the other party is given the opportunity to pay the initial deposit and to proceed with arbitration.[2] It is only in a case where party impecuniosity is caused by the loss of profit subsequent to the contract or due to the conduct of the other party; that an arbitration agreement would be rendered incapable of being performed.[3] However, the purported impecuniosity of the Respondent is not caused by the loss of profit subsequent to the contract or due to the conduct of the Claimant, and therefore, it does not render the agreement to arbitrate inoperable.

1.1 AN ARBITRATION AGREEMENT BY ITS INHERENT NATURE IS BINDING UPON THE PARTIES

Once parties execute an arbitration agreement referring to a particular set of arbitral rules; such parties are deemed to be bound by that arbitration agreement.[4] According to Rule 1 of the KLRCA Rule, by which the contract in dispute is governed; whenever parties have agreed upon to decide their disputes in accordance with KLRCA Rules then; such rules shall apply

[1] For example Arbitration rules of KLRCA; ICC; CIETAC; ICDR; CPR.

[2] KLRCA, r 14.

[3] *Fulgensius Mungereza v. PricewaterhouseCoopers Africa Central* 2010, Volume xxxv Yearbook Commercial Arbitration, Kluwer Law International 2010.

[4].For example Arbitration rules of KLRCA; ICC; CIETAC; ICDR; CPR

to resolve, settle, and to administer their disputes in accordance with 'KLRCA Rules' unless otherwise agreed by parties.[5] This strong approach based on the principle of the binding force of the arbitration agreement is recognized in several jurisdictions, particularly in England, Wales and France for a long period of time. In the case of *Haendler & Natermann GmbH v Janos Paczy*, dealing with an impecunious party, the Court of Appeal in England and Wales ruled that: *" the incapacity of one party to the agreement to implement its obligations under the agreement does not[...]render the agreement one which is incapable of performance[...]"* [6] Following the same ruling in *Nasharty decision* it was held that: *"inability of one party to meet his financial obligations under the ICC or comparable Rules or procedures does not render the arbitration agreement inoperative or incapable of being performed…"*[7]

Since parties to the dispute have agreed upon an arbitration agreement governed by 'KLRCA Rules', they are required to cover the costs of arbitration including preliminary advance deposit, administrative fees and expenses of the arbitral tribunal and arbitrators.[8] Further, pursuant to Rule 13 of KLRCA; the parties are at liberty to agree on the fees and expenses of the arbitral tribunal within a period of 30 days from the appointment of the arbitral tribunal.[9] Even if an arbitration agreement imposes several financial burdens, where an impecunious party finds it hard to confront; simultaneously it provides room to the parties to agree upon a

[5] KLRCA, r 1

[6] Patricia ŽIVKOVIĆ*, 'Impecunious Parties In Arbitration: An Overview Of European National Courts' Practice' (2016) Vol. 23 Croatian Arbitration Yearbook <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2884416> accessed 25 August 2018.; *Haendler & Natermann GmbH v Janos Paczy*

[7];*Amr Amin El Nasharty v J Sainsbury Plc* [2007] Court of Appeal - Commercial Court, EWHC 2618 (Comm) (Court of Appeal - Commercial Court).; Ibid.

[8]KLRCA, r 13

[9] KLRCA, r 13

'fee agreement'.[10] Hence, even if a party claims to be impecunious; an arbitration agreement itself requires the parties to be bound by its monetary obligations including costs of arbitration in order to proceed with arbitral proceedings.

Thus, in this dispute, regardless of the RESPONDENT's claim that it is under financial distress due to its excessive debts, heavy operational costs, and insufficient income; its state of impecuniosity does not render the agreement to arbitrate inoperable.

1.1.1. RESPONDENT HAS CONSENSUALLY AGREED TO ARBITRATE

"*Arbitration is a process by which parties consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudication procedures affording the parties an opportunity to be heard*".[11] Therefore, whenever a dispute is referred to arbitration by the parties, it is considered that the parties have validly given their consent to arbitration and such consent cannot be unilaterally withdrawn.[12]

Therefore, the Respondent cannot withdraw the consent given to arbitrate the dispute, through the arbitration clause, simply based on their impecuniosity.[13]

[10]KLRCA, r 13(4), "a document concluded between parties to agree upon the fees and expenses of the tribunal within the period of 30 days from the appointment of the arbitral tribunal".

[11] Gary B. Born, *International Commercial Arbitration,* (2nd edn, Kluwer Law International 2009) 217.

[12]Cisse Daouda, 'THE VALIDITY OF INTERNATIONAL COMMERCIAL ARBITRATION AGREEMENT' (2016) Vol.4 Global Journal of Politics and Law Research <http://www.eajournals.org/wp-content/uploads/The-Validity-of-International-Commercial-Arbitration-Agreement-1.pdf> accessed 24 August 2018.

[13] KLRCA Model Arbitration Clause, "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with KLRCA Arbitration Rules".

