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 RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

INTERNATIONAL CONVENTION

CASES

ARBITRAL AWARDS

ARTICLES

JOURNALS

BOOKS

MISCALLENOUS

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 failure of the Tribunal to examine the counterclaim would be a violation of the principle of fair trial and right of effective remedy?
    b. Whether the continuation of this proceeding would give rise to grounds for the Respondent to set aside the arbitral award?
2. Should the request of the Claimant to join Vader Ltd. as a party to the Arbitration be granted by the Tribunal?
    a. Whether the claimant has fulfilled the procedural requirement?
    b. Whether the corporate veil should be pierced?
    c. Whether the doctrine of group of company is applicable?
    d. Whether the doctrine of single economic unit is applicable?
3. Was there a valid acceptance of the Respondent's offer?
    a. Whether the mode of acceptance was effectively communicated as acceptance to the offer?
    b. Whether the mode of acceptance opted by the Claimant was reasonable to be construed as an acceptance?
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. Whether damages can be granted to the Claimant?
    d. Alternatively, whether the contract can be terminated?

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 Ltd.**") 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 to which Mr. Paredes construed it to be a refusal of the offer. Subsequently, Mr. Paredes also believed that the Contract was terminated.

7. When the Respondent did not make any deliveries in 2017, the Claimant gave the Respondent a call on mid-March 2017. It was then when the parties soon realized that there has been a misunderstanding. Though without rectifying the situation or finding any

amicable settlement, the Claimant suddenly served the Respondent with a notice of arbitration ("**the notice**") on August 2017.

8. The Claimant sought as follows: (i) to enforce the contract, (ii) to order the two deliveries on 2017, and (iii) to set the terms in writing. However, not having to generate any profits in the last few years since the commencement of the Contract, the Respondent lacked any sufficient means to raise their counter-claim in the arbitration proceeding.

SUMMARY OF PLEADINGS

I. The agreement to arbitrate is now incapable of being performed

The arbitration agreement is now incapable of being performed as the Respondent's impecuniosity has prevented them from raising the counter-claims. This would be a violation of the Respondent's procedural rights. In turn, these violations would taint the arbitration proceeding and render the arbitral award null and void.

II. The Tribunal should not grant the joinder of Vader Ltd. into this proceeding

The Tribunal should not grant the joinder of Vader Ltd. as the two requirements under Rule 9 of the KLRCA Arbitration Rule has been fulfilled. The requirements are consent and prima facie bound by the arbitration agreement. The Respondent and Vader Ltd. never consented to the joinder request. Furthermore, Vader Ltd. is not prima facie bound by the arbitration agreement as they did not exercise control over Respondent. Hence, the corporate veil cannot be lifted and Vader Ltd. cannot be made liable for Respondent's conduct.

III. There was no valid acceptance made by the Claimant

The Indian side-ways head nod conducted by Mr. Deewarvala did not signify as an assent to the offer as the mode of acceptance was not effective in communicating an acceptance. Furthermore, in looking at the cultural background and business practices between the two Parties, it is still not reasonable for Mr. Paredes to have construed the Indian side-ways head nod as an acceptance to the offer.

IV. No reliefs should be awarded to the Claimant

The Contract can neither be enforced nor have its terms set into writing because there was a clear termination of the Contract when the proposal was refused. Additionally, the Claimant is not entitled for a specific performance as the Claimant can still receive the goods from an alternative counterpart. Aside from that, the Claimant is not entitled for damages as the Claimant has not mitigated its losses. Alternatively, if the contract subsisted after the final negotiation, then the Respondent is entitled to seek for the declaration of having the contract to be terminated as there was a fundamental non-performance of the contract committed by the Claimant.

PLEADINGS

I. THE ARBITRATION AGREEMENT IS INCAPABLE OF BEING PERFORMED DUE TO THE RESPONDENT'S IMPECUNIOSITY

1. The Respondent has many counter-claims but is unable to raise them in arbitration due to the costs of arbitration. Thus, it is the Respondent's position that the arbitration agreement is now incapable of being performed.[1]

2. *Robustesse Espacial Solucion Corp's* (hereinafter be referred to as "**RES**" or "**Respondent**") lack of fund to bring the counterclaim would lead to a violation of the principle of fair trial and right to effective remedy (A). Consequently, should the Tribunal decide to continue with the proceedings, it would give rise to grounds for the Respondent to challenge the validity of the Arbitral Award (B).

A. The failure of the Tribunal to examine the counterclaim would be a violation of the principle of fair trial and right of effective remedy

3. Since the Parties have agreed to settle all disputes arising from the contract by applying the KLRCA Arbitration Rules 2017 ("**KLRCA Rules**") hence it is applicable in this arbitration.[2] **Article 36(2) of the KLRCA Rules** gives the Tribunal power to order for the termination of the arbitration agreement if it had become incapable of being performed.

[1] Moot Problem, para. 57.
[2] *Ibid*, para. 15(f).

4. The term incapable of being performed refers to obstacles that may prevent the arbitral proceedings from being effectively set in motion and the lack of funding was found to be one those obstacles by the Federal Court of Germany in its bespoken "**Plumber's case**", whereby it was ruled that the impecuniosity of a party may render an arbitration agreement "inoperative or incapable of being performed", thus allowing the impecunious party to validly commence proceedings before state courts.[3]

5. Impecuniosity is a generic term that refers to various situations, all based on the lack of money. Applied to arbitration, the state of impecuniosity refers to the impossibility of a party to meet the costs of arbitral proceeding.[4] The lack of funding will prevent the arbitral proceedings from being effectively set in motion as the Respondent does not have enough funds to bring the counterclaims in arbitration due to its financial situation.[5] Bringing such counterclaims would elevate the costs of arbitration as pursuant to **Rule 13(7) of the KLRCA Rules** as the calculation of the amount in dispute includes the value of any counterclaim or set off.

