C1810-R

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 RESPONDENT

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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**
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 had enormous sunken costs and loss profits; and therefore hired a team of local Cambodian in-house-counsels to take care of all administrative issues in the best manner possible.

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 bonus 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. THE AGREEMENT TO ARBITRATE IS INCAPABLE OF BEING PERFORMED DUE TO IMPECUNIOSITY OF THE RESPONDENT

The parties in issue signed the contract in September 2013, with an arbitration clause, which recognizes the parties to affirmatively participate in arbitration regarding any dispute, controversy or claim arising out of or relating to the contract. Since there was a mutual misunderstanding between the parties after the Skype call which took place on 23 November 2016, the RESPONDENT's position was that the parties had mutually consented to the termination of the contract. However, on 15 August the Buyer served the Seller with a Notice of Arbitration, and thereafter, the Buyer, acting as the Claimant initiated the arbitration proceedings disregarding the RESPONDENT's state of impecuniosity. Due to the Claimant's readiness to pay the the arbitral proceedings would be regularly conducted and in that event a final award would be made irrespective of the RESPONDENT's financial difficulties. In such event, RESPONDENT's procedural right to raise counterclaims is violated and thereby RESPONDENT would be lack of effective defence, and these situations may lead to the violation of principle of equality and the right to be heard. Therefore, on the abovementioned grounds the impecuniosity of the RESPONDENT shall render the agreement to arbitrate incapable of being peng performed.

B. TRIBUNAL CANNOT GRANT THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION

Although, Claimant has initiated the arbitration proceedings, the RESPONDENT is not at a position to bring its counterclaims in arbitration due to its tense financial situation. In general, Third-Party Funding is done by someone who is not involved (a separate entity) in arbitration proceedings, and therefore according to Rule 9 of KLRCA,VADER can not be joined as a party. Moreover, the preliminary motive behind the joinder of parties is seeking funding to proceed with arbitration, however, since the RESPONDENT is in a state of impecuniosity. which has an impact on VADER as well,, Vader, as a party to arbitration cannot fund the proceedings. Therefore, VADER shall not be added to the arbitration proceedings.

C. THERE WAS NOT A VALID ACCEPTANCE OF THE RESPONDENT'S OFFER.

According to basics of Contract Law, an acceptance becomes effective once it 'reaches' the offeror, which if failed, would result in non-acceptance.The Respondent's offer was not accepted by the Claimant in terms of Article 2.6(2) of the Unidroit Principles as a consequence of non communication. Further the failure of the CLAIMANT to abide by the specific manner in which the offer had to be accepted, also leaves the offer unaccepted. Moreover, the misunderstanding caused a consensus ad idem which renders the agreement void and unenforceable. In the event of an ambiguity with regard to a contract, it is interpreted according to the test of reasonability. A reasonable person in the Respondent's circumstances, who was unfamiliar with local South Asian customs, would assume the side

head shake was a denial of the offer. In any event,the conclusion of a contract would bind parties to their respective duties, and the Claimant not performing the duty to pay a 35% bonus in the December of 2016 indicates that an enforceable contract was not concluded during the final negotiation.

D . THE TRIBUNAL SHOULD GRANT THE FOLLOWING RELIEF.

The circumstances do not enable the Arbitral tribunal to grant the declaratory relief on the existence and enforceability of the contract. However, in the event the Tribunal, holds in favour of the CLAIMANT on this issue, the CLAIMANT is not entitled to equitable relief, i.e. specific performance, due to its failure to qualify under the "clean hands doctrine", and moreover, the tribunal should grant the RESPONDENT, its entitlement to increased profits, as per the purported agreement, if at all, as a pre-condition, if the tribunal is to grant the CLAIMANT, the specific relief prayed for. Finally, in consideration of the serious and irreversible prejudice that can be caused, the tribunal shall not grant the injunctive relief prayed for at the very critical juncture of these arbitration proceedings, as it allows the tampers with the subject matter of the arbitration.

PLEADINGS

A. THE AGREEMENT TO ARBITRATE IS INCAPABLE OF BEING PERFORMED DUE TO IMPECUNIOSITY OF THE RESPONDENT

In situations involving an impecunious Respondent certain differences emerge. Especially, where the Claimant's readiness to pay the advance on costs, arbitral proceedings are regularly conducted and award is made disregarding the impecuniousness of the Respondent. In such cases, the impecuniosity render the agreement to arbitrate incapable of being performed; because Respondent's procedural rights are violated (**1.1**), and to preserve the right of access to justice over the *pacta sunt servanda* principle (**1.2**).

