THE 13TH LAWASIA INTERNATIONAL MOOT COMPETITION

ASIAN INTERNATIONAL ARBITRATION CENTRE

2018

BETWEEN

CHUIZI LEISHEN'S LLC

(CLAIMANT)

AND

ROBUSTESSE ESPACIAL SOLUCION CORP

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

INTERNATIONAL CONVENTION

CASES

ARBITRAL AWARDS

JOURNALS

BOOKS

STATEMENT OF JURISDICTION

The Parties, *Chuizi Leishen's LLC* ("**CL**") and *Robustesse Espacial Solucion Corp* ("**RES**"), have agreed to the following: (1) to submit any dispute arising from or in connection with the Sale and Production Contract ("**the Contract**") before an arbitration forum ("**the Tribunal**") in Cambodia, (2) the law governing the procedure of the arbitration shall be the KLRCA Arbitration Rules 2017, and (3) the substantive law for the Contract shall be the UNIDROIT Principles of International Commercial Contract 2016 ("**UNIDROIT Principles**").

QUESTIONS PRESENTED

1. Is the agreement to arbitrate incapable of being performed due to impecuniosity of the Respondent?
    a. Whether the Respondent has discharged the burden of proof to show its impecuniosity?
    b. Whether impecuniosity is a ground to render an arbitration agreement to be incapable of being performed or inoperable?
    c. Whether the Respondent can still raise an effective defence despite not having to raise its counterclaim?

2. Should the request of the Claimant to join Vader as a party to the Arbitration be granted by the Tribunal?
    a. Whether a joinder application under the KLRCA Rules can be applied for a non-signatory party to join the arbitration proceeding?
    b. Whether the Respondent's corporate veil can be pierced on the basis of agency and principal doctrine?

3. Was there a valid acceptance of the Respondent's offer?
    a. Whether the Indian sideways head nod by Mr Deewarvala of the Claimant amounts to a valid acceptance?
    b. If the Indian sideways head nod constitutes a valid acceptance, whether the acceptance has reached the Respondent?
    c. Whether there is a requirement for there to be a meeting of the minds under UNIDROIT Principles?

4. What relief should the Tribunal grant?

   a. Whether a declaratory relief can be granted to the Claimant?

   b. Whether specific performance can be granted to the Claimant?

   c. Alternatively, whether damages can be granted to the Claimant?

STATEMENT OF FACTS

1. The two main parties in this case are the Claimant, *Chuizi Leishen's LLC* ("**CL**") and the Respondent, *Robustesse Espacial Solucion Corp* ("**RES**"). The Claimant is a company incorporated in China that focuses on construction as its main commercial activity whereas the Respondent is a company incorporated in Cambodia that specialises in production and selling of bricks. The Respondent is also a wholly owned subsidiary of *Vader Ltd* ("**Vader**") a company based in the United Kingdom who shares the same business activity as RES.

2. The Respondent had employed Mr. Armando Paredes ("**Mr. Paredes**") of Mexican origin as their managing director to execute any and all agreements on behalf of RES. Meanwhile Mr. Kalai Deewarvala ("**Mr. Deewarvala**") of Indian-Malaysian origin was appointed as the representative of CL and was authorised to execute any and all agreements with RES.

3. On September 2013, Mr. Paredes and Mr. Deewarvala ("**the Representatives**") formalised and signed a Contract of Production and Sale of construction bricks ("**the Contract**"). The agreed salient terms were such that on the year 2014, RES acting as the Seller is obliged to make four deliveries of construction bricks to their own warehouse in Cambodia. Meanwhile CL acting as the buyer is obliged make payments five (5) days prior to the delivery dates on March, June, September and December.

4. Subsequently on November 2014, after three (3) successful deliveries and payments by the respective Parties, the Representatives held a meeting in Paris to negotiate on

extending the Contract to four (4) more deliveries on 2015, subject to a price increase of fifteen per cent (15%). The Claimant signified his assent by way of a shaking of hands and the new terms were coined as the "**First Incentive**".

5. After the third delivery in 2015, through a correspondence of emails between the Representatives, both Parties had agreed to another extension of the Contract to four (4) more deliveries on 2016 with a second price increase of 15%. Midway through 2016, the Respondent realised that they were not generating sufficient profits, thus the next financially sound decision was to re-negotiate the price with Mr. Deewarvala.

6. On 23 November 2016, both Parties conducted a final negotiation via a skype call to negotiate on the "**Second Incentive**" whereby Mr. Paredes proposed to make four (4) more deliveries on 2017 and another four (4) on 2018. In return, the Claimant has to pay an additional price of thirty-five per cent (35%) bonus at the end of each year. As a response, Mr. Deewarvala gave an Indian sideways head nod (**the "Indian Nod**") to express his acceptance and believed that the Contract was extended in accordance with the new agreed terms.

7. By mid-March 2017 after inquiring for the next delivery date from the Respondent via a telephone call, the Claimant realised that there was a misunderstanding. Subsequently the Respondent committed a breach of the Contract as they did not provide the two deliveries in 2017 as agreed. As a consequence, the Claimant served on the Respondent a notice of arbitration ("**the Notice**") on August 2017.

8. During the preliminary meeting on February 2018, the Claimant raised three main claims before a panel of three arbitrators; (1) to enforce the Contract, (2) to ensure the Respondent will perform the two deliveries, and (3) to set the terms into writing. The Claimant also paid the security deposit for both Parties to ensure that the arbitration can commence without having any financial difficulties. Meanwhile, RES rejected the claims and intended to raise the counter-claim, but failed to do so due to their impecunious state and therefore sought to put an end to the whole proceeding.

SUMMARY OF PLEADINGS

I. The agreement to arbitrate is still capable of being performed despite the Respondent being impecunious

The burden of proof lies on the party relying on their impecunious state and the Respondent has not discharged this burden. Moreover, impecuniosity is not a circumstance that can render an arbitration agreement to be incapable of being performed or inoperative. Alternatively, the Respondent can still provide an effective defence by way of a statement of defence without raising their counter-claim.