1.1.2 SINCE A VALID ARBITRATION AGREEMENT EXISTS, PARTIES ARE UNDER OBLIGATION TO REFER TO ARBITRATION

Article I of the Geneva Protocol, Article II of the New York Convention and the Article 7 of the UNCITRAL Model Law on Arbitration require the parties to 'recognize' the arbitration agreement and they do not create 'free-standing' duties to arbitrate, but these rather give effect to the parties' contractual obligations to submit their disputes to arbitration and to participate affirmatively in the arbitration process to which parties are referred.[14] Therefore, the RESPONDENT, being a party to a 'valid agreement' is bound by the arbitration agreement.[15]

1.1.2.1. THE AGREEMENT IN DISPUTE CAN BE RESOLVED THROUGH THE ARBITRATION

Recognising the arbitral proceedings as a neutral forum to resolve disputes, the English High Court, in the case of *Philpott & Orton v. Lycee Francais Charles De Gaulle School*, held that where an argument of arbitrability is raised, as a matter of substance the court shall consider whether the dispute can be resolved through arbitration as a matter of practice.

Thus, the underlying dispute, whether the contract in dispute is existent and enforceable, could be easily resolved through arbitration.

[14]Art.1, The Geneva Protocol on Arbitration Clauses 1923: Art.II, New York Convention 1958: Art.7, UNCITRAL Model Law on Arbitration: ibid.

[15] Conditions relative to the parties and substantive conditions for a valid international commercial arbitration agreement are fulfilled, namely; the legal capacity to agreement, common intention to be bound by the agreement, the consent, and the formalities where the agreement is required to be in written form; see also Article II(2) of New York Convention; Article 7(2)of UNCITRAL Model Law.

1.1.3 IMPECUNIOSITY OF RESPONDENT IS NOT CAUSED BY THE CLAIMANT NOR THE 'CONTRACT' ITSELF

According to UNIDROIT principles; the RESPONDENT is entitled to claim its state of impecuniosity, only in two specific instances, i.e. if the RESPONDENT is deemed to be an aggrieved party due to its impecuniosity caused by the loss of profit, as a consequence of the contract itself or if the RESPONDENT has been deprived of any monetary gain relating to the contract, as a consequence of the conduct of the Claimant.[16]

The above principle was given judicial recognition by the Supreme Court of Uganda in a case dealing with an impecunious party and therein the court concluded that; *"the poverty or being penniless of a party is not a sufficient reason for exercising discretion to refuse to stay proceedings on the ground that the agreement is incapable of being performed and, in order to justify the exercise of the discretion in favour of such party, it has to be established that the party's impecuniosity was caused by the other party to the contract"*.[17]

Since there is not any form of conduct by the Claimant which caused the purported impecuniosity of the RESPONDENT, the agreement to arbitrate is valid and operable, and can not be overlooked.

[16] UNIDROIT Principles, Art.7.4.2.

[17] Zivkovic (n 6) p.44; *Fulgensius Mungereza* (n 3).

1.1.3.1. RESPONDENT'S OWN ACTIONS CAUSED ITS STATE OF IMPECUNIOSITY

In the case at hand, the RESPONDENT has failed to perform its delivery obligations and since it omitted to renegotiate with the Claimant; RESPONDENT is not only prevent from recovering damages, but also it is prevented from avoiding or withdrawing the contract and from using the Claimant's failure as a defence.[18]

1.2. KLRCA RULE 14 ALLOWS THE PERFORMANCE OF THE AGREEMENT TO ARBITRATE

The 'Parties' to the contract clearly agreed upon to decide any kind of dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, invalidity thereof to be settled by arbitration in accordance with 'KLRCA Arbitration Rules'(hereinafter referred to as KLRCA). [19] KLRCA Rule 14, provides as follows:

"In the event of a party's failure to pay the provincial advance deposit, which is an amount intended to cover the costs of arbitration; the other party is given the opportunity to make the required payment within a specified period of time".[20] Once the deposit is paid in full, the arbitral tribunal shall proceed with the arbitral proceedings.[21]

[18] '*Coal* case', [2006]; CLOUT case No.124 [1995]; CLOUT case No.176 [1996]; see also UNCITRAL Digest 2016, pp.385-388.

[19] Moot problem, para.15.

[20] KLRCA, r 14.

[21] KLRCA, r 14.

Although the RESPONDENT has refused to pay its share of the deposit, the CLAIMANT has paid for the initial security deposit for both parties; which means that the CLAIMANT has already initiated the arbitral proceedings and thereby arbitration proceedings are already underway between the Parties under the contract, and no court would assume the jurisdiction over the dispute.

Therefore, RESPONDENT being impecunious would not render the agreement to arbitrate inoperable since the CLAIMANT has already initiated arbitral proceedings in accordance with KLRCA Rule 14.

1.3. RESPONDENT WOULD NOT BE ENTITLED TO RAISE ITS COUNTERCLAIMS

Once the Respondent submits its counterclaims, separate advance preliminary deposits on costs are fixed by the Director for the claims and counterclaims.[22] When such deposits are fixed, each of the parties to the dispute shall pay the advance preliminary deposit corresponding to its claims.[23] In such event, if a party fails to pay the required deposits corresponding to its claims, such party would not be entitled to establish its claims and subsequently the other party would be given an opportunity to make the required payment within a specified period of time to continue arbitral proceedings. However, if such payment is not made in full, pursuant to Rule 14(7), "the arbitral tribunal may, after the consultation with the Director, order the suspension or termination of the arbitral proceedings or any part thereof".