1.1 VIOLATION OF PROCEDURAL RIGHTS WOULD RENDER AN ARBITRATION AGREEMENT INOPERATIVE

By concluding an arbitration agreement parties are bound to recourse to arbitration in case of any dispute arises out of or relating to the contract. However, if one of the parties is impecunious, there is a possibility to disregard the arbitration agreement, because such party does not have enough funds to commence arbitration proceedings. Generally, in cases where the Respondent is impecunious, due to the Claimant's readiness to pay, the arbitral proceedings are conducted and the award is rendered despite of the financial incapability of the Respondent. In such cases, the Respondent's procedural right to raise counterclaims is

violated (**1.1.1**), and thereby Respondent is lack of effective defence (**1.1.1.1**), which ultimately violate the principle of equality (**1.1.1.1.a**) and the right to be heard (**1.1.1.1.b**).

1.1.1 RIGHT TO RAISE COUNTERCLAIMS

Pursuant to Rule 14(6) of KLRCA Rules; "when the counterclaims are submitted by the Respondent, the Director may fix separate advance preliminary deposits on costs for claims and counterclaims by which the parties are obliged to deposit its share corresponding to its claims".[1] Within that provision, it is meant that the submission of counterclaims of the Respondent in arbitration definitely leads to the payment of a separate advance of deposit.

Moreover,, it is the commonly accepted rule followed by the arbitral institutions to allow the Claimant to pay the Respondent's share of the advance on costs to initiate the arbitration proceedings.[2] Within this meaning, due to Claimant's readiness to pay and its interest to move forward, the arbitral proceedings are generally conducted and the award is rendered. Even more, the arbitral tribunal shall only consider the claims submitted by the Claimant disregarding the counterarguments of the Respondent.

Therefore, in case of an impecunious Respondent, the main legal issue is, the Respondent would not be able to submit its counterclaims due to its financial incapacity to afford fees and expenses of the arbitrators, arbitral tribunal and the administrative costs. Therefore, in this

[1] KLRCA, r 14 (6).
[2] KLRCA, r14 (3), "if any of the parties fail to pay the deposit … the other party is given an opportunity to make the required payment within a specific period of time … and the tribunal shall not proceed until such deposit is paid in full".

situation the non-payment of the advance leads to a withdrawal of the counterclaims, which is usually followed by lack of effective defence (**1.1.1.1**).

1.1.1.1. LACK OF EFFECTIVE DEFENCE

Notwithstanding the fact that Respondent has not enough funds to pay the initial deposit, its lack of funds do impact negatively to proceed with an effective defence. In general, the arbitration costs necessarily include not only the administrative fees of the tribunal; even the travel and other expenses incurred by the arbitrators, costs for expert advice, expenses approved by the tribunal for witnesses and also any amount of fee for the appointed authority, which are indispensable for Respondent's defence.[3] Therefore, whenever the Respondent lack funds to bear these costs, the Respondent may not have the opportunity to bring forth its experts or witnesses to support its counterarguments, by which its defence becomes less effective.

There are instances where the court recognize, how the lack of financial funds on Respondent's side could impair its effective defence and how it violates the party's right to bring forward its case and right to equal treatment before the law.[4] The French Supreme Court in *Pirelli case*[5] decision, "expressly provided that Respondent's inability to pay the costs for an effective defence shall be decided differently , because, unlike in a position

[3] Patricia Zivkovic, *Impecunious Parties in Arbitration:An Overview of European National Courts' Practice* (2016) 33-52.
[4] Patricia Zivkovic, *Impecunious Parties in Arbitration:An Overview of European National Courts' Practice* (2016) 33-52.

[5] [2011] No. 09/24158.

where the Respondent could not finance its counterclaims, the former position directly prevents its right to answer to the claims raised by the Claimant".[6] The court further held that *"the submissions of counterclaims are not to be guaranteed, unless they are inseparable from the main claims"*.[7]

In such cases the RESPONDENT would not be able to raise its counterclaims which are necessary for an effective defence; and, he is not prevented from defending itself against the claims submitted by CLAIMANT, yet prevented from raising new claims.[8]

1.1.1.1.a VIOLATION OF THE PRINCIPLE OF EQUALITY

The principle of equality lies at the heart of the universal principles of human rights; where it recognizes that "all persons are equal before the law and have the right to an effective remedy by a competent court or a national tribunal and entitled to a fair and a public hearing by an impartial tribunal".[9] Mirroring the principle of equality, both the institutional and ad hoc arbitration procedures adopted the view that the parties to arbitration shall be treated equally during the conduct of arbitral proceedings.[10]

[6] Zivkovic (n 4) 33-52.