[3] Bundesgerichstof,14 September 2000, III ZR 33/2000, BGHZ 145, 116.
[4] Kuhner, Detlev. *The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany*. (Journal of International Arbitration, 2014, Volume 31, Issue 6, Kluwer Law International), pg. 807-818.
[5] Moot Problem, para. 59.

6. Under **Article 17(1) of the KLRCA Rules**, each party must be treated with equality and that at the appropriate stage of the proceedings, each party must be given a reasonable opportunity of presenting their case. Therefore, the Respondent should be given the opportunity to present their counterclaims.[6]

7. Furthermore, **Article 8 of the United Declaration of Human Right** ("**UNDHR"**) provides that everyone has a right to effective remedy. Cambodia is a party to this convention and **Article 31 of the Constitution of Cambodia** states that it recognises and respects human rights as enshrined in the United Nations Charter and the Universal Declaration of Human Rights.

8. The right of access to justice guaranteed by **Article 6 of the European Convention of Human Rights** which is in *pari materia* with **Article 8 of the UNDHR** secures everyone the right to have their civil claims to be brought before a court or a tribunal and financial obstacles should not impact this right.[7] As in the case of **Pirelli**, the Court held that the failure of the Respondent to submit their counterclaim had caused the arbitration agreement to be incapable of being performed as continuing with the proceeding would mean violating the principle of fair trial and right to an effective remedy.[8]

[6] Moot Problem, para. 58.
[7] Golder v United Kingdom, Eur. Ct. H.R(1975) para. 36.
[8] Pirelli v. LP, Court of Cassation, Civ. 1, para. 34.

9. In the present case, the estimated costs of the arbitration fees are USD$3,280,095.53. On top of that, **Rule 14(6) of KLRCA Rules** requires a separate deposit to be fixed for counterclaims. Here, the Respondent could not even contribute to the initial security deposit of USD$25,000.00 and it was paid by the Claimant just so the Preliminary Meeting can be set in motion.[9]

10. Hence, if the impecunious Respondent were held to its agreement, it would be deprived of its right to recourse and this would deny the Respondent the right of fair trial and effective remedy.[10] Furthermore, the Respondent had also sought funding from a number of third-party sources but their attempts failed due to their precarious financial position such as having all of their assets tied up for collateral investments.[11]

12. This shows that the Respondent does intend to settle the dispute by way of arbitration and even has exhausted all the means to fulfill their obligations under the arbitration agreement. Nevertheless, even if the Respondent wishes to do so there remains an incommensurable procedural obstacle between the Respondent and relief because of their current circumstances.[12]

[9] Additional Clarifications, para. 2.
[10] Gerhard Wagner, *Poor Parties and German Forums: Placing Arbitration under the Sword of Damocles*?, *Financial Capacity of the Parties: A condition for the Validity of Arbitration Agreements*?,(Schriftenreihe Der August-Maria-Berges-Suftung Fur Arbitrales Recht, 2004,Vol. 16), pg.12.
[11] Clarifications, para. 11.
[12] Moot Problem, para. 59.

13. Therefore, the best option would be for this Tribunal to exercise their power pursuant to **Article 36(2) of the KLRCA Rules** to declare the arbitration agreement is now incapable of being performed so the parties can commence proceedings in a State court. This way the right to legal aid is acknowledged as a means to prevent a party's lack of financial resources resulting in a loss of its rights. Legal aid generally comprises an exemption from court costs as well as the appointment of a legal agent at the government's expenses.[13]

14. Litigation at the national court is the best option as the Claimant would be sure to receive judgment. Additionally, the Respondent's right to effective remedy would be protected compared to an arbitral proceeding which would lead to a deadlock when an impecunious party asserts counterclaims. Thus, in that situation an arbitral tribunal would, either need to hear them for free or risk annulment of the award.[14]

B. Consequently, the outcome of the Tribunal continuing this proceeding would give rise to grounds for the Respondent to set aside the arbitral award

15. **Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards** ("**New York Convention**") and **Article**

[13]Georg von Segesser *Inoperability of Arbitration Agreements due to Lack of Funds? Revisiting Legal Aid in International Arbitration (Kluwer Arbitration Blog, 2015)* http://arbitrationblog.kluwerarbitration.com/2015/01/17/inoperability-of-arbitration-agreements-due-to-lack-of-funds-revisiting-legal-aid-in-international-arbitration/

[14] Jaroslav Kudrna, *Arbitration and Right of Access to Justice: Tips for a Successful Marriage*(Spain Arbitration Review, 2010, Issue 8), pg. 162-163.

46(2)(b) of the Commercial Arbitration Law of the Kingdom of Cambodia provides that an Award can be set aside if it amounts to a violation of public policy.

16. In a **Report on the Public Policy Exception in the New York Convention by the International Bar Association** states that a violation of public policy involves the violation of fundamental or basic principles of law such as the principle of natural justice.[15] The two pillars of natural justice encapsulate the maxims *nemo judex in causa sua* and *audi alteram partem*.[16]

17. In **Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd,**[17] Marks J stated that sub-brances of *audi alderam partem* or the principle that parties must be given adequate notice and equal party are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing is given to all parties.

[15] IBA Subcommittee on Recognition and Enforcement of Arbitral Awards. *Report on the Public Policy Exception in the New York Convention*. (October 2015), pg. 6.
[16] James Pickavance *A practical Guide to Construction Adjudication*. (John Wiley & Sons, 2015) para. 17.01.
[17] Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd[1978] VR 385, para. 396.

18. In **Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd,**[18] Ang J states that a Court or Tribunal will be in breach of natural justice it disregarded the submissions and arguments made by the parties when reaching its decision. The failure to allow a party to address the Tribunal means that a party is denied the opportunity to address its position and judicial mind.

19. The rules of natural justice insist tribunals to not disregard the parties' submissions and arguments in coming to their decision. The Tribunal must at the very least demonstrate that it has attempted to understand and had considered whatever had been said.[19]

20. The Tribunal has a duty to understand and examine the counterclaim raised by the Respondent. However, this could not be done as the Respondent is prevented from raising its counterclaim owing to the fact that there is an astronomical amount of deposits that the Respondent could not afford to pay.