[22] KLRCA, r 14(6)

[23] KLRCA, r 14(6)

Despite the procedural obstacle between RESPONDENT and relief due to its impecunious situation to bring the counterclaims in arbitration; the KLRCA procedural rules, which agreed upon by parties at the time of contract, facilitate the CLAIMANT to go ahead with arbitral proceedings under Rule 14(7) disregarding the Respondent's counterclaims.

1.3.1 THERE IS NO VIOLATION OF HUMAN RIGHTS

Even if the tribunal allows the claimant to go ahead with arbitration once he paid the initial security deposit, it does not violate the Respondent's rights because by entering into arbitration agreement itself the RESPONDENT has waived the right to access courts (**1.3.1.1**) and, Claimant paying the initial security deposit has even facilitated the RESPONDENT to access justice through its agreed justice mechanism i.e. arbitration (**1.3.1.2**) and hence, there is no violation of human rights.

1.3.1.1 THE RIGHT TO ACCESS COURT IS WAIVED

Modeling the universally accepted principle that everyone is entitled to a fair trial and public hearing within a reasonable time, UNCITRAL Model Law on Arbitration refers that the parties shall be treated equally and each party shall be given a full opportunity of presenting its case.[24]

Nevertheless, the right to court becomes a waiver notably in the scope of arbitration.[25] This is meant that there is a delimitation of the supervision and assistance of the courts related to arbitral proceedings; where, the contracting parties enter into an arbitration agreement, the

[24]UDHR, Article 10; ECHR, Article 6(1); UNCITRAL Model Law

[25] *Deewer v. Belgium* [1980] App.no. 6903/75; held that an agreement to arbitrate constitutes a waiver of right to courts.

conclusion of the arbitration agreement itself waives the right of access to justice before the court(s) except in certain matters where so provided by the law.[26] Thus, it could be interpreted that once a party concluded an arbitration agreement, it waives the right to access justice before the courts and right to public hearing; in order to guarantee the confidentiality of arbitration proceedings, which is inherent to arbitration itself. [27]

Thus, the RESPONDENT being a party to the arbitration agreement, has waived its right to access to courts, justice and right to public hearing and thus, there is no violation of human rights.

1.3.1.2 THE CLAIMANT HAS FACILITATED THE 'RESPONDENT' TO ACCESS JUSTICE

For the commencement of arbitration a non-refundable registration fee and a provincial advance deposit shall be paid by the parties and if one party fails to do so the other party is given an opportunity to make the relevant payment.[28] Since the CLAIMANT has paid the initial security deposit for both parties, arbitral proceedings are opened even for the RESPONDENT, and thus in fact the the continuation of the arbitration proceedings safeguard the RESPONDENT's rights to justice.

In the totality of the above circumstances, the Claimant submits that the agreement to arbitrate is valid in law, irrespective of the purported impecuniosity of the RESPONDENT,

[26]UNCITRAL Model Law on Arbitration, Article 5.

[27]Zivkovic (n 6) p.38; KLRCA, r 16.

[28]KLRCA, r 2 together with r 14; "if any of the parties fails to pay such deposit […] the tribunal shall not proceed with the arbitration proceedings.."

and safeguards the RESPONDENT'S right to access justice through arbitration, even when the RESPONDENT is unable to bear the costs of arbitration.

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

The CLAIMANT submits that Respondent's parent company, Vader, should be joined as a party to the arbitration procedure under Rule 9 of KLRCA Arbitration Rules, since, there is no obstacle for the extension of the arbitration agreement to third parties **(1)**, and because there is a rising demand for funding on the issue at hand (**2**).as submitted below.

2.1 ARBITRATION AGREEMENT CAN BE EXTENDED TO THIRD-PARTIES

Since the arbitral tribunals are faced with the issue regarding the extension of the arbitration agreement to non-signatories or third parties more frequently, the question whether an arbitration agreement can or cannot be extended has been answered in the affirmative.[29] However, a non-signatory or a third party become obliged to arbitration proceedings depending on the non-signatory's participation in contract formation (**1.1**), and the 'veil piercing' theory (**1.2**).

2.1.1 NON-SIGNATORY PARTICIPATION IN CONTRACT FORMATION

Whenever a non-signatory is brought into arbitral proceedings, the arbitral tribunal has to consider whether the non-signatory took an active and substantial part in the formation,

[29] I.A.Rodler, 'When are non-signatories bound by the arbitration agreement in international commercial arbitration?',(DPhil thesis,2012).

negotiation or the performance of the main contract and on the other hand whether the inclusion of the third party related to the matter in dispute,which allows the tribunal to access valuable information to make a just decision.[30] According to International Chamber of Commerce (hereinafter;ICC) Case No.7155[31], and ICC Case No.11160, involvement at the time the contract was concluded as well as the role played at the time of the contract formation justifies the joinder of a third party[32]

Notwithstanding the fact that Vader, the third party that sought to be bound, argues that it never entered into a contract with the Claimant and hence it is not bound by the arbitration agreement; its clear manifestation of assent is not necessary since it has performed a significant role at the time of contract formation by taking part in the negotiations at the contract formation where the CEO's of both the Vader and CLAIMANT met at the 'Privacy and Confidentiality in Arbitration' talk on 29th May 2013 at KLRCA.[33] Therefore, Vader shall be brought into arbitration as a non-signatory third party to proceed with arbitral proceedings based on the significant role played by Vader as the parent company at the formation of the contract.