[7] ibid 6

[8] ibid 7

[9] UDHR, Art. 7, 8, & 10.

[10] UNCITRAL Model Law, Art.18; ICC Rules of Arbitration, Art.22(4)

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In the Pirelli case, the Paris Court of Appeal held that the principle of equality is breached in situations where the Respondent's defence was restricted only to reply to the claimant's claims and prevented from introducing its own counterclaims. However, the French Supreme Court annulled the Court of Appeal's decision due to lack of legal basis. The French Supreme Court stated that for an arbitral tribunal to consider whether counterclaims as withdrawn due to the non-payment by one of the parties of its share of the advance on costs, was in contradiction with the principle of party equality, if the counterclaims are inseparable from principal claims.[11]

therefore, if the RESPONDENT's counterclaims are not raised in arbitration proceedings due to its lack of funds, then the principle of equality seems to be violated.

1.1.1.1.b. VIOLATION OF THE RIGHT TO BE HEARD

Right to be heard is one of the fundamental principles guaranteed by the UDHR, and it is generally modeled in both institutional and ad hoc arbitration proceedings. Therefore, if an impecunious party is deprived from raising its defence or if such party is impaired from answering to a claim due to its financial incapability, it would lead to the violation of the right to be heard. This can also be deducted from the decision of the French Supreme Court in *Pirelli* case.

[11] Patricia (n 4) 32-52,theory of inseparability is conceived as to prevent denial of justice but the French Supreme Court provided no criteria for the determination on whether claims and counterclaims are separable or not.

1.2. THE PRINCIPLE OF *PACTA SUNT SERVANDA* SHOULD BE LEFT BEHIND TO PRESERVE THE RIGHT OF ACCESS TO JUSTICE

Leaving behind the principle of pacta sunt servanda, the German, Austrian, and Hungarian courts follow a common line of reasoning, which was mirroring the preservation of right to access justice. The Cologne court in the Case no.18 W 32/13, it was decided that impecuniosity rendered the agreement to arbitrate incapable of being performed.[12] The Szeged Court of Appeal deciding a case which involved a bankrupt party, concluded that the arbitration agreement is incapable of being performed and allowed the bankrupt party to have recourse to the national court.[13]

B. TRIBUNAL CANNOT GRANT THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION.

2.1 A PARTY WHO IS ALREADY A PARTY TO ARBITRATION CANNOT BECOME A TPF.

2.1.1 VADER IS ALREADY A PARTY .

In accordance with the rule 1(1) of KLRCA Arbitration Rules, Article 1(1) of UNCITRAL arbitration rules and Article 7(1) of UNCITRAL Model Law , parties to be bound by an arbitration agreement , it should be signed by them , which delineates that parties have validly consented to resolve any dispute with the usage of arbitration.

[12] Zivkovic (n 4) 33-52.

[13] ibid 12.

[14] Though in that sense Vader Ltd is not a party to the arbitration, based on the " The Group of Company Doctrine"[15], Vader Ltd can be considered as a party to arbitration.

The RESPONDENT is a wholly owned subsidiary of Vader Ltd (Mother Company) even after the Brexit and constitutes one economic reality (*une realite economique unique)*, in particular production and distribution of bricks.

Two preliminary conditions should be met for the application of above doctrine: active role played in conclusion, performance and termination of the contract and the common will of the parties.[16] In the absence of explicit consent, implied consent can be deduced from circumstances relevant to the contract mentioned in Article 4.3-UNIDROIT Principles. The contractual relationship between the CLAIMANT and the RESPONDENT could not have been formed without the intervention and the attempt made by Vader Ltd. CEOs of both companies laid the foundation for their future venture and left the rest to be done by their representatives.[17] Mr. Paredes who is the representative of Vader Ltd and the Managing Director of the RESPONDENT, initiating from signing the contract, did all the work on behalf of the Vader Ltd. For

[14] A. Redfurn and M. Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 131.

[15] *The Dow Chemical Company and others v. Isover-Saint-Gobain*, Zwischenschiedsspruch v. 23.09.1982, ICC Case No. 4131; *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors,* (2013) 1 SCC 641. explain the doctrine

[16] Yaraslau Kryvoi, 'Piercing the Corporate Veil in International Arbitration' (2011) Global Business Law Review 1.