II. The Tribunal should grant the joinder of Vader Ltd into this arbitration proceeding

Vader Ltd can be joined as a party to the arbitration as they are *prima facie* bound by the arbitration agreement pursuant to the second condition of Rule 9 under the KLRCA Arbitration Rules 2017. This can be done by piercing of the Respondent's corporate veil on the basis that there exists a relationship of principal and agent between Vader Ltd and the Respondent. There is sufficient circumstantial evidence to show that Vader had effective control over RES and RES is merely an extension of Vader to ensure that Vader's business would not suffer huge losses due to Brexit.

III. There is a valid acceptance made by the Claimant

The Indian Nod made by Mr. Deewarvala of the Claimant amounts to a valid acceptance. There is no requirement of meeting of the minds between the parties for the acceptance to be effective, as long as it has reached the Respondent. The intention of both Parties during the negotiation is clear by using the subjective test as the

Respondent was aware of the Claimant's intention to extend the Contract. The Indian Nod is reasonable to be construed as an acceptance by a person of the same kind as the Respondent.

IV. The Claimant is entitled to claim for relief due to the non-performance by the Respondent

The Claimant is seeking for a declaration for the Contract to be in existence and to reduce the Contract into writing as there was a valid acceptance of the Contract. Due to the non-delivery of the bricks, the Claimant is entitled to require performance by the Respondent for the first two deliveries of 2017. Alternatively, if this tribunal decides that specific performance cannot be granted, the Claimant also seeks for damages at the value of USD$456,262,500.00.

PLEADINGS

I. THE AGREEMENT TO ARBITRATE IS STILL CAPABLE OF BEING PERFORMED DESPITE THE RESPONDENT BEING IMPECUNIOUS

1. On 15 August 2017, the Claimant served a notice of arbitration ("**the Notice**") to the Respondent in response to the two non-delivery of the bricks on 2017 by the Respondent. [1] Subsequently a preliminary meeting ("**the Meeting**") via teleconference call was held on February 2018 after the constitution of a three (3) member Arbitral Tribunal.[2] The Respondent raised the issue that they are unable to file their counterclaim mainly due to their impecunious state, therefore seeking to put a stop to this arbitral proceeding.[3]

2. However, such reasoning cannot be used as a way to avoid from commencing with the arbitration proceeding. The Tribunal should continue with the proceeding mainly because firstly, the Respondent has not discharged their burden of proof to show impecuniosity (A), secondly impecuniosity is not a ground to render an arbitration agreement to be incapable of being performed or inoperable (B) and thirdly, the Respondent is still able to provide an effective defence irrespective of not raising their counterclaim (C).

[1] Moot Problem, para. 13.
[2] *Ibid*, para. 49.
[3] *Ibid*, para. 57.

A. The Respondent has not discharged the burden of proof to show its impecuniosity

3. As mentioned previously, the Respondent argued that it is unable to raise its counter-claim due to its impecunious state. In regards to this contention, the pertinent issue that the Tribunal must determine here is whether the Respondent has discharged the burden of proof to show that RES is indeed impecunious.[4]

4. Impecunious is defined as when the party is in a state of penniless or lack of money.[5] The Court in **South Eastern Health v Flannigan** opined that the party whom relying on their impecunious state has a burden to provide material evidence to prove that their financial standing warrants one to be in a state of foreseeable insolvency should they incur more expenses.[6]

5. Although the Respondent is claiming that they are impecunious, it can be seen that the legal representatives of the Respondent were three (3) experienced lawyers who were former members of a leading Cambodian law firm named Teng, Pok and Fineang Legal.[7] If the Respondent was truly impecunious, they would not have sufficient financial means to hire such prestigious in-house counsels.

6. A reasonable prudent business person who is suffering from insufficient funds would not have incurred more expenses to hire an expensive legal representation. By virtue of this fact, the Respondent has not discharged the burden to prove that

[4] Moot Problem, para. 59.
[5] *South Eastern Health v Flannigan,* High Court of Justice in Northern Ireland Queen's Bench Division (15 April, 2015), para. 67
[6] *Ibid.*
[7] Moot Problem, para. 51.

it is indeed in a state of impecuniosity so as to avoid the arbitration proceeding to be recommenced. Thus, unless the Respondent can prove otherwise, the agreement to arbitrate is capable of being performed because the Respondent is not impecunious based on the facts presented.

B. Impecuniosity is not a ground to render an arbitration agreement to be incapable of being performed or inoperable

7. The Contract entered between the Parties on September 2013 provides an arbitration agreement that accords an arbitration proceeding to be commenced should a dispute arise in relation to the Contract.[8] The issue stems from the contention raised by the Respondent that is whether impecuniosity can be a circumstance that warrants the arbitration agreement to be inoperable.[9]

8. However it is imperative to clarify the position of law in regards to whether impecuniosity can indeed render an arbitration clause to be incapable of being performed. The Common Law jurisdiction has addressed this by stating it outright that impecuniosity is not a factor that causes an arbitration agreement to be inoperable.[10]

9. The English Court of Appeal in **Jonas Paczy v Haendler and Natermann GmbH** ruled that mere impecuniosity of one of the parties to the arbitration agreement does not render the agreement to be incapable of being performed.[11] In truth it

[8] Moot Problem, para. 15.
[9] *Ibid*, para. 65(a).
[10] *Jonas Paczy v Haendler and Natermann GmbH* (1981) 1 Lloyd's Rep 302, para. 34.
[11] *Ibid*, para. 34.

merely renders one party being unable to discharge his part of the agreement. The *ratio* behind the judgment was that an agreement only becomes inoperable when the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it.[12]

10. Additionally, the court in **Bakri Navigation Co. Ltd. v. Ship Golden Glory, Glorious Shipping** referred to **Jonas Paczy's** case and elaborated further on specific circumstances that are capable of making an arbitration agreement to be inoperable:[13]

> *"Firstly, where the Court has ordered that the arbitration agreement shall cease to have effect, secondly, circumstances in which an arbitration agreement might become 'inoperative' by virtue of frustration, discharge by breach and thirdly, the agreement may have ceased to operate by reason of some further agreement between the parties."*