[30] I.A.Rodler, 'When are non-signatories bound by the arbitration agreement in international commercial arbitration?',(DPhil thesis,2012).

[31]ICC Case No. 7155 [1993].

[32] ICC Case No.11160 [2005].

[33] Moot Problem, para.10, "The CEOs met at the 'Privacy and Confidentiality in Arbitration talk on 29 May 2013 at KLRCA and during the discussions found a mutual business opportunity and decided to execute a formal contract".

2.1.2 CLOSED CORPORATION SET THE BASES FOR 'VEIL PIERCING' THEORY

As per the *Simmons Creek Coal Co v. Doran* [34] which explains the piercing the corporate veil theory, the entity that exists behind the signatory in certain cases, becomes eventually responsible for actions or omissions of the signatory party and it is not allowed to hide behind the company that signed the agreement as away to avoid its responsibility.[35]Further the theory sustains that 'piercing the corporate veil' disregards the separation between the companies organized in corporate form with limited liability of shareholders.[36]

2.1.2.1. THE PARENT HAS EXERCISED COMPLETE DOMINATION OVER THE SUBSIDIARY

To pierce the veil behind the corporate affiliate and to justify the jurisdiction over a parent company who alleged that it cannot be considered responsible since it did not sign the contract containing the arbitration agreement; it is necessary to establish that the said parent company exercised complete domination over the subsidiary.[37]

In the case at hand, the RESPONDENT is a wholly owned subsidiary of Vader and since, Vader has financed, monitored, and has given directives to the RESPONDENT until 23rd of

[34] *Simmons Creek Coal Co. v. Doran* [1892] 142 U.S. 417.

[35] Rodler (n 29) 1-97

[36] Yaraslau Kryvoi, 'Piercing the corporate veil in international arbitration" (2011) Global Business Law Review 169.

[37] Kryvoi (n 35) 169-189; Rodler (n 29) 1-97

June 2016, it could be easily proven that Vader being the sole shareholder of RESPONDENT has exercised complete domination over its subsidiary to a substantial extent.[38] This is further substantiated by the motion passed by the Directors on the 23rd of June 2016, where they took a decision to stop further financing, compliance monitoring, or directives, which in turn proves that VADER at the formation as well as the pendency of the contract has had a substantial control over the RESPONDENT through financing, compliance monitoring, and giving directives.

2.1.2.2. THE RESPONDENT IS A VICTIM OF CORPORATE ABUSE

Vader being the sole shareholder of the RESPONDENT has used its domination over the subsidiary until 23rd of June 2016 and thereafter, Vader's Board of Directors passed a motion saying that no further financing, compliance monitoring, or directives would be given by Vader to RESPONDENT. Since then, due to the abusive conduct of the Vader, the RESPONDENT has not supplied with adequate capital and therefore it has been operating with no profits on top of enormous sunken costs.[39]

However, giving such command Vader is evincing its intention to invoke the legal separation as a liability shield; but, since the Vader and RESPONDENT has shared a common economic roof and since Vader has given chain of commands to RESPONDENT, the corporate veil can be pierced to prevent RESPONDENT being a victim of corporate abuse.[40]

[38] Moot problem, para. 8 & 27.

[39] Moot problem, para.6.

[40] Moot problem,para.27: Rodler (n 29) 1-97.

2.1.3. THE IMPLIED ACQUIESCENCE OF THE PARENT COMPANY IN THE FORMATION OF CONTRACT

Although it is the general rule that the parent company will not be liable for acts of their subsidiaries; there is an exception to this definite rule under the "group of company"doctrine. [41] This doctrine was elaborated in the Dow Chemical case, in which the tribunal relied on *"the common intent of the parties … as it appears from the circumstances that surround the conclusion and characterise the performance and the termination of contract"*.[42] To rely upon the group of company theory, it is required to establish that the implied acquiescence of the parent company is presented in contracts entered by the subsidiary.[43] However, to apply this doctrine it must be proved that the company played an active role in the conclusion and the performance of the contract.[44] Saying that, it is important to consider the specific characteristics of the relationship between the parties to the dispute and the non-signatory. Therefore, in the context of international commercial arbitration, the arbitration agreement can be extended to the parent company of the signatory; provided that "the non-signatory party was involved in the conclusion, performance or termination of the contract in dispute in some way"[45] This doctrine has been applied in ICC Cases No. 5721 and 5730, in which the

[41] Rodler (n 29) 1-97.

[42] *Dow Chemical Case,* ICC Case No.4131 [1984] YCA 131.; Ibid.,

[43] Rodler (n 29) 1-97.

[44] Ibid 42

[45] Ibid 43

arbitral tribunal concluded that the arbitration clause that had been signed by the subsidiary company also was applicable to the parent company.[46]

Therefore, since Vader has played an active role, both expressly and impliedly in the conclusion and the performance of the contract; the arbitration agreement can be extended to Vader even if it claimed to be non-signatory to the contract.