[17]Moot problem,para. 10.

example, extension of contract, implementation of first incentive.Though the contract was only signed by one of the companies in the group, conduct and participation of others implies consent to the contractual obligations spring from the contract.

Apart from the above measure another criteria which court highlighted was the absolute control of the parent company over the subsidiary. In this case, until brexit Vader Ltd possessed the full control on the RESPONDENT . Though Vader transferred the control on its subsidiary to the RESPONDENT after brexit, in particular to Mr. Parades,Vader Ltd continued to own 100% shares in the RESPONDENT. It denotes that Vader Ltd had a considerable influence over its subsidiary but not a control influence. However, Mr. Parades is an employer of Vader Ltd who took care of all the commercial activities in Cambodia and ASEAN behalf of Vader Ltd[18]. Accordingly , it can be stated that even after the brexit, Vader Ltd possessed the absolute control over its subsidiary in reality.

On above basis Vader Ltd can be considered as a party to the arbitration even though it is a non signatory.[19] In accordance with the rule 9 of KLRCA, a joinder of parties cannot be made by the RESPONDENT as the Vader Ltd is already a party to the arbitration.The preliminary motive behind this joinder is seeking funding to proceed

[18] Moot problem, para.12.

[19] ICC Award No.5721 [1990] Clunet 1990, at 1019 et seq.; ICC Arbitration Case No. 5730 [1988] 117 JDI 1990, the arbitral tribunal stated that the arbitration clause which was signed by the subsidiary company could also be applicable for the parent company.

with the arbitration as the RESPONDENT is in a state of impecuniosity. Therefore, Vader Ltd as a party to the arbitration cannot fund the proceedings since third party funding is done by someone who is not involved (separate entity) in arbitration proceedings.[20]

2.1.2 VADER LTD CANNOT AFFORD THIRD PARTY FUNDING OWING TO ITS PRECARIOUS FINANCIAL SITUATIONS.

Third party funders engage in dispute solving with a capitalistic aim of making profits.[21] Vader Ltd is not in a good financial situation to make this investment of TPF. The funder in a third party funding should have sufficient capital to meet all liabilities that could arise.[22] In accordance with the paragraph 27 of the Moot Problem , Vader's business annihilated and profits plunged due brexit. Brexit reduced credit ratings of U.K from AAA to AA and currency exchange rate in market.[23] The precarious financial situation of Vader Ltd pose a threat on effective creation of claims, counter-claims and final award. Moreover, funder may exert improper

[20] REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING 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.

[21] REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING 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.

[22] Thibault De Boulle, 'Third party funding in International Commercial Arbitration' (DPhil thesis, University of Ghana 2013).

[23] ibid.

influence or pressurize the parties during the proceeding owing to its tensed financial situation. Therefore, Vader cannot become a third party funder to the RESPONDENT as it may jeopardize parties right to access justice , free and fair trial.

C. THERE WAS NOT A VALID ACCEPTANCE OF THE RESPONDENT'S OFFER.

Acceptance of an offer to be effective so as to form a valid contract must be communicated effectively to the offeror, according to the Law[24] In explanation, this means the notice of acceptance must "reach the offeror" through the means prescribed. If the assent was not rightfully communicated to the offeror there lacks consensus ad idem, the mutual assent, which renders the agreement void. In interpreting the conduct of a party much consideration is given to the knowledge a party had about the other party's intention. Additionally, the interpretation relies on the reasonability of assuming the meaning of a party's conduct by the other party. Nonetheless, if indeed a valid contract is formed, then the parties are required to conform to the agreements, in which failing to do so proves the lack of a valid contract.

3.1 CLAIMANT'S ACCEPTANCE WASN'T EFFECTIVELY COMMUNICATED TO THE RESPONDENT.

Offer and acceptance is the foundational doctrine of a contract[25]. The offer suggested by one party must unequivocally be accepted by the offeree. This denotes that the communication

[24] Unidroit Principles. Art. 2.6(1)

[25] Shawn J. Bayern, Offer and Acceptance in Modern Contract Law: A Needless Concept, 103 Cal. L. Rev. 67 (2015). < at: http://scholarship.law.berkeley.edu/californialawreview/vol103/iss1/2> accessed on 24 August 2018

of acceptance must be provided clearly as discussed in *Rex V Nel* (1921) A.D 339 and *McKenzie V Farmers Co-op Meal Industries Ltd* (1922)[26]. In human bargaining and negotiating, gestures and other forms of body language are to be expected. As a consequence an acceptance to an offer can be communicated through gestures like "raising a hand, or nodding one's head[27]". Nonetheless such gestures are deemed effective only when the offeror comprehends the meaning of that conduct[28]. That is, the assent is valid when the addressee understands the acceptance not when the the acceptance is given[29] .

