

**THE 13th LAWASIA INTERNATIONAL
MOOT COMPETITION 2018**

Asian International Arbitration Centre

On behalf of:

Rebustesse Espacial Solucion Crop

-Respondent-

Aganist:

Chuizi Leishen's LLC

-Claimant-

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

I .	TABLE OF AUTHORITIES	3
II .	STATEMENT OF JURISDICTION.....	5
III .	QUESTIONS PRESENTED	6
IV .	STATEMENT OF FACTS.....	7
V .	SUMMARY OF PLEADINGS	10
VI .	PLEADINGS	11
VII .	PRAYER FOR RELIEF.....	17

I. TABLE OF AUTHORITIES

TAB Description

Cases

1. Codelfa Construction Pty Ltd v State Rail Authority of New South Wales(NSW SC) 15
2. ICC Case No. 4504..... 12
3. Raffles v Wichelhaus [1864] England and Wales SC Exch J19 16

Statutes

4. Cambodian Contract Law21
5. AIAC Arbitration Rules9,14
6. UNIDROIT Principles1.9,2.1.6,4.23

Other Authorities

7. Black's Law Dictionary.....14

8. Global Competence.....	15
9. 39 ZDAR 12(2014) Arbitration Agreements between Parties of Unequal Bargaining Power- Balancing Exercise on Either Side of the Atlantic.....	11

II. STATEMENT OF JURISDICTION

1. 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)
2. 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

1. Is the agreement to arbitrate incapable 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 counterclaim

2. Should the request of the Claimant to join Vader as a party to 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.

3. Was there a valid acceptance of the Claimant's offer:
 - a. whether the Claimant's head nod can be interpreted as an assent; or
 - b. Whether the Indian head nod is eligible as the usage.

4. What relief should the Tribunal grant:
 - a. Whether the contract was existent; or
 - b. Whether the Claimant is entitled to apply for the compensation.

IV. STATEMENT OF FACTS

The partners

1. The Claimant, Chuizi Leishen's LLC, is a commercial company duly incorporated under the laws of the People's Republic of China ("China") in 2000. The company intends to expand its business by successfully tendering in many B&R projects.
2. The Respondent, Robustesse Espacial Solucion Corp, is a Single-Member Private Limited Company duly incorporated under the laws of Cambodia in January 2013 wholly owned by Vader. Vader is a commercial company duly incorporated under the laws of the United Kingdom (the "UK") in 1950. Both companies' main business activity is the production and selling of bricks.

The beginning of the partnership

3. On 29th May 2013, the CEOs met at the "Privacy and Confidentiality in Arbitration" talk at the Kuala Lumpur Regional Centre of Arbitration ("KLRCA"), and found a mutual business opportunity and decided that a formal contract should be conducted at a later point in time when their respective legal counsels and representatives could review it.
4. For the purpose of negotiating the contract between CL and RES under the B&R initiatives, the Buyer appointed a Malaysian-Indian construction specialist, Mr. Kalai Deewarvala, as the

representative of CL. In the meantime, the Seller appointed a Mexican specialist Mr. Armando Paredes as the Managing Director of RES.

5. By September 2013, Mr. Paredes and Mr. Deewarvala had successfully drafted, revised and signed a contract. The Contract was structured as an exclusive distribution agreement even though the Seller wanted to contract with multiple counterparts.

The First Incentive

6. In October of 2014, the Brexit threatened the Seller's activities in Europe. At this moment, Vader's Board of Directors determined that no financial aids or administrative aids will be given to RES.
7. In November 2014, the Representatives met in Paris. The Buyer raised the proposal of The First Incentive to prolong the contract to 2015.
8. In November of 2015, the Representatives crossed emails and decided to extend the agreement to 2016 for 4 more deliveries and a second 15% price increase. No formal contract was conducted by the Representatives to record this agreement.
9. Brexit annihilated the business of Vader in the EU. Vader's Board of Directors passed a motion such that no further financing, compliance monitoring, or directives would be given by Vader to RES. This meant that Mr. Paredes had full control over RES's activities.