11. To summarise, the Respondent cannot rely on impecuniosity as an excuse to evade the arbitration proceeding. It is clear that the position of Common Law is that an arbitration agreement can still be performed despite the party being impecunious. None of the circumstances laid down by **Bakri Navigation**'s case echoes impecuniosity to be a factor that is capable of making the agreement to be inoperable.[14] Moreover it cannot be said that the Respondent was in a state of

[12] *Ibid*, para. 35.
[13] *Bakri Navigation Co. Ltd. v. Ship Golden Glory, Glorious Shipping S.A.,* [1991] FCA 235 (Federal Court of Australia), para. 45.
[14] *Ibid.*

impossible to perform the proceeding. However, in truth it was a circumstance where the said party was merely unwilling to perform it, per **Jonas Paczy's** case.[15]

12. The solution to RES' problem here would be to receive financial assistance from third parties so that RES can pay for their counterclaim. However, the facts show that the Respondent still has not exhausted all the means to procure any financial aid. While the Respondent has approached third party funders and failed to acquire any,[16] nevertheless the next viable solution would be to allow Vader Ltd to provide financial assistance by way of allowing a joinder application. Thus, the Respondent's situation is not one that warrants the arbitration agreement to be incapable of being performed, rather it is one where the Respondent chose not to perform the agreement.

13. Ultimately, impecuniosity is not a viable reason for an arbitration agreement to be inoperative. The reason is because the situation itself does not place the Respondent in a state of impossibility. On the contrary, the Respondent is still able to find an alternative means to procure financial assistance, namely the joinder of Vader Ltd.[17]

C. The Respondent can still raise an effective defence even if the Respondent is unable to raise its counterclaim

14. For this contention, the leading authority can be seen in the **Pirelli**'s case where the factual matrix concerns the respondent submitting its counterclaims in the ICC

[15] *Jonas Paczy v Haendler and Natermann GmbH* (1981) 1 Lloyd's Rep 302, para. 34.
[16] Moot Problem, para. 61.
[17] *Ibid*, para. 65(b).

arbitration where subsequently they could not pay the advance costs due to their bankruptcy.[18] The tribunal withdrew the counterclaim and granted an award solely based on the claims submitted by the claimant and the reply to the claims by the respondent.[19]

15. It is important to note the differing judgments given in its Appellate stage and its Supreme Court's stage in the aforementioned case. In the former, the Court of Appeal of France held that the award by the Tribunal was tainted with illegality as it had violated Article 6 of the European Convention of Human Rights (ECHR) on the matter of fair hearing when the Respondent was deprived of having their counter-claim being heard.[20] It was also decided that due process and principle of equality were not observed.[21]

16. The French Supreme Court then overruled the Court of Appeal's decision and held that the Respondent while had not raised their counter claim, they can still provide an effective defence.[22] The rationale is that there is a clear distinct nature between a statement of defence and a counter claim.[23] If the statement of defence is not effectively raised or argued by the respondent due to impecuniosity, then it can be said that there is a violation of the right to present the case and the right to equal treatment.

[18] *Bertrand Derains, Pirelli & Co. v. Licensing Projects and other*, Court of Cassation of France, First Civil Law Chamber, Pourvoi No. 11-27.770, 28 March 2013, para. 28.
[19] *Ibid.*
[20] *Société Licencing Projects SL v Société Pirelli,* RG: 09/24158 Court of Appeal (France), 17 November 2011, para. 30.
[21] *Ibid.*
[22] *Bertrand Derains, Pirelli & Co. v. Licensing Projects and other*, Court of Cassation of France, First Civil Law Chamber, Pourvoi No. 11-27.770, 28 March 2013, para. 28.
[23] *Ibid.*

17. However, if the counter claim cannot be raised and argued by the respondent due to lack of financial standing, the court held that it does not mean the respondent was deprived of an effective defence.[24] This is because the submission of counterclaims is not guaranteed procedurally, unless they are inseparable from the main claims.

18. The principal claims forwarded by the Claimant were (i) to declare that the Contract was existent and enforceable, (ii) to order the Respondent's performance (the first two deliveries of 2017), and (iii) to set the terms of the Contract in writing.[25] Meanwhile the counterclaim by the Respondent as itemised in the facts were claims in the form of monetary reliefs.[26] The nature of pleadings raised by the Claimant and the Respondent respectively are indeed distinct. This is because the Claimant's pleading is essentially a claim for declaration and specific performance, meanwhile the Respondent's pleading is claim for damages.

19. In addition, the counterclaim is contingent to the success of the first relief from the principal claim. If the Tribunal finds that there was no contract to be enforced, the counterclaim will be irrelevant altogether. This further shows that the counterclaim is premature and insufficiently connected with the principal claims. Hence, it is not necessary for the Respondent to raise such as they can still provide an effective defence to reply directly to all the claims raised by the Claimant.[27]

[24] *Bertrand Derains, Pirelli & Co. v. Licensing Projects and other*, Court of Cassation of France, First Civil Law Chamber, Pourvoi No. 11-27.770, 28 March 2013, para. 28.
[25] Moot Problem, para. 45.
[26] Moot Problem, para. 58.
[27] *Ibid*, para. 57.

20. Furthermore, it should be noted that the KLRCA Rules made a clear distinction between a statement of defence and a counterclaim, including their fees. **Article 21 in Part II of the KLRCA Rules**[28] states that a statement of defence shall be accompanied by all documents and other evidence relied upon by the Respondent. Meanwhile a counterclaim is also a claim as defined under **Article 20**[29] similar to a statement of claim.

21. In other words, the Respondent's statement of defence can also include any and all relevant documents, evidence in a form of witnesses or even expert witness as provided under the KLRCA Rules as a means to support their contentions. Additionally, the Respondent need not have to be concerned about the security deposit for the said hearing as the Claimant has paid for the security deposit for both Parties.[30] In summary, it is not necessary for the Respondent to raise the counterclaim because the Respondent is able to provide an effective defence.

22. To conclude, the Respondent has not discharged the burden of proving that it is impecunious hence they can afford the arbitration fees. Secondly, impecuniosity is not a circumstance that can render an arbitration agreement to be inoperative as the Respondent can still find other means to procure financial assistance and pay for the arbitration fees. Finally, the Respondent can still provide an effective defence in a form of a statement of defence despite not having to raise its counterclaim because the latter is not sufficiently connected to the principal claim. Ultimately, the agreement to arbitrate is still capable of being performed irrespective of the Respondent being impecunious.