Article 2.6(2) of the UNIDROIT Principles stipulates that an acceptance is effective once it "reaches" the offeree. Accordingly if the offeror was unaware that an acceptance was conveyed then it purports that the assent did not "reach" the offeree. In the present case in considering that the Respondent had no knowledge of the Claimant's acceptance, it could be denoted that the acceptance did not "reach" the Respondent**(3.1.1).** Moreover the assent would have been understood by the Respondent had the Claimant conveyed it using the mode of acceptance prescribed by the Respondent **(3.1.2)**.

[26] C.J Weeramantry, *Law of Contract*, (1st & 2nd volume) Stamford Lake Publication (1999)
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[27] Maria del Pilar Perales Viscasillas, The Formation of Contracts & the Principles of European Contract Law, 13 Pace Int'l L. Rev. 371 (2001)

[28]GUIDE TO ARTICLE 23 September 2018

[29]Saúl Litvinoff, Offer and Acceptance in Louisiana Law: A Comparative Analysis: Part II - Acceptance, 28 La. L. Rev. (1968)

3. 1.1 THE ACCEPTANCE DID NOT REACH THE RESPONDENT.

With reference to the previous business agreements the parties experienced, the contract was validly formed as a consequence of the Claimant's assent 'reaching' the Respondent. In the initial instance the agreement was concluded with a formally written contract[30]. The second negotiation process was finalized with the "First incentive" which is the 15% price increase for an increase of deliveries, and the parties "shook hands[31]" at its conclusion. In both of these instances there was no doubt as to the indication of assent or the formation of a contract, since the acceptance was clear and unambiguous. A handshake, a verbal contract not a written contract, was found to be legally binding by reason of the establishment of a valid offer and acceptance[32]. Similarly in the third instance, the emails exchanged justified the transference of the offer and acceptance between the parties[33]. Per contra in the instance at dispute, a valid conveyance of acceptance is lacking.

Article 2.6(1)[34] specifically states that an acceptance is not valid unless the 'notice thereof reaches the offeror[35]. Only when the knowledge of acceptance is received by

[30] Moot Problem, para.13.

[31] Moot Problem, para 22.

[32] *Hurtubise v. McPherson (2011) 80 Mass. App. Ct. 186*

[33] *Spring Forest Trading 599 CC v Wilberry* (2014) 725/13

[34] Unidroit Principles

[35] ibid,.33

RESPONDENT can a valid contract be formed[36]. Since the RESPONDENT, the offerer, did not know of CLAIMANT'S acceptance, a contract was not formed[37].

3.1.2 CLAIMANT DID NOT FOLLOW THE MODE OF ACCEPTANCE PRESCRIBED BY THE RESPONDENT.

If the offeror prescribes a method of acceptance so as to make its communication effective, the offeree has an obligation to follow it unless a more reasonable method could be employed [38]. In the present instance, in considering the dialogue between the two parties during the final skype call[39] the Respondent clearly specifies a method in which the Claimant is required to respond. Respondent states the words "yes or no?[40]" as an answer to the offer. Within the context of the verbal contract they are negotiating on, the aforementioned words are clearly an invitation to respond with an oral answer. However, the Claimant responds with a sideways 'Indian head nod[41]' which is not the method of acceptance the Respondent was expecting.

[36] *Reid V Jeffreys Bay Property Holdings/ Driftwood Properties V Mclean (1976)* (3) SA 134 (C) , *Household Fire & Cas. Acc. Ins. Co. v. Grant* (1879) 4 Ex D 216

[37] *Fern Gold Mining Co.V Tobias*(1890) 3 S.A R. 134

[38] Yates Building Co Ltd v R J Pulleyn and Son (York) Ltd (1975) 119 Sol. Jo. 370

[39] Moot Problem, Para.34

[40] ibid,. 38

[41] Moot Problem, Para 35.