21. This would ultimately lead to a violation of the principle of fair trial which is a part of the rule of natural justice. Thus, the failure to adhere to the principle of fair trial,

[18] Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 80, para. 31.
[19] Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 80, para. 31.

which is to examine the Respondent's counterclaim would constitute to a violation of public policy.[20]

22. Other than that, **Rule 12(7) of the KLRCA Rules**[21] also provides that no award shall be given unless all costs have been paid. Ultimately, this whole arbitration proceeding would be futile as the proceedings were tainted and it will be a waste of resources and time.[22]

II. VADER LTD. SHOULD NOT BE MADE AS A PARTY TO THIS PROCEEDING

23. The Claimant's joinder request for Vader Ltd. to be made as a party to this proceeding should be rejected as firstly, there is no consent to the joinder request (A); secondly, Respondent is not an agent or alter ego of Vader Ltd. (B); thirdly, the arbitration agreement cannot be extended to non-signatories using the doctrine of group of companies (C); lastly, the doctrine of single economic unit is inapplicable (D).

[20] BLB and another v BLC [2013] SGHC, para. 93.
[21] KLRCA Arbitration Rules 2017.
[22] Jaroslav Kudrna, *Arbitration and Right of Access to Justice: Tips for a Successful Marriage* (Spain Arbitration Review, 2010, Issue 8), pg. 162-163.

A. The Claimant has failed to fulfill the procedural requirement

24. The contractual nature of arbitration requires the consent of each party to submit their disputes to arbitration. A valid arbitration agreement is the essential element of and the basis of arbitration. It must clearly express the intention of the parties to arbitrate.[23]

25. Under **Rule 9 of the KLRCA Rules** the Claimant has failed to fulfil two requirements provided under the said rules.

26. The first requirement under **Rule 9 of the KLRCA Rules** requires for a written consent from the parties to the arbitration agreement and the additional party before the joinder request can be granted.

27. In the present case, the Parties to the arbitration agreement are the Claimant and the Respondent. It can be deduced from the facts that Respondent has never consented to the request for any joinder. Further, the lack of consent from Vader Ltd. can be implied from their conduct of passing a motion stating that the Respondent's operation is independent from that of Vader Ltd. This indicates that they have no intention to join this arbitration proceeding.

[23] J. Lew, L. Mistelis & S. Kroll, *Comparative International Commercial Arbitration* (Redfern & M. Hunter, 2003) para. 6.1, 7.1,.10

B. The Respondent is not an agent or alter ego of Vader Ltd.

29. The second requirement under **Rule 9 of the KLRCA Rules** provides that an additional party can be made as a joinder if it is *prima facie* bound by the arbitration agreement. Vader Ltd. is not *prima facie* bound by the arbitration agreement as the Tribunal should not pierce the corporate veil.

30. The case of **Jiang Hai Yang v Tan Lim Hui** illustrates the application of **Rule 7 of the SIAC Rules**[24] which is in *pari materia* with **Rule 9 of the KLRCA Rules.** It was ruled that in order to find the parent company *prima facie* bound by the arbitration agreement, the corporate veil should be pierced.[25]

31. **Article 284 of the Cambodian Law on Commercial Enterprise**[26] states that a subsidiary has legal personality separate from their principals. This is the codification of the principle established in the case of **Solomon v Solomon**.[27] Hence the common law principle to pierce the corporate veil is applicable in our present case.

32. In **Adam v Cape Industries,** the threshold to pierce the corporate veil are firstly, there must be a fraud and secondly, the company is an alter ego of the parent

[24] Singapore International Arbitration Centre Rules (6th Edition, 1 August 2016).
[25] Jiang HaiYing v Tan Lim Hui and another suit [2009] SGHC 42, para. 42.
[26] Cambodian Law on Commercial Enterprise 2005.
[27] Salomon v Salomon & Co. Ltd. [1897] A.C 22, pg. 31.

company.[28] The Court also emphasized the importance of the involvement of the parent company in the day-to-day operations of the subsidiary in order to consider the later an alter ego of the parent.[29]

33. The first element of fraud is not satisfied as the Claimant not only was aware that it was Mr. Auld Chap who initially secured the contract, but they also knew that the contract was to be performed by the Respondent solely.[30] There was no concealment or fraud on the part of Vader Ltd. and the Claimant agreed to the contract with full knowledge of this.[31]

34. The second element of agent and alter ego has also not been satisfied as the Respondent's acts cannot be attributed towards Vader Ltd. In order for control to exist, six factors must be met:[32]

a. the parent company has to be in effective and constant control;

b. the parent must govern the adventure of the subsidiaries;

c. the parent must be the head and brain of the company;

d. the subsidiary must not make the profit by its own skill and direction;

[28] Adams v Cape Industries plc [1990] Ch 433, pg. 1022.
[29] State of New Jersey Department of Environmental Protection v Ventron Corp, 440 A.2d 455 (1981), para. 223.
[30] Moot Problem, para. 11.
[31] Noel Development Ltd v Metro Construction (1999) BCSC Canada, para. 23-26.
[32] Smith Stone Knight v Birmingham [1939] 4 All ER 116, pg. 122.

e. the persons conducting the business must be appointed by the parent company;

f. the profit of the subsidiary must be treated as the profit of the parent.

35. Here, all six factors are not present. The first four factors are not satisfied as Vader Ltd. has passed multiple resolutions stating that Respondent's operation is independent from Vader Ltd. showing that Vader Ltd. plays no role in the Respondent's operation.