[28] Article 21 of UNCITRAL Arbitration Rules (Part II of KLRCA Arbitration Rules 2017).
[29] Article 20 of UNCITRAL Arbitration Rules (Part II of KLRCA Arbitration Rules 2017).
[30] Additional Clarifications, para. 2.

II. THIS TRIBUNAL SHOULD GRANT THE JOINDER OF VADER LTD INTO THIS ARBITRATION PROCEEDING IN AIDING THE RESPONDENT'S IMPECUNIOUS STATE

23. After the Tribunal was constituted on 15 December 2017, the Claimant had filed a request for joinder of Vader Ltd as a non-signatory party to the arbitration proceeding.[31] The reason for this application was to allow the Respondent to receive financial assistance in raising their counterclaim.[32] The legal relationship between Vader Ltd and the Respondent is one that is parent-subsidiary relationship.[33]

24. The said application can be done carefully by two pertinent steps. Firstly, applying under the KLRCA Arbitration Rules 2017 for a joinder of a non-signatory party into the arbitration proceeding (A)**.** Secondly, there is a need to pierce the Respondent's corporate veil on the basis of agency and principal doctrine to justify the application (B).

A. Joinder application under the KLRCA Arbitration Rules 2017 for a non-signatory party to join the arbitration proceeding

25. A joinder for Vader Ltd was already applied by the Claimant after the constitution of the tribunal on 15 December 2017 pursuant to **Rule 9(1) of the KLRCA Rules**.[34]

[31] Moot Problem, para. 44.
[32] *Ibid*, para. 62.
[33] *Ibid*, para. 6.
[34] *Ibid*, para. 62.

26. According to **Rule 9(1) of the KLRCA Rules,** it states that any party to the arbitration may request one or more additional parties to be joined as a party to the arbitration provided they fulfil either of these two conditions. Firstly, if all the parties to the arbitration and the additional party give their consent in writing to the joinder; or secondly the additional party is *prima facie* bound by the arbitration agreement. Such application shall be determined by the arbitral tribunal if a tribunal had already been constituted.

27. The first condition cannot be fulfilled as from the preliminary meeting the tribunal has established that the joinder application is to be a contentious matter. Hence it can be inferred that no consent was given.[35] The second condition is applicable in this situation and the requirement stipulated thereon is for Vader Ltd to be *prima facie* bound by the arbitration agreement.

28. There is no clear interpretation of *Prima Facie* under **Rule 9(1) of the KLRCA Rules**. However, it should be noted that **Rule 7 of the Singaporean International Arbitration Centre Rules 2016** ("**SIAC Rules**") is in *pari materia* with **Rule 9** in regards to the first and second condition. More importantly **Rule 7 of the SIAC Rules** also uses the term "*prima facie* bound by the arbitration agreement".

29. Furthermore, the Singaporean High Court case of **Jiang Haiyang v Tan Lim Hui** provided a judicial pronouncement that echoes the interpretation of *prima facie.*[36] It was held that while a non-signatory party is not bound by an arbitration agreement due to the privity of contract principle, nonetheless there are exceptions

[35] Moot Problem, para. 65.
[36] *Jiang Haiying v Tan Lim Hui and Another Suit* [2009] 3 SLR 13; [2009] SGHC 42, para. 41.

to such rule. Namely by way of incorporation of an arbitration agreement by reference, assumption of rights or liabilities to a contract such as assignment or novation, an agreement entered by an agent or the corporate veil-piercing on the basis of alter ego principle.

30. It is by virtue of the final exception from the **Jiang Haiyang's** case that the Respondent's corporate veil should be pierced so Vader Ltd can be joined to the proceeding to prove that the latter is *prima facie* bound by the arbitration agreement. Furthermore, in the Australian jurisdiction which is still under the Common Law system, "agency" is used interchangeably by the courts with the phrase "alter ego" as held in **Brewarrana v Commissioner of Highway**.[37] Therefore the agency and principal doctrine will be used to justify the piercing of Respondent's corporate veil.

B. The Respondent's corporate veil should be pierced on the basis of agency and the principal doctrine to justify the application

31. The principle of separate legal entity provides a clear separation between the parent and the subsidiary company. However, the actual legal relationship between Vader and the respondent is one that is distinguished. By analysing the two companies, it can be seen that they are neither separate nor independent as the facts mentioned. In actuality the Respondent acts as though it is an agent to Vader.

[37] *Brewarrana v Commissioner of Highways* (1973) 4 SASR 476, para. 480.

32. In **Smith, Stone and Knight, Ltd v The City of Birmingham**, it was found that the subsidiary was the 'agent or employee, tool of' the holding company after addressing the following questions: (c) was the holding company the 'head and brains' of the venture; (d) did the holding company govern the business, decide what should be done and what capital should be embarked on the venture; (f) was the holding company in effective and control.

33. Similarly in **Noel Developments Ltd. v. Metro-Can Construction (HS) Ltd,** the Supreme Court of Canada was confronted with an issue of whether a parent company can also share liability in a claim where its subsidiary company was originally liable in a construction dispute.[38] It was found that a management agreement between the parent and subsidiary proved that the subsidiary was completely ran by the parent. The three main roles played by the parent were: (1) securing the contract (2) contract management from the start to the completion and (3) lending of the necessary start-up capital.