Additionally, the method prescribed was for the benefit of the Respondent, the offeror, so as to establish an effective and comprehensive means of getting a concrete response from the Claimant. Since this method was not prescribed for the latter's benefit, the Claimant was obliged to accept it in the said method[42]. The acceptance by head nod would be sufficient if it was Respondent who prescribed such method[43]. Due to the Claimant's unemployment of the said method the acceptance did not 'reach' the Respondent as required[44] and rendered the agreement invalid. There is no contract " "unless and until he is himself made conscious of it [45]". Hence, if there is a method of acceptance specified, only an acceptance communicated via that method is valid[46].

3.2 THERE WAS NO CONSENSUS AD IDEM AT THE TIME OF THE CONCLUSION OF NEGOTIATIONS WHICH DEEMS THE CONTRACT INVALID.

A fundamental element in contract formation is the mental element of the contracting parties, or rather, what they wish to result from the agreement[47]. It necessarily follows that any misunderstanding on the part of either of the parties would be fatal to the proposed contract

[42] *Financings v Stimson* [1962] 3 All ER 386

[43] *Re Selectmove Ltd* (1995) WLR 474

[44] Entores Ltd v Miles Far East Corporation (1955) 2 QB 327

[45] Lewis v. Browning, 130 Mass. (1881)173 .

[46] *George Hudson Holdings Ltd v Rudder (1973) 128* CLR *387*

[47] Clarence D. Ashley, "Mutual Assent in Contract" (1993) Vol. 3 JSTOR 71

because there is no mutual assent[48]. In the present instance, the two parties involved are clearly at a dispute because of the misunderstanding regarding the acceptance. Consequently as there was no consensus ad idem at the time of the conclusion of the contract, as neither of them was rightfully aware of the other's intention, the contract is unbinding[49].

Additionally, in accordance with Article 4.3(c) of the UNIDROIT Principles, the statements and conduct of the parties are interpreted with regard to the subsequent conduct of the parties. The Respondent, after the conclusion of the meeting with the Claimant considered it to be acceptable to look for other counterparts "on more competitive terms[50]". Regarding the contract, the Respondent and the Claimant clearly did not foresee an identical future which indicates the lack of mutual assent in the proceeding.

3.3. A REASONABLE PERSON IN RESPONDENT'S SITUATION WOULD ASSUME ITS OFFER WAS REJECTED.

In the event where one party believes in the non-existence of a contract which is more reasonable than the other's belief of its existence, the reasonability prevails[51]. There would be

[48] ibid,.47

[49] *Raffles v Wichelhaus* [1864] EWHC Exch J1

[50] Moot Problem, para 40.

[51] Shawn (n24)

no contract. This purports that the conduct of the Claimant would be interpreted in accordance with an objective analysis[52].

Under Article 4.2(2)[53] the statements and conduct of a party are interpreted according to the understanding of a reasonable person in the same circumstance[54]. The agent of the Respondent in the issue at hand is of Mexican descent[55], with his education being done in France[56]. Therefore it is reasonable to assume that he was not familiar with the gestures of Indians.

Additionally, while a head nod may denote acceptance and is a popularly used gesture for assent, the sideways head shake is popularly employed to convey negation[57] or a refusal.

Consideration must be given to all relevant circumstances in forming an objective interpretation[58].The Claimant was aware that the Respondent wanted to terminate the contract [59]. The Respondent entered into negotiations in Good Faith respecting the relationship of trust

[52](*Magnesium case*) (1995) 8324 ICC, (*Hanwha Corporation v. Cedar Petrochemicals, Inc.*) (2011) 09 Civ. 10559 (AKH)

[53] Unidroit Principles

[54] (*Fabrics Case*) (1997) 3PZ 97/18

[55] Moot Problem, para. 12

[56] clarifications, Section 5

[57] Adam Kendon, Some uses of the head shake, (2002) 10.1075/gest.2.2.03ke,

[58] (*Fruit and vegetables case*) (2008) HOR.2006.79 / AC / tv

[59] Moot Problem, para.31

built between the two parties[60]. Nonetheless negotiations with another counterpart would have been beneficial and profitable to the Respondent. The Claimant was aware that the Respondent's company was in need of profits , hence the initial offer was made with a 15% price increment per year[61] . Since the Respondent's counter-offer was a 35% price bonus at the end of each year along with the First Incentive, it is reasonable to assume the Claimant rejected the offer since it was much higher than the initial offer.