36. Furthermore, Mr. Paredes had full control over the operation and key decision making of the Respondent as the managing director and this can be seen when he decided not to look for a new counterpart and continued with the contract even though he was aware that an entry level negotiation with a new counterpart would signify greater profits.[33]

37. This shows that Mr. Paredes indeed has effective and constant control over the Respondent and that Vader Ltd. does not determine the Respondent's business decision. If Vader Ltd. was the principal controlling the Respondent, they would have ensured that the key decision would bring great advantage to them such as greater profits. However, in this present case, it was Mr. Paredes who decided to rely on the strength of the relationship between the Claimant and the Respondent to

[33] Moot Problem, para. 25

continue with the contract which means that all the Respondent's profits are made through their own skill and direction.[34]

38. The fifth factor is also not satisfied. Mr. Paredes was employed by the Respondent and not Vader Ltd. negating the possibilities that Mr. Paredes was acting as an agent because he needs to satisfy the needs of his employer.[35]

39. The sixth factor is not satisfied as it has been stated that the Respondent did not have a loosened financial situation or any leeway on its expenditure allocation. All of the Respondent's profits had been used for its immediate expenses and overheads such as paying taxes, insurance, utilities and rent. On top of that, the Respondent's profit is also used to hire a team of in-house Counsels.[36]

40. All these facts need to be looked in totality and points to the irresistible conclusion that Vader Ltd. does not have control over the Respondent and it can be concluded that the Respondent is not acting as an agent or alter ego of Vader Ltd.

[34] Moot Problem, para. 25.
[35] Clarifications, para. 6.
[36] Moot Problem, para. 26.

41. Therefore, since the threshold to pierce the corporate veil has not been met, this Tribunal should not pierce the corporate veil to find that Vader Ltd. is *prima facie* bound by the arbitration agreement.

C. The arbitration agreement cannot be extended to non-signatories using the doctrine of group of companies

42. The group of companies doctrine is a method where courts or tribunals can bind a non-signatory on the basis of that company's strings to, or parent/sibling relationship with another company.[37]

43. This doctrine however, has been rejected in numerous jurisdictions such as Switzerland,[38] USA,[39] and England. The group of companies doctrine, much like the single economic unit, is inconsistent with the principle of privity of contract and separate legal entities which is also the principle applicable in Cambodian law.

[37] Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford University Press 2010, 1st Ed), pg.11.
[38] Ad hoc Award of 1991, ASA Bull 2/1992, para. 202.
[39] Sarhank Group v Oracle Corporation 404 F 3d 657 (2d Cir 2005), para. 45.

44. Nevertheless, even if the Tribunal finds that the doctrine of group of companies is applicable, Vader Ltd. did not meet the requirement for this doctrine to be applicable. There are two conditions that need to be satisfied:[40]

a. the intention of all the parties involved to consider the whole group as the contracting party without giving importance to which company would conclude or perform the contract;

b. the active participation of the non-signatories in the negotiation, performance or termination of the contract, showing the will of those companies to be party to the contract.

45. The first element is not satisfied as the contract was structured as an exclusive distribution agreement.[41] The significance of this is that it is of the utmost importance that the party to deliver the bricks is the Respondent's and not any other company within Vader Ltd.'s corporate group.

46. The second element is also not satisfied as on October 2014 Vader Ltd. had passed a resolution stating that the operation of the Respondent's should remain independent. There are two points that can be deduced from this.[42] Firstly, the wordings "should remain independent"[43] indicate that Vader Ltd. had never been involved with the

[40] ICC Case No. 4131 of 1982 (Dow Chemical Case); ICC Case No. 11405 of 2001(110 Journal du droit International, 1983), pg. 905-907.
[41] Moot Problem, para. 14.
[42] *Ibid*, para. 19.
[43] *Ibid*, para. 19

performance of the contract between the Claimant and the Respondent. Secondly, the passing of the motion also means that Vader Ltd. had no intention to be involve with the Respondent's operation in the future. As such, no will of being a party to the contract can be imputed to Vader Ltd.[44]

47. Thus, this Tribunal should reject the Claimant's request for joinder as Vader Ltd. does not control the activity of the Respondent and therefore should not be made liable for the Respondent's activities.

D. The single economic unit doctrine is inapplicable

48. The single economic unit is a tool that can be used to ignore the corporate personality. This is based on the fact that a group of companies act as a unit in order to achieve a common objective and consequently should answer as a unit for the obligations of the members of the group.[45]

49. This doctrine made its debut in the case **of DHN Food Distributors Ltd v Tower Hamlets London Borough Council**.[46] DHN was a holding company which ran its business through two wholly owned subsidiaries. One of the subsidiaries held the

[44] Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?* (Journal of International Arbitration, 2009 Vol. 26 Issue 5) pg. 647–67.
[45]Thomas K. Cheng, *The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines* (Int'l & Comp. L. Rev. 329 ,2011, Vol. 34 B.C) pg. 4-15 5.
[46] DHN Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852, pg. 462.

title of the land where the warehouse that DHN used to carry its business was located. The Borough Council compulsorily acquired the land and refused to pay compensation to DHN because DHN did not own the land. The Court of Appeal held that since in the DHN group, there was only one business and two of the three companies forming part of the group did nothing but own the businesses' fixed assets, the corporate veil should be lifted.

50. This doctrine however had been rejected in many jurisdictions such as the United Kingdom.[47] The DHN decision has been rejected in the case of **Woolfson v Strathclyde Regional Council**[48] which presented similar circumstances to those in DHN case and later in the case of **Adams v Cape Industries**;

> "…we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used as to ensure the legal liability in respect of a particular future activities of the group will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law."[49]

[47] Navarro Jose , *The piercing of the corporate veil in Latin American jurisprudence; with specific emphasis on Panama* (City University London, 2013), pg. 52.
[48] Wollfson v Strathclyde Regional Council [1978] UKHL 5, pg. 161.
[49] Adams v Cape Industries plc [1990] Ch 433, pg. 1026.

51. Thus, this Tribunal should reject the Claimant's request for joinder as Vader Ltd. is not prima facie bound by the arbitration agreement just because Vader Ltd. owns the shares of the Respondent.

