THE 13th LAWASIA INTERNATIONAL MOOT COMPETITION 2018

Asian International Arbitration Centre

On behalf of:	**Aganist :**
Rebustesse Espacial Solucion Crop	***Chuizi Leishen's LLC***
-Respondent-	**-Claimant-**

MEMORIAL FOR RESPONDENT

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II. STATEMENT OF JURISDICTION

A. The parties, Chuizi Leishen's LLC ("CL") and Robustesse Espacial Solucion Corp ("RES"), have agreed to submit the present dispute to arbitration in accordance with the Kuala Lumpur Regional Centre for the KLRCA Arbitration Rules. (AIAC Arbitration Rules)

B. Article 35, paragraph 1 of the AIAC Arbitration Rules states that the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Agreement between CL and RES stipulates that everything will be in accordance with and interpreted under the law of UNIDROIT principles. Accordingly, the UNIDROIT principles will apply to this dispute.

III. QUESTIONS PRESENTED

A. Whether the agreement to arbitrate is capable of being performed due to impecuniosity of the Respondent:

a) whether the arbitration may be terminated; or

b) whether the Respondent is capable to raise the counterclaims

B. Whether Vader can be seen as a party to join the Arbitration be granted by the Tribunal:

a) whether Vader is prima facie bound by the contract; or

b) whether both of the parties give the consent to the joining of Vader

C. Whether there is a valid acceptance of the Respondent's offer

a) Whether the Indian head nod is sufficient to show acceptance or,

b) How should the gesture be interpreted in case of a misunderstanding,

D. What relief should the Tribunal grant:

a) Whether the contract was existent and valid and,

b) Whether the Claimant is entitled to be awarded the relief it claimed for.

IV. STATEMENT OF FACTS

The Parties

1. The claimant, CL, is a commercial company duly incorporated under the laws of the People's republic of China in 2000. CL has developed construction projects in different regions of China for the last 10 years, and has begun to explore the markets in Southeast Asian Countries as China's Belt & Road Initiative offers many construction opportunities outside of China. CL intends to expand its business by successfully tendering in many B&R projects.
2. The respondent, RES, is a Limited Company duly incorporated under the laws of Cambodia in January 2013, and is a subsidiary of Vader, a commercial company duly incorporated under the laws of the United Kingdom in 1950. Vader decided to go into the Asian market and quickly established a subsidiary in the Kingdom of Cambodia to carry out its Asian business due to the possibility of the Brexit. Both companies' main business activity is the production and selling of bricks. Vader was the sole shareholder of RES until 2013.

The Contract between RES and CL

3. In the beginning of 2013, the CEOs of CL and Vader had a business negotiation about purchasing bricks from RES. In September, an exclusive distribution agreement between RES and CL was signed. Mr. Kalai Deewarvala (a Malaysian-Indian) was

chosen as a representative of "CL", and Mr. Armando Paredes (a Mexican) was authorized to execute agreements on behalf of "RES".

4. Both parties agreed upon using UNIDROIT principles as the applicable law in the transaction, and having the arbitration in KLRCA to settle any dispute, controversy or claim arising out of the contract.

The First Incentive

5. In the November of 2014, CL and RES met in Paris for prolonging the contract since the first contract is satisfactory. CL proposed a 15% price increase and RES accepted the offer. The two representatives started a new round of cooperation by shaking hands, but without setting the terms in writing.
6. Later in November of 2015, two parties decided to have another cooperation and extend the agreement with a second 15% increase in the price. They merely crossed e-mails.

The Changed Situations and its Consequences on RES and Vader

7. During the first half of 2016, the prices of bricks skyrocketed and RES has been operating without profit. In the meantime, Vader was influenced by Brexit, thus stopped the administrative and financial support to RES. The decision made RES an independent company.
8. RES realized the profit was not high enough to support the operation of the company, and intended to terminate the contract.

The Second Incentive

9. On the 23rd of November, 2016, CL having already known the RES's intention, raised the Second Incentive through the Skype call. RES made a counter-offer in the terms of maintaining the First Incentive (i.e. 15% price increment per year and 4 more deliveries) and to give a bonus to the Seller after 4 compliant and timely new deliveries as a second incentive.

The Misunderstanding

10. Mr. Deewarvala double checked the terms with Mr. Paredes, and Mr. Kalai Deewarvala accepted the offer with an Indian sideways nod. However, Mr. Armando Paredes misinterpreted the gesture into a refusal of their offer.
11. The first delivery was not performed due to the misunderstanding. Later, CL brought the case to arbitration.