3.4 IF THERE WAS A VALID ACCEPTANCE THEN THE CLAIMANT IS REQUIRED TO PERFORM THE DUTIES.

In reference to the final skype call between the parties, the Respondent makes a counter offer of a 35 % bonus price at the end of each year "from now on[62]". The negotiation takes place on the 23rd of November 2016, which implicates that the Respondent's counter offer applies to the December of 2016. The Respondent has reason to believe the Claimant comprehended this condition since a clarification was made regarding the bonus price in which the agent asks "to be paid at the end of each year"[63] to which the Respondent gives an affirmation,

[60] Moot Problem, para 25

[61] Moot Problem, para 31

[62] Moot Problem, para.34

[63] ibid,. 61

In accordance with Article 4.3(c) of the UNIDROIT Principles, which deems that the subsequent conduct of a party is utilized in interpreting the meaning of their conduct[64]. Claimant by his actions justified the non existence of a contract.

[64] (*Alpha Prime Development Corporation, Plaintiff, v. Holland Loader*) (2010) 09-cv-01763-WYD-KMT, (Textile Case) (1990) 5 O 543/88

D. THE TRIBUNAL SHOULD GRANT THE FOLLOWING RELIEF.

The RESPONDENT submits that the Arbitral Tribunal should in the first instance dismiss the CLAIMANT'S prayer for a declaration on the existence and enforceability of the contract, in consideration of the aforementioned submissions of the RESPONDENT.

However, in the event the Arbitral Tribunal grants the declaratory relief prayed for by the Claimant, the Respondent submits that the Arbitral tribunal should make the following Order, and shall not grant the specific performance relief prayed for by the CLAIMANT, without granting the following order, since the relief of specific performance, is an equitable remedy in Contract Law, which is granted based on equitable principles following the clean hands doctrine. The RESPONDENT, submits that, in the event the Arbitral tribunal holds that the contract was in existence and is enforceable, the CLAIMANT'S failure to honour its own obligations under the contract that they claim to have been in existence, deprives them of their right to an equitable remedy, i.e. specific performance.[65] Further the absence of a clause that provides for specific performance as a remedy under the contract, RESPONDENT submits, deprives the CLAIMANT of its right to a specific performance order.

Moreover the, RESPONDENT argues that the fact that the main matter in arbitration is solely based on the contract at issue, the granting of the injunctive relief prayed for , and allowing the contract to be put into writing , at this critical stage when the parties are contesting the terms of the contract would seriously prejudice the arbitration proceedings and will cause

[65]P.S Bedell and L.K Eblinng, ' Equitable Relief in Arbitration'[2011] Loyola University Chicago Journal

serious, irremediable damage to the RESPONDENT, while further complicating the matters in arbitration. The RESPONDENT argues that the granting of the said injunctive relief at this juncture is violative of primary matters taken into consideration in granting injunctive relieves by arbitral tribunals. [66]

4.1 THE CLAIMANT MUST PERFORMANCE ITS MONETARY OBLIGATIONS TOWARDS THE RESPONDENT (MONETARY RELIEF).

All contract remedies are focused on protecting one's contractual rights. Therefore, in accordance with the general principle of *pacta sunt servanda*, the RESPONDENT always requires the performance of the contractual obligation to pay money. It is also the rule in Article 7.2.1 of the UNIDROIT principles - *Where a party who is obliged to pay money does not do so , the other party may require payment.* Pursuant to Article 62 of CISG, unless the seller has resorted to a remedy which is inconsistent with the requirement of monetary relief, the seller can require the buyer to pay the price. CISG views monetary relief as a specific performance which its performance can be enforced in a condition of fundamental breach of contract.[67]

[66] Stephen P. Bedell and Louis K. Eblinng, ' Equitable Relief in Arbitration'[2011] Loyola University Chicago Journal

[67] Peter A. Piliounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time under the CISG: Are these worthwhile changes or additions to English Sales Law' (2000) Spring 121 Pace International Law Review.

So, in this issue, in the absence of restored remedy by the seller which is inconsistent with the requirement of monetary relief such as avoidance or price reductions or increments,[68] seller can invoke the performance of buyer's obligation to pay the price due to the existence of a fundamental breach of contract (*Cerveceria y Malteria Paysandu S.A v. Cerveceria Argentina S.A)*[69]. Violation of contractual obligations which are directly emanating from the contract (natural rights) is considered to be a breach of fundamental nature.[70] The CLAIMANT claims that the contract is still enforceable.[71] According to terms of the contract , 35% of the total contract amount per year should be paid by the buyer- the second incentive , starting from 2016, apart from the 15% price increasement - the first incentive. Though the last delivery of 2016 was carried out without any mishap, the CLAIMANT did not pay the second incentive to the buyer which the CLAIMANT should have paid base on above - mentioned CLAIMANT'S contention which is a contractual obligation of the buyer. CLAIMANT'S conduct breached the RESPONDENT'S right to require payment for delivered goods in line with Article 58[72] and 62 of CISG (Arbitration proceeding 24/2003) [73].