III. THERE WAS NO VALID ACCEPTANCE OF THE RESPONDENT'S OFFER

53. On November 2016, the representatives of the Parties, Mr. Paredes of the Respondent and Mr. Deewarvala of the Claimant conducted a final negotiation ("**the final negotiation**") via a Skype call.[50] The outcome of the said negotiation was a dispute concerning the validity of the acceptance whereby Mr. Deewarvala understood that he had agreed to incorporate new terms and extend the contract for another two years.[51] On the other hand, Mr. Paredes thought there was a refusal of the offer and rendered the contract to be terminated.[52]

54. Mr. Paredes' understanding of the Indian side-ways head nod (**"the Indian Nod"**) used by Mr. Deewarvala as a refusal to the offer is justified as the mode of acceptance had not effectively communicated as an acceptance to the offer (A). Furthermore, due to the peculiar nature of the Indian Nod, such mode of acceptance was not reasonable to be construed as an acceptance (B).

[50] Moot Problem, para. 30.
[51] *Ibid*, para. 41.
[52] *Ibid*, para. 40.

A. ***The mode of acceptance was not effectively communicated as acceptance to the offer***

55. The issue concerning the validity of the contract arose the moment when Mr. Deewarvala opted to use the Indian Nod to signify his acceptance to the offer by Mr. Paredes. Hence, it is imperative to scrutinize the position taken by UNIDROIT Principles in regards to the mode of acceptance. The Parties agreed that the law applicable to the Contract shall be the UNIDROIT Principles. Pursuant to **Article 2.1.6(2)** of the **UNIDROIT Principles**, it states that:

> *"(2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror".*

56. The meaning of "effective" according to the UNIDROIT Principles as elaborated in its commentary[53] portion (**"the Commentary"**) expressly states that: (1) acceptance becomes effective when the assent reaches the offer, (2) the risk of transmission is placed on the offeree since he chooses the means of communication and better understands it and (3) an acceptance by way of a conduct only becomes effective when a notice reaches the offeror.

[53] Comments under Article 2.1.6 UNIDROIT Principles 2016.

57. The mode of acceptance opted by Mr. Deewarvala was not effective to indicate as an assent since the duty to confirm whether the acceptance has reached Mr. Paredes rests upon the Mr. Deewarvala himself. When Mr. Deewarvala has failed to ensure whether Mr. Paredes had understood the Indian Nod as an acceptance and nothing else by way of a confirmation or a notice to show acceptance, thus the mode of acceptance was not effective to show assent.[54]

58. Moreover, the mode of acceptance was not effective in communicating the assent because Mr. Deewarvala did not adhere to the appropriate mode as established by Mr. Paredes. When Mr. Paredes had clarified the offer to Mr. Deewarvala, he had put forward the appropriate mode to accept or reject the offer by way of "yes" or "no".[55]

59. While the question "yes" or "no" were not the prescribed mode of acceptance as agreed by both Parties, nevertheless such response in those manner would be in the affirmative to agree on the offer.[56] The UNIDROIT Principles acknowledged that in the event if there is no prescribed mode of acceptance agreed by the parties, the mode has to be in the affirmative so that the other party would not have construed it any other way except for an acceptance.[57]

[54] Moot Problem, para. 40.
[55] *Ibid,* para. 34.
[56] *Ibid*.
[57] *Roser Tecnologies v. Carl Schreiber GmbH (*2013) U.S. District Court, Western District of Pennsylvania, para. 23.

60. In **Roser Technilogies v Carl Schriber GmbH**[58], the U.S District Court of Pennsylvania had referred to **Article 18(1)** of the United Nation Convention of International Sales of Goods ("**CISG**"), which is in *pari materia* with **Article 2.1.6 of UNIDROIT Principles**. In this case there was an exchange of emails between the parties in placing a purchase order and such mode of acceptance was never prescribed by the parties. The court held that the email from the plaintiff to accept the counteroffer from the defendant in respect to the purchase order was evidence to show acceptance as there was an affirmative statement to indicate assent to the counteroffer.[59]

61. Similarly in **It's Intoxicating Inc v Maritime Hotelgesellschaft,**[60] in construing **Article 18 of CISG**, the U.S District Court of Pennsylvania opined that an affirmative conduct or statement that indicates assent to an offer is suffice when the other party can construe it only as an acceptance and not otherwise.[61] In contrast to the current situation, Mr. Paredes provided the proper mode of acceptance by way of an affirmative statement either in the form of a "yes" or a "no".[62] The only way for Mr. Deewarvala to indicate his assent effectively is to respond as such or within the same manner so that Mr. Paredes can construe it only as an acceptance as per **Roser Technologies'** case.[63]

---

[58] *Roser Tecnologies v. Carl Schreiber GmbH (*2013) U.S. District Court, Western District of Pennsylvania, para. 23.
[59] *Ibid*, para. 24.
[60] *It's Intoxicating, Inc., v. Maritim Hotelgesellschaft mbH and D. Zimmer* (2013) U.S. District Court, Middle District of Pennsylvania, para. 34.
[61] Ibid
[62] *Moot Problem*, para. 34.
[63] *Roser Tecnologies v. Carl Schreiber GmbH* (2013) U.S. District Court, Western District of Pennsylvania, para. 27

62. However, when Mr. Deewarvala did not adhere to the proper mode and responded with the Indian Nod, it was insufficient to convey an affirmative conduct to show acceptance, by virtue of **It's Intoxicating Inc's** case.[64] It was clear that the mode of acceptance opted by Mr. Deerwala was one that could not even be construed as a "yes". Therefore, the acceptance was not effectively communicated to the Respondent.[65]

B. The mode of acceptance opted by the Claimant was not reasonable to be construed as an acceptance

63. It was clear that Mr. Paredes did not construe the Indian Nod as an acceptance. This is evident when the Respondent did not perform any deliveries on 2017 as offered previously.[66] The main reason here is because it is not reasonable for Mr. Paredes to share the same understanding of the Indian Nod with Mr. Deewarvala.