34. Aside from that, the parent owned all of the shares of the subsidiary and both the companies shared their employees and officers. The Court held that despite there was no fraud or misconduct on the part of the parent, the Salomon doctrine was precluded and the corporate veil of the subsidiary company was allowed to be pierced. These factors and tests used are also applicable in the current situation to show that the Respondent was indeed an agent to Vader Ltd.[39]

[38] *Noel Developments Ltd. v. Metro-Can Construction (HS) Ltd.* (1999), 50 C.L.R. (2d) 117 (B.C.S.C.), para. 56.
[39] *Ibid.*

35. Firstly, on 29 May 2013, Mr Auld Chapman, the CEO of Vader persuaded the Claimant's CEO, Mr Lee to enter the Contract where certain terms were discussed and even agreed upon.[40] Subsequently a formal Contract was created that was signed by the respective representatives of the Respondent and Claimant.[41] Thus, it can be seen that Vader was the actual "head and brains of the venture", as per **Smith Stone & Knight,** as they are the one who secured the Contract for the Respondent and such Contract was the only Contract that the Respondent had entered into since its date incorporation.[42]

36. Secondly, prior to the whole operation of the Contract being commenced, the parent company injected capital into the Respondent for the establishment costs and to ensure that the operations has no financial difficulties.[43] Moreover, it should be noted that throughout the whole contractual period since the date of operation until July 2016, Vader Ltd had been providing further financial assistance, compliance monitoring and even directives to the Respondent.[44] These listed practices further illustrate the extent of control Vader had upon the Respondent and that it clearly indicates that Vader actually governs the business and decides what should be done, as per **Smith Stone & Knight**'s case.

37. Thirdly, RES is a Single-Member Private Limited with Vader as the sole shareholder, who still has a strong voice in decision making of the company and substantial voting rights to influence the Respondent.[45] **Article 118 of the Law on Commercial Enterprises of Cambodia 2005** states that for a private limited

[40] Moot Problem, para. 10.
[41] *Ibid.*
[42] Moot Problem, para. 10.
[43] Clarifications, para. 3.
[44] Moot Problem, para. 27.
[45] Clarifications, para. 2.

company shall have one or more directors and the Shareholders shall elect their directors by ordinary resolution of shareholders who have the rights to vote.

38. In **Kristian Equipment Ltd. v. Campbell West Ltd**, a cause of action for breach of contract accrued by the defendant and later it was brought before the court by the plaintiff. Though the plaintiff took action against both the parent and the subsidiary when the fault was only caused by the latter. During the proceeding, the plaintiff managed to prove that the parent had control over the subsidiary by owning 80% of the shares and the rests were shareholders with no equity in the subsidiary. Additionally, the subsidiary was only managed to operate due to the injection of funds by the parent company. The Court ultimately held that the actions of the subsidiary were the actions of the parent and therefore allowed a piercing of the corporate veil by virtue of the agent and principal doctrine.[46]

39. The irresistible conclusion from all these circumstantial evidence ultimately prove that RES is indeed an extension of Vader and therefore a sole agent for Vader's business motives. By establishing this relationship, the subsidiary is in fact an agent to the parent company and henceforth this Tribunal should pierce the corporate veil in making Vader Ltd *prima facie* bound by the Contract pursuant to **Rule 9 of the KLRCA Rules**.

[46] *Kristian Equipment Ltd. v. Campbell West Ltd.* [1992] 2 W.W.R. 69, para. 27.

III. THERE IS A VALID ACCEPTANCE MADE BY THE CLAIMANT DURING THE NEGOTIATION

40. The Indian Nod made by Mr Deewarvala of the Claimant amounts to a valid acceptance (A) since it has reached Mr Paredes of the Respondent (B) as there is no requirement for there to be a meeting of mind in the conclusion of the Contract (C).

A. The Indian Nod amounts to a valid acceptance

41. The Parties have agreed that the law applicable to the Contract shall be the UNIDROIT Principles. Under **Article 2.1.6(1) of the UNIDROIT Principles**, a statement made by or other conducts of the offeree indicating assent to an offer is an acceptance. In this regard, Mr. Deewarvala of the Claimant accepted the offer made by Mr. Paredes of the Respondent during the four-hour negotiation through a skype video call by doing the Indian Nod which constitutes a valid acceptance.[47]

42. In the **Fuel Oils case**, a contract can be concluded both with the acceptance of the offer, and with the behaviour of the parties demonstrating sufficient certainty that the agreement has been reached by virtue of **Article 2.1.6 of the UNIDROIT Principles**.[48] Similarly in the present case, the Second Incentive has been concluded when the offer was accepted through the use of the Indian Nod.[49]

[47] Moot Problem, para. 35.
[48] Ad hoc Arbitration, Rome 4 December 1998, para. 466.
[49] Moot Problem, para. 35.

43. Under UNIDROIT Principles, statements or conducts are interpreted based on the parties' intentions during the negotiation by looking into two tests in order to determine the validity of the acceptance made by the Claimant, which are the subjective test (a) and the reasonableness test (b) under **Article 4.2 of the UNIDROIT Principles**. [50]

(a) The Claimant's intention to extend the Contract can be identified through the 'subjective test'

44. Pursuant to **Article 4.2(1) of the UNIDROIT Principles**, the subjective test provides that the statements and other conduct of a party is to be given preference, provided that the other party knew or could not have been unaware of that intention.[51]

45. The conduct has to be interpreted according to the intention of the Claimant since the Respondent knew the actual intention of the Claimant as decided by the Appellate Court in the case of **BRI Production "Bonaventure" v Pan African Export**.[52]

46. As affirmed in the **Chemical products case**, the actual will of the Claimant was easily recognisable that the Respondent could not have been unaware of it. [53] This can be seen when the Respondent was aware of the Claimant's intention to pursue the extension of the Contract as the Respondent demanded to increase the price of

[50] *Joseph Charles Lemire v Ukraine* No ARB/06/18; IIC 424 (2010), para. 113.
[51] *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407, para. 7.
[52] *BRI Production "Bonaventure" v. Pan African Export*, Court of Appeal (France), 22 February 1995.
[53] *Chemical products case*, Supreme Court (Switzerland), 5 April 2005.

bricks substantially after the Respondent knew about the Claimant's intention to extend the Contract. [54]

47. In addition, the relevant circumstances of the case must be taken into consideration in order to interpret the intention of the parties under **Article 4.3(a) of the UNIDROIT Principles**, the preliminary negotiations of both parties has to be given the utmost weight where intention must be inferred from the contents of the proposal for concluding a contract and from the circumstances in which it was manifested. The more detailed the elaboration of the proposal for concluding a contract, the more it is justified to infer the intention of being bound.[55]

48. The Parties have been communicating for about four months for a new round of negotiations to come up with new terms of the Contract since July 2016 and ended during the final skype call on 23 November 2016.[56] Thus, this indicates that there have been many series of negotiations between the Parties which verifies the determination of both Parties to pursue the extension of the Contract for the Second Incentive.