The Obstacles in the Arbitration

12. RES could not afford the security deposit or the expenses required to raise the counterclaims due to its tense financial situation.
13. CL later paid the security deposit for RES.

V. SUMMARY OF PLEADINGS

A. The arbitration can proceed.

Applying AIAC Arbitration Rules, based on the fact that CL has paid the security deposit for RES, and all procedural requirements of the arbitration have been fulfilled, e.g. hearings, deposit, claims and counterclaims.

B. Vader shall be granted to join the arbitration as a joinder.

Vader is the non-signatory party in the conduct of the first contract, but it participated in the substantial negotiating part, hence is prima facie bound by the contract. Vader and RES shall be seen as a single economic entity, indicating that the subsidiary acted on behalf of the mother company.

C. The acceptance of the Respondent's offer is valid

a) The head nod is sufficient to signify its agreement

The parties had concluded contracts in relatively informal ways in the previous years, through which they tacitly agreed and established a usage that so long as no party expressly stated their intention to terminate their cooperation, a renewed contract for the second year will be concluded. Hence, under Article 1.9 of the UNIDROIT Principles, the parties have successfully established a usage between

themselves. Consequently, the head nod is sufficient to show the consent to the Respondent's counteroffer.

b) In any event, the head nod can only be interpreted as the Claimant's consent.

In case the Respondent holds a different interpretation of the usage established between the parties, applying Comment 2 of Article 2.1.1 and Article 4.1(1) of the UNIDROIT Principles, the meaning of the Indian head nod should still be interpreted to the common intention of the parties, i.e., constructing the contract, especially when the prior relationships, actions and proposals in the Skype negotiation and the circumstances of the two parties are taken into consideration. If the Respondent asserts that such intention of the parties cannot be established, under Article 4.1(2) of the UNIDROIT Principles, the conduct shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances. Considering the relevant circumstances, entering a contract with CL shall still be the intention of any entity in same situation as RES, thus the nod shall still be deemed as a valid acceptance of RES's offer.

D. The tribunal should grant the relief that the Claimant sought.

a) **A new round of contract was successfully concluded by the Claimant's acceptance of the offer.**

Applying Article 2.1 and 3.1.2 of the UNIDROIT Principles, a new round of

contract was concluded by the acceptance of Mr. Paredes's counter-offer, shown expressly in the form of a head nod.

b) The Claimant is entitled to order the performance of the stipulated and enforceable contract

Under the basic principle *pacta sunt servanda*, manifested by Article 1.3 of the UNIDROIT Principles, the contract, validly entered into, is binding upon the parties. The obligations of performance stipulated in the contract should be fulfilled by the Respondent.

c) **The contract shall be set in writing.**

Despite the successful contracts in the prior years, the oral contract led to some unnecessary disputes. It will be beneficial for both parties to set the terms of the contract in writing.

VI. PLEADINGS

A. The arbitration can proceed with mandatory conditions fulfilled.

a) The security deposit has been paid by the claimant. [1]Pursuant to the Case declaration, the security deposit has already been paid by the claimant, and all the prerequisites has been met according to AIAC[2], thus giving the arbitration its full possibility.

b) RES has difficulty in raising the counter offer[3], due to its impecuniosity. Even the RES does not have enough fees to raise their counter-offer, RES can claim a set-off as the technique to raise their counter-claim.

c) RES and CL reached an agreement in 2016, which modified the price of the contract to 35% of bonus plus 15% of the price base from 2015.[4] The second incentive has not yet been paid by CL, and RES can use that as a set-off in this case, in order to raise their counter-offer of the arbitration.

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[1] Statement of Facts 12.

[2] AIAC arbitration rules

[3] Statement of Facts 13

[4] Statement of Facts 10

B. Vader is a joinder in this arbitration.

a) Vader and RES is a single-economic entity. When the mother company and subsidiary have the mutual interest and the same behavior and was separated to avoid the debts, than the companies can be seen as a single-economic entity by the tribunal or court. Pursuant to the discussion of the case The Decision in In re 91st Street Crane Collapse Litigation[5] and alter ego theory[6], the conditions of RES and Vader have met with the doctrine of the single economic entity:

(1) Both the mother company and the subsidiary share the common interest. [7]Both of the companies manufacture bricks, but only distributing them in different markets.