2.2 RISING DEMAND FOR FUNDING

Since, the contract in dispute increases the demand for funding for many reasons, Vader can be joined as a third-party funder in arbitration.[47] Primarily, Third-Party Funding (herein after; TPF) is the only possible way to cover the costs of arbitration **(2.2.1)** and it grants the access to justice for those who could not bear the financial burdens **(2.2.2)**. Further it helps to the 'funded party' to pursue meritorious claims**(2.2.3)**.

[46]ICC Award No.5721 [1990] Clunet 1990, at 1019 et seq.; ICC Arbitration Case No. 5730 [1988] 117 JDI 1990.; Ibid.

[47]*REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDI NG IN INTERNATIONAL ARBITRATION* (International Council for Commercial Arbitration 2018) <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf>accessed 25 August 2018; According to ICC Queen Mary Task Force Report, the term "third-party funder" refers to any natural or legal person who is not a party to the dispute and is not a party's legal counsel, but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party: thus, Vader can be considered as a corporate affiliate to the RES, p.92

2.2.1 A WAY TO COVER THE COSTS OF ARBITRATION

In identifying why funding is sought, the ICCA Queen Mary Task Force Report on TPF in International Arbitration(hereinafter; Task Force Report), discovers that; "TPF is sought to cover the legal fees, out-of-pocket costs (e.g., arbitrator fees, expert fees, arbitration institution fees, discovery related fees, etc…), or costs incurred by the arbitral tribunal during the arbitration proceedings".[48] Thus, with the rising costs of international commercial arbitration and with the additional number of constraints that included into corporate legal budgets; it is admissible that TPF is the only possible way to cover the costs of arbitration in a simplest manner.

2.2.2 ACCESS TO JUSTICE

Access to justice is primarily considered to be one of the most important advantages of TPF that grant an equal opportunity, for those who could not bear the financial expenses in international commercial or investment arbitration.[49] Even more, with reference to Task Force Report, access to justice is referred to as one of the four main forces that drive the sharp increase in demand for TPF in civil litigation.[50] The emphasis on providing access to justice is given recognition even through the legislative changes and judicial practices. For an

[48] Report of the ICCA Queen Mary Task Force (n 46) 1-272

[49] Dominik Horodysky & Maria Kierska, 'Third-Party Funding in International Arbitration- Legal Problems and Global Trends with a Focus on Disclosure Requirement, p. 67

[50] Task Force Report (n 46) 1-272

instance, in England, the Court of Appeal in one its decision, describes the commercial funders as a group who … *"provide help to those who seeking access to justice which they could not otherwise afford"*.[51]

Even more, TPF could be viewed as a means of spurring the development of the rule law, by which it corresponds to an increase in litigation and court caseloads.[52] Generally, in deciding how the rule of law is practised across the world, civil justice is considered to be one of the main forces that indicate the absolute position of rule of law. In this regard, to assure the enforcement of rights and due performance of remedies an accessible and effective civil justice system shall exist.[53]

Therefore, the request made by the CLAIMANT is appropriate and necessary in a context of arbitration where the arbitral costs have become extremely expensive for commercial partners who could not proceed without substantive financial resources.[54] Therefore, affirming the request of the Claimant to join Vader as a party to the arbitration, RESPONDENT would be able to pursue meritorious claims.

[51] *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 665; 'Third party funding of international arbitration',CIArb News, 1November 2017, accessed http://www.ciarb.org/news/ciarb-news/news-detail/features/2017/11/01/third-party-funding-of-international-arbitrations

[52]Syed Ahmed, 'Access To Justice : Litigation Financing And The New Developments' (2017) Vol. 4 International Academic Journal of Accounting and Financial Management <http://iaiest.com/dl/journals/5-%20IAJ%20of%20Accounting%20and%20Financial%20Management/v4-i1-jan-mar2017/paper8.pdf> accessed 19 August 2018.

[53] Task Force Report (n 46) 1-272

[54] Task Force Report (n 46) 1-272

2.2.3 RESPONDENT CAN PURSUE MERITORIOUS CLAIMS

It could also suggest that TPF is way of fuelling the external financial help provided to commercial corporations and investors who experienced economic instability and were unable to proceed with meritorious claims due to lack of financial resources.[55]

Although there are many arbitration institutions that set forth procedural rules, where parties are under obligation to pursue their statement of claim or defence; many parties could not generate their claims due to reduced cash flow and confront the risk of 'bet-the-company' dispute.[56] Therefore, the RESPONDENT being impecunious would not leave the itself defenceless in the arbitration, once the tribunal accepted the request made by the Claimant to join Vader as a party to the arbitration.

[55] ibid 53

[56] Article(s) 20 & 21, UNCITRAL Arbitration Rules (Revised 2013); ibid 54.

C. THERE WAS A VALID ACCEPTANCE OF THE RESPONDENT'S OFFER .

Acceptance of an offer, in the form of a statement or other conduct of the offeree indicating assent to an offer is valid according to the Law[57]. Moreover, a party's conduct is interpreted with regard to the knowledge the other party had about its intention, and the cultural practices of such party. The CLAIMANT'S acceptance of the offer of the Respondent to increase the price of the bricks by 15% with a bonus of 35% at the end of each year, by an Indian head nod, is a valid acceptance,because the said 'Indian head nod' was a culturally prevalent expression made by the Claimant with the intention of accepting the said offer, particularly in the absence of a request for clarification by the RESPONDENT regarding the CLAIMANT'S conduct.