49. Prior to that, Mr. Paredes did not look for an alternate counterparty and instead relied on the Contract to continue generating a steady income for the Respondent which displays the intention to be bound on the part of the Respondent. [57]

50. Furthermore, under **Article 4.3(c) of the UNIDROIT Principles**, the conduct of the parties subsequent to the conclusion of the contract has to be taken into account

[54] Moot Problem, para. 32; *Textiles case*, District Court (Hamburg), 26 September 1990.
[55] Anton K. Schnyder; Ralf M. Straub, *The Conclusion of a Contract in Accordance with UNIDROIT Principles* [1 Eur. J. L. Reform 243 (1999)], para. 243.
[56] Moot Problem, para. 28.
[57] *Ibid*, para. 25.

as well whereby the Claimant contacted the Respondent to confirm the next delivery date for the first deliveries in 2017 four months after the skype video call.[58] This phone call establishes the fact that the Respondent had notice that the Indian Nod made by Mr. Deewarvala amounts to an acceptance of the Respondent's offer.[59] The notice of the Claimant's inquiries during the phone call proves that the Respondent was aware of the Claimant's intention to conclude the Second Incentive and this fulfils the subjective test.[60]

(b) It is reasonable for the Respondent to construe the Indian Nod as a valid acceptance

51. The reasonableness test is laid down under **Article 4.2(2) of the UNIDROIT Principles** which provides that statements or conducts of the party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.[61]

52. In the case of **Chia Ee Lin Evelyn v Teh Guek Ngor Engelin**,[62] the intention which courts will attribute to a person is always that which that person's conduct and words amount to when reasonably construed by a person in the position of the offeree, and not necessarily that which was present in the offeror's mind.[63]

[58] Moot Problem, para. 43.
[59] *Calzados Magnanni v Shoes General International*, Court of Appeal (France), 21 October 1999, para. 28.
[60] *Film coating machine case*, District Court (Germany), 15 September 1997, para. 4.2.
[61] *Compañia Rioplatense de Hoteles S.A. v Joao Fortes Engenharia S.A. and J. F. International S.A.,* Ad Hoc Arbitration (Uruguay), 30 December 1998, para. 26.
[62] *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin* [2004] 4 SLR 330, para. 43.
[63] *Standard Chartered Bank v Neocorp International* Ltd [2005] SGHC 43, para. 44.

53. The understanding that could reasonably be expected of persons in dispute should take into account their business experience and their linguistic knowledge to construct the understanding of an average prudent and diligent business man.[64]

54. As in the case of **Proforce Recruit Ltd v The Rugby Group Ltd**,[65] the relevant circumstances, including the negotiations leading up to the contract, reveal whether a party was aware of the other's intentions.

55. The facts of the case have to be looked in totality. Mr. Paredes states in paragraph 34 of moot problem that: *"I restate my client's intention to continue to deliver every quarter of 2017 – we like this Contract"*. This shows the intention on the part of the Respondent to extend the Contract and none of the exchanges here show any intention of termination.[66]

56. Later, Mr. Deewarvala replied with the understanding that if the Claimant were to pay 35% bonus, the Respondent will commit not only to 4 but 8 deliveries which was then followed by a restatement of his understanding. Following that exchange, Mr. Paredes responded with a yes.[67]

57. Given that the whole narrative following the exchange between the parties show a positive discussion, thus proving that both Parties have been persistent in showing their intention to extend the First Incentive.

58. As affirmed in the **Egg's case**, any reasonable man of the same kind as Mr. Paredes would interpret these positive acts that happened during the negotiations, to

[64] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2015, 2nd Ed), para. 583.
[65] *ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69, para. 28.
[66] Moot Problem, para. 34.
[67] *Ibid.*

comprehend the fact that the Second Incentive had in fact been concluded between the parties.[68]

59. Furthermore, knowledge about cultural background is important when it comes to negotiating with a foreign partner as non-verbal behaviours can be significant. It is imperative that in global business situations, effective intercultural communication skills must be acquired.[69]

60. As a known brick specialist, Mr. Paredes would have been in business transaction with many people of different cultural backgrounds especially India since it is a well-known fact that the Indian brick industry is the second largest producer in the world.[70]

61. In the present case, the relationship of both Mr. Paredes and Mr. Deewarvala has to be taken into account as not only that they have been in business for three years, but also by the fact that the Contract was structured as an exclusive distribution agreement.[71]

62. The Parties have agreed for the Contract to be incorporated as an exclusive distribution agreement whereby the Respondent was aware that they cannot make any agreement to supply bricks to any other third party.[72] Thus, as a reasonable business man that is involved in an exclusive distribution agreement, the Respondent should have the sufficient degree of knowledge of the Claimant's

[68] *Egg case*, District Court (Germany), 28 February 1996, para. 20.
[69] Johny K. Johansson, *Global Marketing: Foreign Entry, Local Marketing & Global Management* (McGraw Hill, 2009, 5th Ed), para. 110.
[70] Naveen Siriman, *Production and Marketing Network Chain of Brick Kiln Product: A Case Study of Hyderabad City* (International Journal of Managing Value and Supply Chains, 2016, Vol.7 No. 1), pg. 28.
[71] Moot Problem, para. 4.
[72] *Ibid*, para. 14.

background as the Claimant is the only party to the Contract that has engaged with them for about three years on the basis of good relationship of trust and faith.[73]

63. In addition, the educational background of Mr. Paredes has to be taken into consideration whereby he received a Degree in Engineering from the University in Mexico City and later completed an MBA in France.[74] Therefore, as a person who has spent much of his time during his education and career in two different countries would be more culturally aware and would be more internationally exposed to different cultures and traditions.[75]

64. Not only that, it is widely accepted in the international sphere that the Indian Nod resembles a western positive nod and that it means an affirmation or agreement.[76] The Indian Nod is defined as a motion which consists of a side-to-side tilting of the head along the coronal plane in which brings the affirmative meaning of yes or an agreement.[77]

65. The US Court of Appeal in the case of **MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino** strongly rejected any argument that an individual, purportedly experienced in commercial matters, would not be bound merely because he could not understand the language when he signed the contract.[78]