64. Previously, **Article 2.1.6 of UNIDROIT Principles** mentioned that a conduct can also be in a form of acceptance provided that such conduct was effective in reaching to the other party only as an acceptance. In addition, **Article 4.2 of UNIDROIT Principles** is relevant to determine whether the Indian Nod can be construed as an acceptance by way of the subjective test and the objective test:

[64] *It's Intoxicating, Inc., v. Maritim Hotelgesellschaft mbH and D. Zimmer* (2013) U.S. District Court, MiddleDistrict of Pennsylvania, para. 40.
[65] Moot Problem, para. 40.
[66] *Ibid*, para. 40.

"(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) *If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances".*

65. The two tests as explained in **Ricketts v Pennsylvania** where the Court stated that the subjective test looks into the statement maker's will and intention when the intention is known or could have known by the recipient. Meanwhile, the objective test looks into the actual intent of the statement maker and what a reasonable man would understand.[67]

66. At the outset, the subjective test is not applicable to the present situation between the Claimant and the Respondent by reason of the requirement laid down by the U.S District Court of Kansas in **Guang Dong Light Headgear Factory Co Ltd v ACI International**.[68] **Article 8 of the CISG** was referred in this case, and the court opined that: *"The plain language of the CISG requires the Court to evaluate a party's subjective intent, so long as the other party was aware of that intent. Otherwise, paragraph two of article 8 applies"*

[67] *Ricketts v Pennsylvania R.Co.*, 2 Cir. 1946, 153 F.2d 757, 760–762, 164 A.L.R. 387, para. 40.
[68] *Guang Dong Light Headgear Factory Co., Ltd., v. ACI International* (2007*) Inc.*, para. 123.

67. It should be noted that according to the **Commentary**[69] under **Article 4.2 of UNIDROIT Principles**, it states that the application of Article 4.2 is in *pari materia* with Article 8(1) and (2) of the CISG. Thus, the aforementioned judgment is also applicable in construing the said provision under the **UNIDROIT Principles.**

68. In order to evaluate the intention of Mr. Deewarvala by way of the subjective test, Mr. Paredes must not have any reason to not know of the Mr. Deewarvala's intent. Otherwise the objective test is preferred.[70] Mr. Paredes knew that Mr. Deewarvala intended to continue with the contract[71]. However, it cannot be said the same after Mr. Paredes put forward the offer to Mr. Deewarvala.[72]

69. Henceforth, the preferred test would be the objective test or hereinafter be referred as the "**reasonableness test**". Pursuant to the **Commentary**[73] under **Article 4.2(2) of UNIDROIT Principles,** the reasonableness test is when it is reasonable for persons to know of each other's intentions and conducts especially when they share the same linguistic knowledge, technical skills or business experience.

70. In applying the reasonableness test, Mr. Paredes while share the same technical skill or business experience with Mr. Deerwavala, though they do not share the same cultural background. Mr. Paredes is of Mexican origin while Mr Deerwavala is of

[69] Commentary under Article 4.2(2) of UNIDROIT Principles.
[70] *Guang Dong Light Headgear Factory Co., Ltd., v. ACI International* (2007) *Inc.* para. 125.
[71] Moot Problem, para. 32.
[72] *Ibid*, para. 34.
[73] Commentary under Article 4.2(2) of UNIDROIT Principles.

Indian Malaysian Origin.[74] The Indian Nod can safely be said to be a cultural exclusive body language expertly understood among Indians and most Westerners often confuse and more likely to interpret it as a "no" rather than a "yes".[75]

71. Moreover **Article 4.2** shall be read in tandem with **Article 4.3,** whereby regard shall be given to circumstances including, among others: (b) practices which the parties have established between themselves; and (c) the conduct of the parties subsequent to the conclusion of the contract.

72. Likewise, in **Hideo Yoshimoto v Canterbury Gold International Ltd,** the Court of Appeal of New Zealand had interpreted and applied **Article 4.3** as exactly how it was written:[76]

> *"In determining…the understanding of a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."*[77]

73. This was also followed by the court in **Proforce Recruit v The Rugby Group** where the Court held that in applying **Article 4.2**, other relevant circumstances laid down

[74] Clarifications to Moot Problem, para. 5.
[75] Jeffrey Hays, *Indian Customs, Etiquette and Manners* (2008) (http://factsanddetails.com/india/People_and_Life/sub7_3c/entry-4168.html)
[76] *Hideo Yoshimoto v Canterburry Golf International Limited* [2000] NZCA 350 (27 November 2000), para. 50.
[77] *Ibid.*

under **Article 4.3** shall be read together as well. This is to include established practices, pre-contractual negotiations, usage, subsequent conduct and so on.[78]

74. Aside from the difference of cultural background, regards to other relevant circumstances to apply the reasonableness test can include, among others, practices established by the parties and the conduct of the parties subsequent to the conclusion of the contract, as per **Art 4.3(b) of UNIDROIT Principles.**

75. First, the practices which the parties have established between themselves. Both Parties have been in business relation with each other pursuant to the Contract they entered in September 2013 up until the final negotiation on November 2016.[79] However, irrespective of the business duration, Mr. Paredes and Mr. Deewarvala only had three (3) encounters when it comes to negotiating the Contract.

76. Previously the Representatives shook hands to show assent at the end of the first negotiation; [80]and in another negotiation through email correspondence[81], assent was given in a form of a statement. Neither one of these previous conducts ever came close to an Indian Nod. Thus, it would not be reasonable for Mr. Paredes to construe the nod to signify assent.

[78] *Proforce Recruit Ltd vs. The Rugby Group Ltd.* [2006] EWCA Civ 69, para. 12.
[79] Moot Problem, para. 13.
[80] *Ibid,* para. 22.
[81] *Ibid*, para. 24.