The Second Incentive

10. On the 23rd of November 2016, the Representatives had a final Skype call. The Representatives negotiated for more than 4 hours.
11. As the Buyer knew that the Seller wanted to terminate the Contract, Mr. Deewarvala proposed to maintain the First Incentive and to give a bonus to the Seller after 4 compliant and timely new deliveries as a second incentive.
12. As the Seller knew that the Buyer wanted to extend the Contract, Mr. Paredes requested the increase of price substantially before committing to further deliveries. Mr. Paredes intended to set the Second Incentive at a 35% of the total price as the bonus.
13. Mr. Deewarvala responded Mr. Paredes' proposal (35% of the total amount of the contract per year in very December to ask for 8 deliveries) by doing an Indian head nod, a side-ways nod, which interpreted the side-ways nod as a refusal.
14. RES could not afford the security deposit or the expenses required to raise the counterclaims due to its tense financial situation.
15. CL later paid the security deposit for RES.

V. SUMMARY OF PLEADING

- A. RES did not have enough money to raise the counter offers due to its financial situation in time, and it would cause a great burden to RES's financial situation to start a new round of arbitration.
- B. Pursuant to the case declaration, the Cambodian lawyers who might lack certain knowledge about International commercial arbitration had to be hired by RES, which can cause a huge difference of power in the arbitration.
- C. The contract existing is conducted by RES and CL in 2016, with no participation of Vader.
- D. The Claimant's side-ways nod cannot be interpreted as an assent.
- E. The side-ways nod representing acceptance is not the usage of the parties.
- F. Tribunal should deny the existence of the contract.
- G. Tribunal should demand the Claimant to pay for all the arbitration and administration fees, and all counsel's fees and expenses.

VI. PLEADINGS

A. The arbitration cannot be continued though CL has already paid the deposit.

1. RES did not have enough money to raise the counter offers¹ due to its financial situation, and pursuant to the case declaration, RES had to hire the Cambodian lawyers in this case who might lack certain knowledge about International commercial arbitration in comparison to the lawyer team of CL. This can cause a huge difference of power in the arbitration, thus the proceedings shall not proceed. According to 39 ZDAR 12(2014) Arbitration Agreements between Parties of Unequal Bargaining Power-Balancing Exercise on Either Side of the Atlantic², it is stated that the unequal bargaining power can cause the problem of arbitrability and thus mandatory procedural may be taken into consideration.
2. Pursuant to AIAC Rules 14³, the parties shall pay the advance deposit corresponding to its claims in 21 days of written notification by the AIAC of such estimate, each Party shall deposit its share of the estimate with the AIAC. The circumstance is that RES was not

¹ Moot problem Page 2, Paragraph 14

² The case named 39 ZDAR 12(2014) Arbitration Agreements between Parties of Unequal Bargaining Power-Balancing Exercise on Either Side of the Atlantic

³ The tribunal is Asian International Arbitration Centre

capable to pay the deposit fee within the duration of time, and RES cannot possibly raise a counterclaim in the current arbitration, and it can cause a huge burden to the financial situation of RES to initial a new arbitration procedural.

B. Vader shall not be seen as a joinder in this situation.

Vader does not fit the AIAC arbitration rules for a joinder. According to AIAC arbitration rule 9, the third party can be seen as a joinder under the two conditions, that is (i) the consent of both parties, or (ii) the third party is prima facie bound by the contract. Respondent declined the joining of Vader in this arbitration, whether Vader is prima facie bound by the contract is controversy.

- a) The contract existing is conducted by RES and CL in 2016⁴, with no participation of Vader. Vader only exists as the first negotiation part in the contract⁵, and did not participate in the following conclusion of the contract. In the similar case ICC Case No. 4504⁶, a non-signatory party participated in the negotiation and even the performance of the contract, yet the tribunal declared that the role of the non-

⁴ Moot problem Page 2, Paragraph 10

⁵ Moot problem Page 1, Paragraph 3

⁶ ICC Case No. 4504

signatories in negotiation and performance of the contract was insufficient to warrant conclusion they had assumed and been bound by the contract. (The ICC Rules have similar requirements for joinder)

- b) RES has its full legal personality and is capable of performing the contract independently. (i) Vader only supported RES financially before 2013, and RES was fully capitalized and financed on its own. RES is endowed with the ability to sign a contract independently⁷. (ii) Though Vader was the previous mother company of RES, it has already stopped the financial support and administration to RES, which gave RES its full legal entity to sign the contract as an independent company according to the Moot problem. (iii) RES and Vader have separate administrative systems. Mr. Parades had the full control of RES⁸.