(2) RES was set for expanding Vader's markets, and behaves correspondingly to the mother company. RES was initialized to expand Vader's business in Asia, thus to lower the risk of Brexit on the current market. [8]In 2013, the first contract was negotiated among the CEOs of Vader and CL, and then signed by RES and CL

[5] Case from 91st Streent Crane Collapse Litigation

[6] 7.70 U. Cin. L. Rev. 95 (2001-2002) Revamping Veil Piercing for All Limited Liability Entities: Forcing the Common Law Doctrine into the Statutory Age

[7] Statement of Facts 2

[8] Statement of Facts 2

indicating that RES's contract was based on the intention of Vader, that is they acted correspondingly.

(3) RES was once financially controlled by the parent company Vader. [9]Though the financial aid was cut finally, an independent position in conducting and performing a contract can be affected negatively by the mother company.

b) Vader is a party in this contract, and is *prima facie* bound by the contract, which can be considered as a joinder in the arbitration according to the AIAC RULE 9[10]. The CEO of Vader participated in the negotiation of the contract in 2013, and concluded the substantial part in the negotiation. The subsequent contract was then signed by CL and RES, with no further significant modifications. Vader is a non-signatory party in the contract existing between CL and RES. Pursuant to the ICC Case No. 17768 [11]which shared the same conditions under ICC Rules for a joinder in an arbitration. It was concluded by the tribunal that even the non-signatory party of the contract can be considered bound by the contract if the party is directly involved in the negotiation, performance or termination of the relevant agreement. The phenomenon is widely regarded in various international commercial arbitrations.[12]

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[9] Statement of Facts 2

[10] AIAC Arbitration Rules

[11] Case from ICC (International Commercial Court)

[12] Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd., 909 F.2d 698, 703 (2d Cir. 1990)\Contractor (Malaysia) v. (1) Owner (Saudi Arabia) and (2) Foundations (Saudi Arabia), Final Award, ICC Case No.17768\Dow

c) The renewed contract modified only the price. No other merit part was changed, thus the contract indicated the mutual intention of Vader and CL, and does not necessarily altered the participating parties in this contract.

d) The divorce can only be seen as the internal agreement between Vader and RES, and do not have validity against CL. The first contract does not include the clauses indicating the possibility or the consequences toward CL if the divorce can happen, hence as long as Vader was bound by the contract the divorce can only be seen as the internal reformation of one party, but did not necessarily have negative influence on the counterpart of this contract.

C. The acceptance of the Respondent's offer is valid

a) The Claimant's head nod is sufficient to signify its agreement

(1) The head nod through the Skype call[13] to give the final decision on whether to conclude the contract at the given terms is sufficient to signify Claimant's assent. Usages established between the parties need not be widely known in order to be binding. [14]The parties tacitly agreed and established a usage through their prior

Chemical v. Isover Saint Gobain (France) (Case N. 4131) Interim award of 23 September 1982,110 Journal du droit international (Clunet) 1983 p. 899 et seq., note Y. Derains; confirmed by Paris Court of Appeal, 21 October 1983

[13] Statement of Facts 9

[14] Austria 15 October 1998 Supreme Court (*Timber case*) 2 Ob 191/98x

transactions, that so long as no party expressly stated their intention to terminate their series of contract, a new round of contract will be performed.

(2) Though the UNIDROIT Principles did not define in what situations can a practice be deemed "established", it states that whether a particular practice has been "established" naturally depend on the circumstances of the case.[15] The Supreme Court of Austria further states that if parties can assume in good faith that these practices will be observed again in a similar instance, the practices that has occurred with a certain frequency and during a certain period of time set by the parties can be seen as "established".[16]

Judges in an American court states that if parties do not want to be bound by the practices established between themselves, they need to expressly exclude them.[17] Given the fact that the parties had renewed their contract through a simple handshake[18], or even a cross of email[19] in the years before going into a new round of contract without meticulous negotiation or even explicit statements of intentions, also the mutual satisfactory of the previous transactions, it can be concluded in good faith that, in the absence of expressed intention to terminate

[15] UNIDROIT Principles 2016 Comment 2 of Article 1.9

[16] Supreme Court of Austria (Oberster Gerichtshof) 31 August 2005 [7 Ob 175/05v]

[17] Geneva Pharmaceuticals Tech. v. Barr Laboratories, 201 F. Supp. 2d 236 (S.D.N.Y. 2002)

[18] Statement of Facts 5

[19] Statement of Facts 6

their business, the contract is automatically renewed.

(3) Hence, Mr. Deewarvala, by giving his Indian head nod to Mr. Paredes's counter-offer[20], should be seen as acting in accordance to the practices established between CL and RES instead of negligently showing an ambiguous move that contains flaws in expressing his consent.

b) In any event, the head nod can only be interpreted as the Claimant's consent.