77. Second is the conduct of the parties subsequent to the conclusion of the contract. According to the terms of the contract, both parties agreed that payment shall be made five (5) days prior to the delivery date.[82] It is only reasonable for the Indian Nod to be an acceptance if the Claimant were to make the payment of 35% increase of bonus five days prior to the delivery. Instead, Mr. Deewarvala merely contacted Mr. Paredes and did not make any payments to show that he intended to proceed with the contract. By virtue of this subsequent conduct, it is not reasonable for the Indian Nod to be construed as an acceptance.[83]

78. Ultimately, the Indian Nod was insufficient to signify as a valid acceptance, hence the assent did not reach the Respondent and therefore there was no valid acceptance of the Second Incentive as proposed by the Respondent during the final negotiation.

IV. THE CLAIMANT IS NOT ENTITLED FOR ANY RELIEFS SOUGHT FROM THIS TRIBUNAL

79. The Claimant is expected to seek for the following reliefs from the Tribunal: (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

[82] Moot Problem, para. 15(e).
[83] *Ibid*, para. 40.

Contract in writing. [84] They also had set the value of its claim at USD$456,262,500.00, which is the value of the two deliveries.[85]

80. It is in light of this, the Respondent contends in the following: the Contract had been terminated, ergo the contract cannot be enforced (A), the Claimant is not entitled for specific performance (B), the Claimant is not entitled to damages (C), and in the alternative if this Tribunal finds that there was a contract, the Respondent is seeking to declare the Contract to be terminated (D).

A. The contract was terminated, therefore the contract cannot be enforced or set in writing

81. The moment when Mr. Paredes had construed the Indian Nod as a refusal to the offer, the Contract had ceased to exist. This is because a notice of termination had already been communicated from Mr. Deewarvala to Mr. Paredes. **Article 7.3.2 of UNIDROIT Principles** states that the right to terminate the contract is exercised by notice to the other party. Additionally, this provision has to be read together with **Article 1.10** whereby a notice is effective when it reaches the person whom it is given and such notice can also be in any other form of intention that is appropriate in the circumstances.

[84] Moot Problem, para. 45.
[85] *Ibid*, para. 55.

81. The Indian Nod has reached Mr. Paredes through a live stream Skype call from Mr. Deewarvala, and such conduct was construed only as a refusal the offer.[86] The Indian Nod is in line with the meaning of a "notice of termination" under **Article 7.3.2** because by not agreeing to extend the Contract, it is automatically terminated. Furthermore, taking into account that both Parties were having a live stream call, the Indian Nod is an appropriate form of notice, as per **Article 1.10**. In summary, the contract had been terminated and therefore there is no contract to be enforced or reduced into written form.

B. The Claimant is not entitled for specific performance

82. It is expected that the Claimant is seeking to order the Respondent to perform the two deliveries of 2017[87]; hence it is reasonable to anticipate that the Claimant will seek for the relief of specific performance. Nevertheless, the Respondent will negate such claims on the basis that the Claimant is not entitled for such relief.

83. **Article 7.2.2 of UNIDROIT Principles** states that a party is entitled to require another party to perform certain obligation when the latter owes an obligation but does not perform it. However, the exception to this general rule is when the party may reasonably obtain performance from another source as laid down under **Article 7.2.2(c) of UNIDROIT Principles.**

[86] Moot Problem, para. 34.
[87] *Ibid*, para. 45.

84. The **Commentary** under **Article 7.2.2(c)** defined "**Replacement Transaction**" to mean when a contract with such generic goods or services is not performed, and the other party can obtain substitute goods and services and claim damages for non-performance, thus it excludes the other party from being entitled to a specific performance, as they may reasonably obtain performance from another sources.

85. To put it simply, the Claimant is not entitled for specific performance if there exists alternative counterparts who can supply the same type of bricks that they receive from the Respondent. According to the International Trade Statistics, which is in collaboration with the European Union (EU), World Trade Organization (WTO) and United Nations Conference on Trade and Development (UNCTAD), the largest exporter of bricks on the year 2014 to 2017 was China.[88]

86. To conclude, the Claimant can easily find an alternative counterpart as a source of the bricks from their own country, which can also be a more lucrative bargain considering that there is no need for additional expenses for the transfer cost. Therefore, the Claimant is not entitled for specific performance due to the exception of Replacement Transaction by virtue of **Article 7.2.2 (c) of UNIDROIT Principles.**

[88] List of Exporters and Product bricks, blocks, tiles, and other ceramic goods (2013 - 2017) International Trade Statistics (ITC) (https://www.trademap.org/tradestat/Country_SelProduct_TS.aspx?nvpm=1).

C. The Claimant is not entitled for damages

87. In accordance with the preliminary meeting, the Claimant has also set the value of their claim at USD$456,262,500.00, which is the value of the two deliveries on 2017.[89] Henceforth, another relief that the Claimant is likely to bring would be damages in the form of monetary payment. The Respondent then will negate on such claims as the Claimant is not entitled for damages.

88. As mentioned under **Article 7.4.1** of **UNIDROIT Principles**, non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with other remedies.

89. In other words, the Claimant is entitled only for damages or in conjunction with any other remedies if the Claimant can prove that the Respondent had committed a non-performance of the contractual obligation. However, such relief can only be granted to the Claimant when they had mitigated their losses, per **Article 7.4.8 of UNIDROIT Principles.**

90. The said provision clearly states that the aggrieved party is not entitled to receive compensation when the said party could avoid or reduce the losses suffered. Additionally, the aggrieved party is only entitled to recover expenses incurred in attempting to reduce the harm.

[89] Clarifications, para. 18.