[68] As expressly stated in the text of CISG Art. 46(1) and 62, in order for the buyer / seller to exercise the right to require performance of the contract, he/she must not restored to a remedy which is inconsistent with that right, e.g., by declaring the contract avoided under Art.49 or by declaring a reduction of the price under Art.50.

[69] *Cerveceria y Malteria Paysandu S.A v. Cerveceria Argentina S.A*, Camara Nacional de Apelaciones en lo Comercial de Buenos Aires, 21 July 2002.

[70] *Thread case ,*Oberlandesgericht Dusseldrof [I-15 U 222/02], 21 April 2004.

[71] Moot Problem, para. 58.

[72] The buyer is bound to pay the price after the occurence of two circumstances: delivery of goods or documents controlling their disposition and possession and utilization of an opportunity to examine the delivered goods.

[73]*Arbitration proceeding 24/2003*, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 17 September 2003.

Therefore, the RESPONDENT (seller) requires the performance on the payment of the second incentive for December of 2016.

Contract with the modification of second incentive is operative till 2018 December.[74] Therefore, non - payment of the amount corresponding to 8 deliveries supposedly scheduled for 2017 and 2018 including the first incentive and the second incentive for 2017 December and 2018 December breached fundamental contractual rights of the seller. However, in this situation , the RESPONDENT requires the performance of both the payment and taking the delivery as the buyer has neither paid the price nor taken delivery in accordance with the cumulative essence of Article 53[75], 60[76] and 62 of CISG. In Clout case No. 133[77] ,*Construction Machine Case*[78], Arbitration proceeding 24/2003, *Filter's case* [79],*Globes case*[80] and *B.V.B.A.A.S v.GmbH P.CF*[81] court upheld the fact that the seller is entitled require performance of non - payments under above-mentioned ground.

[74] Moot Problem, para 41.

[75] The buyer must pay the price for the goods and take the delivery of them as required by the contract.

[76] The buyer's obligation to take delivery consists of in doing all the acts which could reasonably expected of his in order to enable the seller to make delivery and in taking over the goods.

[77] Clout case No.133, Appellate Court Munchen [7U 1720/94] Germany, 8 February 1995, there is hardly any case law on the seller's right to require buyer to take delivery of goods but this case provide a general statement regarding *inter alia* buyer's refusal to take delivery.

[78]*Construction machine case*, Bundesgericht [4C.307/2003/ech] Switzerland, 19 February 2004, court held that r was thus obliged to pay, in accordance with CISG Art.53, and the seller entitled to seek payment in accordance with the CISG Art.62.

[79] *Filter's case,* LG Monchengladbach [7 O 221/02] Germany, 15 July 2003.

[80] *Globes case,* LG Munchen [5 HKO 3936/00] Germany, 27 February 2002.

[81] *B.V.B.A.A.S v.GmbH P.CF*, Hof van Beroep [1997/AR/384] Belgium, 2 December 2002.

Therefore, the RESPONDENT prays the Arbitral Tribunal to grant the following relief.

1) To declare that the contract is void and unenforceable

2) Strictly without prejudice to the aforesaid, in the event the Arbitral Tribunal holds against the RESPONDENT, under the first prayer, To order the CLAIMANT'S performance under the purported contract as a precondition to RESPONDENT'S obligation to fulfill the first two deliveries of 2017 and

3) To refuse the injunctive relief prayed for by the CLAIMANT

PRAYER FOR RELIEF

The RESPONDENT seeks to request the tribunal to;

1. Declare that the agreement to arbitrate is incapable of being performed due to its state of impecuniosity;
2. Declare that VADER can not be joined as a party and;
3. Strictly without prejudice, in the event that the Claimant's prayer on the existence and enforceability of the contract is granted by the tribunal, then the RESPONDENT to be granted the followings relief ;

    3.1. the payment of the Second Incentive for December of 2016 and;

3.2. the amount corresponding to 8 deliveries supposedly scheduled for 2017 and 2018.

4. Dismiss the CLAIMANT'S prayer to put the contract in to writing,