(1) In case the Respondent holds a different conception of the usage established between the parties, the head nod, still, can only be interpreted as affirmative. Applying Comment 2 of Article 2.1.1 and Article 4.1(1) of the UNIDROIT Principles in determining whether there is sufficient evidence of intention to be bound by a contract, the meaning of the Indian head nod should be interpreted to the common intention of the parties, i.e., constructing the contract.

(2) Comment 1 of Article 4.3 of the UNIDROIT Principles indicates circumstances which have to be taken into consideration when applying the criterions in Article 4.1, among which the preliminary negotiations, conduct of the parties, and the nature and purposes of the contract are all sufficient to further explain the parties' mutual intention.

(3) Before having the Skype negotiation, the parties had tried to come to terms of a

[20] Statement of Facts 9

new round of contract for more than 4 months[21], through which the parties gained increased awareness to the current situation, both cherishing the strong hope of further cooperation.

Knowing RES's intention to seek more lucrative negotiations, Mr. Deewarvala proposed an extra bonus (the "Second Incentive") to maintain their business relationship[22]. Mr. Paredes fixed the number of the bonus at 35% of the price, and committed to 8 deliveries, thus clearly showing his willingness to enter a contract at such price.[23]

The nature of the contract is for the parties to both benefit from their business at the minimum cost, that is, the Claimant's stable supply of high-quality bricks, and the Respondent's steady income.

(4) With the foregoing circumstances taken into consideration, applying the subjective test[24], the interpretation should be made in accordance to the common intentions, that is, to conclude and perform a contract.

(5) If the Respondent asserts that such intention of the parties cannot be established, under Article 4.1(2) of the UNIDROIT Principles, the conduct shall be

[21] [28], Moot Problem

[22] Statement of Facts 9

[23] Statement of Facts 9

[24] Comment 1 of UNIDROIT Principles Article 4.3

interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

The Respondent has been in a tense financial situation[25], and is in urgent need of stable income and a reliable business partner. The rate of the bonus was fixed by the Respondent's representative, and he even promised 8 deliveries under such terms[26], thus fully showing his willingness of concluding the contract with the second incentive.

(6) Appellate Court (Hof van Beroep) of Gent held in its treatment that when considering silence as an acceptance, a trader is undoubtedly obliged by application of good faith principle to protest immediately or within a reasonable amount of time against a communication to which he cannot agree.[27]Acknowledging such obligation and treasuring the business relationship with the Respondent, while also following the established practices, the Claimant will not negligently cause any form of ambiguity.

D. The tribunal should grant the relief that the Claimant sought:

a) Rule that the contract was existent and valid.

[25] [26], Moot Problem

[26] [34], Moot Problem

[27] Hof van Beroep Gent (NV A.R. v. NV I.) (Design of radio phone case) 15 May 2002

Articles 2.1.1 and 3.1.2 of the UNIDROIT Principles states that a contract can be concluded by acceptance of an offer or by conduct that is sufficient to show agreement, without any further requirement.

In the present case, as the Claimant successfully and expressly showed its acceptance to the offer by Mr. Deewarvala's head nod, a new round of contract was concluded.

b) Order the respondent's performance

Article 1.3 of the UNIDROIT Principles manifested the basic principle of pacta sunt servanda, hence the contract which was validly entered into has a binding force upon the parties. The obligations of performance stipulated in the contract should be fulfilled by the Respondent. Article 7.2.2 of the UNIDROIT Principles listed the situations in which the performance of non-monetary obligations is not mandatorily enforceable. None of those circumstances would happen if RES is bound by the contract with CL, since the terms in the contract (payment of the consideration comes before the delivery)[28] ensured the stable income for RES. The Claimant is then entitled to require performance of the first two deliveries of 2017.

c) Set the terms of the Contract in writing.

[28] [15] Contract Term e), Moot Problem

Despite the successful cooperation in the previous years[29], this year, the oral contract caused significant and unnecessary misunderstanding[30]. It would be necessary and beneficial for both parties to set up a written contract.

VII. PRAYER FOR RELIEF

For the foregoing reasons, the Claimant respectfully request the Tribunal's Ruling that:

a) Declare that the Contract was existent and enforceable,

b) Order the Respondent's performance (the first two deliveries of 2017)

c) Set the terms of the Contract in writing.

Dated September 19th, 2018

COUNSEL FOR THE CLAIMANT

[29] [18], [25], Moot Problem

[30] [43], Moot Problem