91. This has been affirmed in the **ICC Award Paris 8817**,[90] where the tribunal gave a judicial opinion in regards to mitigation:

> *"...it is a principle of international commercial law that the party suffering harm must take the necessary steps to mitigate the harm. A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated..."*[91]

92. The facts clearly show that the Claimant did not make any attempt to mitigate their losses. After realising that there was a misunderstanding on the Second Incentive after a call with the Respondent, there was no action taken to rectify the issue.[92] Instead the Claimant waited until August 2017, knowing that the deliveries were not being made and served the Notice of Arbitration to the Respondent.[93]

93. Therefore, the Claimant did not perform any act to mitigate their losses such as calling to rectify the terms or looking for alternative counterparts as the source of the bricks.

[90] Award in ICC Case No.8817 (1997), para. 14.
[91] *Ibid.*
[92] Moot Problem, para. 43.
[93] *Ibid*, para. 44.

94. Moreover, if the Tribunal were to grant such relief to the Claimant, there would be an unjust enrichment from the part of the Claimant. The value set was USD$456,262,500.00 for the value of the two non-delivery on 2017. It should be noted that the **UNIDROIT Principles** also provides that a party is only entitled for damages when the harm is one that is foreseeable at the time of the conclusion of the contract, by virtue of **Article 7.4.4.**

95. Further explanation of the said provision can be seen in its **Commentary**[94] which highlights the test applicable to ascertain whether the harm is foreseeable and what would an ordinary diligent person foresee as the consequences of the non-performance in the ordinary course of things.

96. To put it simply, the amount set by the Claimant is not foreseeable as a consequence to the non-delivery by the Respondent, especially when such value is based on the two non-deliveries. Such amount raised by the Claimant is indeed too excessive and not one that would ordinarily rise out of the non-performance. Hence, if the Claimant were to receive such amount, then they would actually get enriched by the losses for the non-performance of the Respondent.

[94] Comments under Article 7.4.4 of UNIDROIT Principles 2016.

97. Such enrichment is prohibited under the **UNIDROIT Principles** as can be seen in the **Commentary**[95] under **Article 7.3.1**, which states that:

> *"The aggrieved party must not be enriched by damages for non-performance… account must be taken of any gain resulting to the aggrieved party from the non-performance, whether that be in the form of expenses which it has not incurred… or of a loss which it has avoided"*

98. In conclusion, the Claimant is not entitled for damages as they did not mitigate their losses as mentioned under **Article 7.4.8**. Additionally it would be an unjust enrichment as the value set is not foreseeable and that the Claimant would actually be enriched from the losses, as per the **Commentary**[96] of **Article 7.3.1.**

D. In the alternative, if this Tribunal finds that there was a contract after the negotiation, then the Respondent is seeking to declare the Contract to be terminated

99. During the final negotiation on November 2016, Mr. Paredes offered to make 8 more deliveries in the subsequent years, to which Mr. Deewarvala would have to make a

[95] Comments under Article 7.3.1 of UNIDROIT Principles 2016.
[96] *Ibid.*

35% increase bonus payment at the end of each year.[97] The narrative of the said negotiation also included that such payment would commence at the end of 2016.[98]

100. In looking at the conversation, it is very clear that both Parties understood that the 35% bonus payment would commence at the same year where the final negotiation took place. Hence, if there was a valid acceptance to the offer, then Mr. Deewarvala would have also accepted to provide the said payment on December 2016. However, the narrative after the final negotiation clearly suggests that the Claimant did not provide any payment after the final delivery on December 2016 has been duly performed by the Respondent.[99]

101. Pursuant to **Article 7.3.1 of UNIDROIT Principles**, it allows a party to terminate the contract where the other party has failed to perform a fundamental obligation set out under the contract.

102. Moreover, by virtue of the **Commentary**[100] under **Art. 7.3.1 of UNIDROIT Principles,** in assessing the terms, it should be determined that whether the nature of the performance is of the essence of the contract. In other words, a party is allowed to terminate the contract if the term that was not performed by the other party is considered to be a strict performance of contract essence or rather a fundamental non-performance.

[97] Moot Problem, para. 34.
[98] *Ibid*, para. 34.
[99] *Ibid*, para. 42.
[100] Comments under Article 7.3.1 of UNIDROIT.

103. Such relief was practiced by the tribunal in **Arbitral Award Nov 30, 2006 of the Centro de Arbitraje de Mexico** where the Respondent was a Mexican grower and the claimant was a distributor from the United States. Both parties entered into an exclusive contract to which the Respondent agreed to make deliveries of goods to the claimant on an exclusive basis. The dispute arose when the Respondent had breached the contract when they contracted with a third party. Additionally, they also had failed to deliver the goods as it was a salient term mutually agreed by both parties. The tribunal granted the award in favour of the claimant including the termination of the contract and damages as provided under the UNIDROIT Principles.[101]

104. Here, it can be seen that the delivery of the bricks and the payment are both salient terms of the contract.[102] It was made known very clear since the main subject matter of the final negotiation between the Parties were delivery and the payment, especially the 35% bonus payment.[103]

105. Again because Mr. Deewarvala agreed to pay the 35% for every final delivery starting after the date of the final negotiation, which was 23rd November 2016. Hence, the Claimant has yet to pay the 35% bonus, and therefore committed a fundamental non-performance, by virtue of **Article 7.3.1 of UNIDROIT Principles.**

[101] *Arbitral Award Nov 30, 2006 of the Centro de Arbitraje de Mexico*, para. 17.
[102] Moot Problem, para. 15.
[103] *Ibid*, para. 34.

106. In conclusion, the Respondent being the aggrieved party is entitled to a relief in a form of a declaration from the Tribunal to declare the contract to be terminated due to a fundamental non-performance by the Claimant by virtue of **Article 7.3.1 of UNIDROIT.**

PRAYERS FOR RELIEF

The Respondent prays for the following from this tribunal:

1. To render the arbitration agreement inoperable and stop this proceeding;

2. To not grant the joinder of Vader Ltd into this arbitration proceeding;

3. To declare that there was no contract because there was no valid acceptance;

4. To not grant any reliefs to the Claimant; AND

5. To terminate the contract should this tribunal thinks there was a contract after the negotiation.