66. Thus, it would be reasonable for Mr. Paredes to have already acquired knowledge about the Indian culture not only by the fact that he has many exposure in

[73] ICC Case No. 9651 (2000), para. 23.
[74] Clarifications, para. 5.
[75] *MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino* 144 F.3d 1384 (11th Cir. 1998), para. 1388.
[76] Asha Singh, *Indianism and Its Complexities in Globalization* (International Journal of Science and Research, 2018, Volume 7 Issue 1)
[77] Allan Pease, Barbara Pease, *The Definitive Book of Body Language: How to read others' attitudes by their gestures* (Orion, 2017, 1st Ed)
[78] *MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino* 144 F.3d 1384 (11th Cir. 1998), para. 1388.

international trade but also by the good business relationship that he has with Mr. Deewarvala, to comprehend that the Indian Nod constitutes a valid acceptance to the Respondent's offer.[79]

B. The acceptance has reached the Respondent

67. Under **Article 2.1.6(2) of the UNIDROIT Principles**, for an acceptance to an offer to be effective, the acceptance must reach the Respondent and oral offers must be immediately accepted.

68. The Ad hoc Arbitration in the case of **Fuel oils case** stated that a declaration or other behaviour held by the recipient of the offer indicating his consent constitutes acceptance and acceptance takes effect from the moment in which the consent reaches the proposer.[80]

69. The element of 'reach' is defined under **Article 1.10(3) of the UNIDROIT Principles** as when the notice was given to that person orally or delivered at that person's place of business or mailing address. Here, through the skype video call, the acceptance made by Mr. Deewarvala has reached Mr. Paredes.[81]

70. In regards to immediately accepting oral offers which is provided under **Article 2.1.7 of the UNIDROIT Principles**, an offer is to be considered oral not only when made in the presence of the offeree, but whenever the offeree can respond immediately which includes the case of an offer made over the phone or

[79] Moot Problem, para. 25; *MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino* 144 F.3d 1384 (11th Cir. 1998), para. 1387.
[80] *Fuel oils case,* Ad hoc Arbitration (Italy) 4 December 1998, para. 468.
[81] Moot Problem, para. 39.

communicated electronically in real time. In this case, the communication between the parties took place through a skype video call which is considered to be made in the presence of one another.

71. In addition, an acceptance made through a skype video call is an anticipated method of communicating acceptance as evident under the commentaries of **Article 1.2 of the UNIDROIT Principles** where it qualifies as an instantaneous communication.[82]

72. Therefore, since the acceptance has reached the Respondent, it has immediately becomes effective which concludes the Contract for the Second Incentive by the mere agreement of the Parties by virtue of **Article 3.1.2 of the UNIDROIT Principles** without any further requirement.

C. No meeting of minds between the parties is required under the UNIDROIT Principles

73. The requirement of meeting of the minds or also referred to as *consensus ad idem* under the principle of contract law is not present under **Article 2.1.6(2) of the UNIDROIT Principles** as an acceptance can be perfected when the communication of acceptance has reached the offeror.

74. As in the case of **Riverisland Cold Storage Inc v Fresno-Madera Production**, it was found that provided that the offeror or the person who is communicating his assent is innocent where he has not engaged in improper conduct to mislead or to

[82] Christina Ramberg, *CISG-AC Opinion no 1: Electronic Communications under CISG* (Sweden)

prevent misunderstanding, that party should not be penalized based on the other party's failure to seek out assistance in understanding the terms of the contract.[83]

75. Any element of mala fide on the part of the Claimant is absent in this case as both parties have relied on the solid relationship of trust and good faith throughout the enforcement of the Contract.[84]

76. Strictly by virtue of **Article 2.1.6(2) of the UNIDROIT Principles**, the Indian Nod made by Mr. Deewarvala is considered as a valid acceptance when it was immediately conveyed to the Respondent. The Claimant cannot be held liable for the Respondent's failure to understand the Claimant's mode of acceptance.

[83] *Riverisland Cold Storage Inc v Fresno-Madera Production* 291 P.3d 316 (Cal. 2013), para. 324.
[84] Moot Problem, para. 25.

IV. THE CLAIMANT IS ENTITLED TO CLAIM FOR RELIEF DUE TO THE NON-PERFORMANCE BY THE RESPONDENT

77. Due to the misinterpretation of the alleged refusal by the Respondent and the non-compliance of the obligation of Second Incentive, the Claimant seeks relief from this tribunal in two forms: firstly, a declaratory relief for the Contract to be enforceable and to be put into writing (A); secondly, specific performance for the two deliveries in 2017 (B). In the event that this tribunal decides that specific performance cannot be granted, alternatively the Claimant would like to seek for damages (C)**.**

A. The Claimant is requesting from this tribunal to declare for the Contract to be in existence and to be reduced into writing

78. The KLRCA Rules apply to this arbitration.[85] According to **Rule 12(2) of the KLRCA Rules**, the Tribunal needs to draft the final award before the arbitral proceeding is closed and this impliedly justifies that the arbitral tribunal does have the power to grant any award to the party in the proceeding.

79. This Tribunal should firstly declare for the Contract to be in existence and enforceable and also to set the terms of the Contract in writing as granting a declaratory relief is one of the steps in the arbitral tribunal's process in awarding specific performance or damages.[86]

[85] Clarifications, para. 17.
[86] Michael E. Schneider, *Non-monetary Relief in International Arbitration: Principles and Arbitration Practice* (Juris, 2011, 1st Ed), pg. 28.

80. In the **ICC Case No 7453**, the arbitrator determined that in a situation where the parties were in 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.[87]

81. Therefore, declaratory actions must be admissible in international arbitration without the claimant having to show a legal interest in the manner in which this is prescribed in some countries by the domestic law of civil procedure.[88]

82. Furthermore, **Article 2.1.17 of the UNIDROIT Principles** justifies that, if the conclusion of a contract is preceded by more or less extended negotiations, the parties may wish to put their agreement in writing and to declare the document to constitute their final agreement.

83. Previously, the terms of the Contract for the First Incentive and the Second Incentive were negotiated and discussed orally,[89] and the signing of the Contract was made through electronic means.[90] Thus, to ensure that the Second Incentive to be final and conclusive by virtue of **Article 2.1.17**, the Claimant is requesting for the Contract to be put into writing.