3.1. CLAIMANT'S INDIAN HEAD NOD QUALIFIES AS ACCEPTANCE UNDER IN TERMS OF ARTICLE 2.1.6(1) OF THE UNIDROIT PRINCIPLES

According to Article 2.1.6**(**1.**)** of the UNIDROIT Principles, the governing law of the contract,[58] "*A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance* ". In this regard, the indication of assent need not be a verbal statement as conduct pertaining to indication of assent can form a valid contract between the parties. Accordingly, the Respondent's offer to increase the price by 15% and the 35% bonus at the end of each year, was accepted by the Claimant by way of an 'Indian head nod' which falls within the premises of " other conduct" in Article 2.1.6(1) **(3.1.1)**. In the event of any ambiguity with regard to the indication of assent, such conduct is interpreted according to the

[57] UNIDROIT Principles

[58] Moot Problem, para.15(f).

knowledge the other party had about this party's intention. In consequence, Claimant establishes that the assent was sufficient in accordance with Article 4.2(1) of the UNIDROIT Principles **(3.1.2)**.

3.1.1. A HEAD NOD IS ACCEPTABLE IN LAW AS " OTHER CONDUCT" .

Article 2.6.1(1) of the UNIDROIT Principles does not stipulate the scope of "other conduct" included in the provision. Nonetheless, it specifies that an acceptance need not be verbal or in writing, Accordingly, in the event of the absence of a verbal affirmation to an offer, conduct of a party can be construed to be an affirmation to the offer[59]. Consequently, Claimant in the present instance indicated his assent by a 'head nod' which in contract law amounts to a valid acceptance[60].

In considering the said Article, which elaborates that "*silence of inactivity does not amount to acceptance*" Claimant would establish that,the absence of a verbal confirmation is not equal to silence, as silence would imply no sign of affirmation to the offer[61]. However in this particular instance there existed an expressed assent, as Claimant was not 'silent'. Therefore, Claimant validly establishes that the head nod amounts to a valid acceptance[62], and that it conforms to the category of "other conduct".

[59] UNIDROIT Principles, Art. 2.6(1)

[60] Richard Stone, James Devenney, *Cases and Materials on Contract Law* (4th edn) Routledge (2017)

[61] UNIDROIT Principles, Art. 2.6(1)

[62] *NILAVAR, Appellant, v OSBORN et al, Appellees* [1998] 97 CA-95

3.1.2. CLAIMANT'S CONDUCT SHOULD BE INTERPRETED ACCORDING TO ARTICLE 4.2(1) OF THE UNIDROIT PRINCIPLES.

On account of the doubt regarding the Claimant's assent, due consideration must be given to Article 4.2(1)of the UNIDROIT Principles, which stipulates that the conduct of a party shall be "*interpreted according to that party's intention if the other party knew or could not have been unaware of that intention*". Accordingly, Respondent was well aware of Claimant's intention to extend the contract[63], and hence the said conduct should be interpreted with regard to Respondent's knowledge. As claimed by one arbitral tribunal the two parties must have a close relationship that imports that the statements and conduct were easily understood by each other[64] in order to validate that the other's intent was understood by a party.Therefore, in reference to the dialogue between the Claimant and the Respondent prior to the conclusion of the contract[65] the 'close relationship' between the two could be justified. Respondent's usage of informal vocabulary in negotiating with the Claimant (i.e. amigo; which translates to 'friend in the Mexican Language) and addressing the latter with the first name; "Kalai[66]", verifies the 'close relationship'.

Additionally, whether or not the conduct meant acceptance must be interpreted according to the the expressed declarations and communications between the parties prior to the conclusion of the contract[67], including the negotiations[68].Accordingly, the mere fact that the

[63] Moot Problem, para.32.

[64] *(Magnesium case)* [1995] 8324 ICC

[65] Moot Problem, para.34.

[66] Ibid,.61

[67] *(Office furniture case)* [2006] ACJC/524/2006, *(Yarn case)* [2000] 9 U 13/00 OLG

Claimant made the initial offer to extend the contract[69] is an indication of its intention to contract with the Claimant. This intention was expressed by means of the Indian head nod[70] at the conclusion of the skype call.

3.2. CLAIMANT'S HEAD NOD MUST BE UNDERSTOOD ACCORDING TO CULTURE

Contracts which are formed as result of human bargaining must be seen according to the context in which they are formed[71]. "The globalized marketplace has created a greater diversity between the contracting parties"[72] The negotiating parties would not always have the same set of cultural references or vocabulary, especially within an international context.

Technology, as with the case at hand, brings parties together over a vast geographical distance[73]. This increases the likelihood of creating misunderstandings caused by the assumptions the parties tend to make about the other party[74]. Consequently this paves the way

[68] *(Shoes case)* [1994] 5 U 15/93 OLG, *(Fashion products case)* [2003] 11849 of 2003 ICC

[69] Moot Problem, para.31.