[87] ICC Case No 7453 (1994).
[88] Michael E. Schneider, *Non-monetary Relief in International Arbitration: Principles and Arbitration Practice* (Juris, 2011, 1st Ed), pg. 28.
[89] Moot Problem, paras. 21 and 28.
[90] Clarifications, para. 15.

B. The Claimant is entitled to require performance by the Respondent for the first two deliveries of 2017

84. **Article 7.2.2 of the UNIDROIT Principles** provides that where a party who owes an obligation other than one to pay money does not perform, the other party may require performance. Unlike the obligation to deliver something, contractual obligations to do something or to abstain from doing something can often be performed only by the other contracting party itself. In such cases the only way of obtaining performance from a party who is unwilling to perform is by enforcement.

85. In the case of **Co-Operative Insurance Society Ltd v Argyll Stores**,[91] the action of specific performance shall be granted if the party at fault has the necessary means to perform the contract.

86. Here, the Respondent cannot rely on **Article 7.2.2(b) of the UNIDROIT Principles** on the basis that the performance is unreasonably burdensome or expensive as the Claimant has clearly agreed to the increased payment of the 35% bonus.[92] Thus, it would not be unreasonably burdensome or expensive as the Respondent would be compensated as per agreed in the Contract.

87. The US District Court in the case of **Magellan International v Salzgitter Handel** upheld the buyer's claim for specific performance because it is in accordance with a provision in the US Uniform Commercial Code, where it states that specific

[91] **Co-Operative Insurance Society Ltd v Argyll Stores** [1997] 2 WLR 898, para. 31.
[92] Moot Problem, para. 37.

performance may be granted when the buyer proves the difficulty of obtaining similar goods on the market.[93]

88. Similarly in the present case, **Article 396 of the Civil Code of Cambodia** allows specific performance to be granted and also because the type of bricks supplied by the Respondent is of a state-of-the-art, special sized, tailor made and colour-coated construction bricks, the uniqueness of the bricks makes it difficult to be obtained from other suppliers.[94]

89. This also does not excuse the Respondent to rely on **Article 7.2.2(c) of the UNIDROIT Principles** on the basis that the Claimant may reasonably obtain performance from another source. 'Reasonably' here is defined under the commentaries of the same provision by the mere fact that the same performance can be obtained from another source is not in itself is sufficient, since the Claimant could not in certain circumstances reasonably be expected to have recourse to an alternative supplier.

90. The Parties have also agreed for the Contract to be incorporated under an exclusive distribution agreement.[95] Thus, the Claimant is not capable of finding similar type of bricks from another counterpart due to the uniqueness of the bricks and expert skills of the Respondent in manufacturing bricks.

[93] *Magellan International v Salzgitter Handel* 76 F.Supp.2d 919 (N.D. Ill. 1999), para. 42.
[94] Moot Problem, para. 15(a).
[95] Moot Problem, para. 14.

C. Alternatively, the Claimant also seeks for damages at the value of USD$456,262,500.00

91. Given that the Respondent has failed to deliver the bricks as it is their main obligation under the Contract, this simply proves the Respondent's non-performance and automatically gives the Claimant as the aggrieved party a right to damages under **Article 7.4.1 of the UNIDROIT Principles**.

92. Under **Article 7.4.2 of the UNIDROIT Principles**, it also entitles the Claimant as the aggrieved party to full compensation for any loss it has suffered as a result of the non-performance. However, the extent of the liability of the party in breach is restricted by the contemplation principle under **Article 7.4.3** and **Article 7.4.4 of the UNIDROIT Principles** where a sufficient causal link between the non-performance and the loss must be established for compensation to be allowed.

93. Under **Article 7.4.4 of the UNIDROIT Principles**, the emphasis is on loss which was actually foreseen or which the party ought to have foreseen in the light of circumstances known to him or of which he should have known as a possible consequence of the breach.

94. In the **Propane's case**,[96] the Austrian Supreme Court held that lost profits which a buyer could have gained from resale, had the seller properly performed his contractual obligations, must be compensated if such profit from resale was foreseeable for the party in breach, and that, whenever commercial goods are sold to a merchant, no further proof of the foreseeability of a resale-transaction is

[96] *Propane case*, Supreme Court (Austria), 6 February 1996, pgs. 21-22.

required. The defendant even admitted that it was obvious to him that the goods would be resold.

95. As decided by the Austria Supreme Court in the case of **Cooling System's case**,[97] it was noted that the right to damages under Article 74 of CISG which is in *pari materia* with **Article 7.4.1 of the UNIDROIT Principles** follows the principle of foreseeability and full compensation, and that all losses, including expenses made in view of the performance of the contract and loss of profit, are to be compensated to the extent they were foreseeable at the time of the conclusion of the contract. The foreseeability requirement is met if, all the circumstances of the case is considered, a reasonable person could have foreseen the consequences of the breach of contract.

96. In this case, it is foreseeable that when a simple contract of delivery of bricks has failed to be performed by the Respondent, the non-delivery of the bricks could result in the loss on the part of the Claimant to fulfil its other contractual obligations.[98]

97. Therefore, the Claimant suffered loss as a result form the non-delivery of the bricks. As a buyer and also a construction company, it can be reasonably inferred that the Claimant already has a construction project set in place.[99] Thus, because of the failure to deliver the bricks by the Respondent, the Claimant will not be able to adhere to its own obligations and this proves the causal link between the loss and the non-performance by the Respondent.[100]

---

[97] *Cooling system case*, Supreme Court (Austria), 14 January 2002, para. 38.
[98] Moot Problem, para. 2.
[99] *Ibid.*
[100] *Cooling system case*, Supreme Court (Austria), 14 January 2002, para. 39.

PRAYERS FOR RELIEF

For the foregoing reasons, the Claimant respectfully requests the Tribunal to declare that:

1. The agreement to arbitrate is still capable of being performed despite the Respondent being impecunious.
2. The joinder of Vader into this arbitration proceeding should be granted.
3. There was a valid acceptance of the Respondent's offer.
4. The relief of declaration and specific performance or damages.