[70] Moot Problem, para.35.

[71] Larry,A. DiMatteo and Blake D. Morant, 'Contracts In Context And Contracts As Context' (2010) Rev. 549 UFLawScholarshipRepository<https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1552&context=facultypub> accessed 8 September 2018.

[72] Nancy Kim, 'Reasonable Expectations In Socio-Cultural Context' (2010) REV. 641 CWSL Scholarly Commons <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1090&context=fs> accessed 14 September 2018.

[73] Nancy (n 71) 642

[74] Nancy Kim, 'Reasonable Expectations In Socio-Cultural Context' (2010) REV. 641 CWSL Scholarly Commons <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1090&context=fs> accessed 14 September 2018.

to disputes[75]. Accordingly much regard has to be given to the the cultural context of the two parties to garner their reasonable expectations[76]. In this regard the Indian head is deemed to be an assent in the culture of the agent of the Claimant, and hence is required to be seen as a valid acceptance given to the offer of the Respondent. In addition, in the international context the Indian head nod is popularly regarded as an assent **(3.2.1).**

3.2.1. INDIAN SIDEWAYS HEAD NOD IS POPULARLY UNDERSTOOD AS AN AFFIRMATION.

In conducting business in an intercultural context, one must be competent with the gestures, behaviours and practices associated with the culture of the other party[77]. The Indian head nod is a worldly known form of gesture that conveys the meaning of an affirmation[78]. In communicating with business partners from other cultures it is reasonable to expect that the party would be aware of the mannerisms[79].

[75] Larry,A. DiMatteo and Blake D. Morant, 'Contracts In Context And Contracts As Context' (2010) Rev. 549 UF LawScholarship Repository <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1552&context=facultypub> accessed 8 September 2018.

[76] Nancy (n 71)

[77] Nancy (n 71)

[78] Jon M. Shepard,*Cengage Advantage Books: Sociology* (10th ed.) Cengage Learning (2010)

[79] Discussed in 3.3

3.3 IT IS REASONABLE TO ASSUME THAT THE ACCEPTANCE WAS UNDERSTOOD.

In intercultural business negotiations uncertainty in references may occur, such as the case at hand. Lack of clarity in circumstances may create ambiguity and uncertainty in the proceedings. Ambiguity is,in this instance, the simple lack of clarity in language[80], or rather the manner in which the Claimant conveyed the acceptance. In the instance where the Claimant required a clarification regarding the Respondent's offer it was asked and the doubt was cleared[81]. In the absence of any request for clarification by the Respondent it is reasonable for the Claimant to assume that the acceptance was understood. Additionally Respondent's regular business activities in ASEAN and with the Claimant infers that the Respondent understood the Indian head nod **(3.3.1).**

3.3.1. RESPONDENT'S REGULAR BUSINESS ACTIVITIES IN ASEAN, REASONABLY INFERS THAT THE RESPONDENT UNDERSTOOD THE INDIAN HEAD NOD

The business relationship between the Claimant and the Respondent commenced in September 2013 and the parties have been contracting for four years[82]. The usage of informal terms during the skype call infers that they have a congenial relationship[83]. Consequently it is not unreasonable to assume that the Respondent understood Claimant's mannerisms.

[80] *Osterholm v Boston & Montana Consol Copper & Silver Mining co*[1910] s107 p. 499, 40 mont. 508 Mont.

[81] Moot Problem, para. 34.

[82] Moot Problem.

[83] Moot Problem, para.34.

Moreover, CLOUT case No. 175[84] observed that usages that apply to a particular country may apply to a contract if the foreign party regularly conducts business in that country and has engaged in multiples transactions of the same type. The sideways Indian Head nod is a popular form of assertion in South Asian countries. In this present instance RESPONDENT has contracted with the CLAIMANT for four years starting the initial contract in 2013. Additionally, the Respondent has been chosen to "execute any and all agreements on behalf of Robustesse Espacial Solucion Corp in Cambodia and ASEAN.Hence, he spends a lot of time in Asia and it has been identified that a party to an international sales contract need to be familiar with the practices of that particular geographical location[85].

D. THE TRIBUNAL SHOULD GRANT THE FOLLOWING RELIEF.

The tribunal has the jurisdiction under Rules 6 and 12 of KLRCA and section IV of UNCITRAL to grant following reliefs, in particular declaratory relief, specific performance and injunctive relief respectively for the reliefs sought by the parties.

4.1.THE TRIBUNAL SHOULD DECLARE THAT THE CONTRACT WAS EXISTENT AND ENFORCEABLE.

In accordance with rule 12 of KLRCA and section IV of UNCITRAL , the arbitral tribunal in granting the final award should make a declaratory relief to constitute the fact that the contract was existent and enforceable, as it created uncertainty with regard to the legal obligations or rights associated with the contract. Ambiguity over the existence of the contract generated a possibility of the parties' rights being subjected to abuse, e.g., arbitrary

[84] *(Marble slabs case)* [1998] 6 R 194/95 OLG

[85] : *(Timber case)* [1998] 2 Ob 191/98x CLOUT

termination of the contract, violation of the right to performance and require for performance due to non-payment and non- performance of the parties, and right to claim adequat damages. Therefore, as expressed in *American Household Products, Inc. v. Evans Manufacturing, Inc.*[86] repudiation of rights and obligation can be paused via an early determination of a declaratory relief.

In accordance with the French tradition, an arbitral tribunal to declare upon the existence or non- existence of a legal relationship two conditions should be met: legal interest/specific usefulness to the claimant by such declaration and grave and serious threats created by present disturbance.[87]This principle was upheld in ICC case No.9617 and ICC case No.4.[88]

In this issue, fundamental breach of contract, arbitrary termination, damage of solid relationship of trust and good faith between parties and inability to contract with new counterparts due to uncertainty on existing exclusive distribution agreement are the possible destructive outcomes that can generate by present bothersome situation, as the parties are unclear on their respective obligations under the contract. Therefore, the CLAIMANT is able to clearly identify its scope of activity under the contract through this declarative relief, and avoid the occurrence of breach of contract. A similar operation can be identified in ICC case No. 7453[89], the arbitrator determined that in a situation where the parties were in

[86] *American Household Products, Inc. v. Evans Manufacturing, Inc.*139 F. Supp. 2d 1235 (N.D. Ala. 2001).

[87] Michael E. Schinder, ' Non-Monetary Reliefs in International Arbitration.' (2011) LLC < https://www.lalive.law/data/publications/mes-05-Part-I-Chapter-1.html.> accessed 5 September 2018.

[88] Ibid.

[89] ICC case No. 7453 of 1997.

disagreement about the existence of an obligation continuing in the future, he had the power and indeed the obligation to make a declaratory award about this obligation.

4.2.THE TRIBUNAL SHOULD ORDER RESPONDENT TO PERFORM THE FIRST TWO DELIVERIES OF 2017.

Article 7.2.2 of the UNIDROIT Principles grants the right to require the performance of non-monetary obligations (specific performance). "When a party owes a contractual obligation other than paying money does not perform , the other party may require performance".[90] Simply , it describes the buyer's right to require the seller to perform the contract after the seller has in some manner failed to perform as agreed.[91]

This issue in this matter is a non-delivery type of breach. The buyer utilizes the right to require performance where the seller has totally failed to perform as in the case *Soinco v. NKAP*[92]. Accordingly, the buyer can insist on performance as long as the seller has not delivered. In this issue , the contract which is still enforceable is effective till 2018 December and the buyer (The CLAIMANT) ceased its performance of the deliveries in 2016 December, while the seller got 8 more deliveries to complete . As of now, seller failed to perform two deliveries: March and June. So, the seller (The RESPONDENT) breached its obligation (non-delivery) under the contract and it nullified or essentially depreciated the buyer's justified contract expectations. According to *Magellan International v. Salzgitter*

[90] UNIDROIT Principles, Article 7.2.2.

[91] CISG, Article 46.

[92] (1996) ZHK 273/95.

Handel[93]*, Clothing case*[94] *and Shoes case*[95], the remedy of specific performance sought by the buyer/seller should be the action or inaction of the obligation entitled to and breached by the respective other party under the contract. Therefore, the tribunal should order the RESPONDENT (The seller) to perform the first two deliveries of 2017.

4.3.THE TRIBUNAL SHOULD ORDER THE TERMS OF THE CONTRACT TO BE IN WRITING.

A Permanent Injunctive relief should be granted by the courts to order the terms of the contract to be in writing. Though parties have successfully managed to operate upon an informal contract, it generated lot of controversies on terms of the contract, reduced the meaningfulness and the validity of the contract, mitigated the responsible function of the parties and pose a threat to the consistency of the arbitration proceeding, e.g., non-communication of the Vader's partnership shift to the CLAIMANT, the dispute at hand is a result of this informal contractual relationship. Therefore, this category of relief helps to recreate an unambiguous contract and re-perform contractual conducts by parties successfully, as it (permanent injunction relief)can utilize to eradicate future complications in enforcing the contract, because this written requirement can be enforced through the final award.[96]

[93] (1999) 99 C 5153.

[94] (2010) HG070223/U/dz.

[95] (1994) 52 S 247/94.

[96] *Toyo Tire Holdings of Americas Inc. v. Cont'lTire N. Am. Inc.*(2010), 609 F.3d 975, 981 ; *Ortho Pharm. Corp. v. Amgen, Inc* (1989) 882 F.2d 806, 812.

According to *Puerto Rico Hosp. Supply, Inc. v. Boston Sci.Corp*[97] as an extraordinary remedy, injunctive relief can utilize for the preservation of the status quo and in order to prevent possible injustice. In this issue, non- execution of a formal document can subject the parties to arbitrary termination, breach of right to performance etc. So to prevent this injustice , tribunal should order the terms of the contract to be in writing.

PRAYER FOR RELIEF

For the foregoing reasons, Chuizi Leishen's LLC respectfully requests the Tribunal to hold and:

1. Declare that the Contract was existent and enforceable;
2. Order the RESPONDENT to specifically perform the first two deliveries of 2017 and;
3. Order that the terms of the Contract must be in writing.

[97]*Puerto Rico Hosp. Supply, Inc. v. Boston Sci.Corp*.(2005) , 426 F.3d 503, 505 .