C. There was not a valid acceptance of the respondent's offer.

According to the UNIDROIT Principles ARTICLE 2.1.6 ((Mode of acceptance) an acceptance of an offer should meet one of the two requirements to become effective: (a) the assent indicated by the statement or conduct of the offeree reaches the offeror OR; (b) the offeree may indicate

⁷ Moot problem Page 2, Paragraph 9

⁸ Moot problem Page 2, Paragraph 9

assent without notice to the offeror due to virtue of the offer or practices established by the parties or the usage.

1. The Claimant's side-ways nod cannot be interpreted as an assent.

- a) Pursuant to UNIDROIT Principles ARTICLE 4.2, The statements and other conduct of a party shall be interpreted according to that party's intention only if the other party knew or could not have been unaware of that intention or it is interpreted by a reasonable person. There is no fact proving that Mr.paredes has known the meaning.
- b) Referring to Black's Law Dictionary⁹ a reasonable person is an ordinary person who exercises care while avoiding extremes of boldness and carefulness. Such a reasonable person would not take an indirect response as an acceptance.
- c) In the second comment of the article 2.1.6, the indication of assent may either be made by an express statement or be inferred from the conduct of the offeree if the offer does not impose any particular mode of acceptance. When asked a yes-or-no question, the Claimant replied with a vague expression rather than a direct response¹⁰, no wonder the Respondent would take it as a refusal considering the possibility of the misunderstanding.

⁹ Black's Law Dictionary

¹⁰ Moot problem Page 6, Paragraph 35

2. The side-ways nod representing acceptance is not the usage of the parties.

- a) According to UNIDROIT Principles ARTICLE 1.9, the usage shall be bound by the parties that are widely known to and regularly observed in international trade, Yet an Indian side-ways nod is inappropriate to be a usage under the circumstance when the other representative is a foreigner, for there is no clear difference between a side-ways nod and Headshake which means no.
- b) Referring to a book named "global competence"¹¹ written by Diana K.Rowland, it introduces a variety of head movements of Indian which Contains different meanings. As a foreigner, it is absolutely not easy to understand the Indian side-ways nod.
- c) The case named Codelfa Construction Pty Ltd v State Rail Authority of New South Wales¹² cited by the NSW SC shows Textualism prevails Contextualism. The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. However, it is not admissible to contradict the language of the contract when it has a plain meaning.

¹¹ a book written by Diana K.Rowland

¹² The case is cited by the NSW SC

d) In the case *Raffles v Wichelhaus* [1864] England and Wales SC Exch J19¹³, which established that when both parties to a contract are mistaken as to an essential element of the contract, the court will attempt to find a reasonable interpretation from the context of the agreement before voiding it, the Lords ruled that if the two parties did not agree to the same thing, there was no binding contract.

D. Tribunal could grant the following relief.

1. Tribunal should deny the existence of the contract.

In addition to missing any of the two requirements, Invoking Cambodian Contract Law¹⁴ Art. 21 that In the case where there is nullity of a contract, the situation prior to entering into the contract shall be restored. as submitted previously, the Respondent sincerely hopes the Tribunal's Ruling that the contract was invalid, thus no compensation should be granted to the Claimant.

2. Demand the Claimant to pay for all the arbitration and administration fees, and all counsel's fees and expenses.

¹³ The case named *Raffles v Wichelhaus* [1864] England and Wales SC Exch J19

¹⁴ The seat of the arbitration is in the Kingdom Of Cambodia

After the realization of misunderstanding on mid-March 2017, there has been no form of meetings to remedy the situation¹⁵. The Respondent has always been open to further negotiations and held the position that the situation could be settled in an alternative way.

¹⁵ The clarifications Page 2, Paragraph 10

VII. PRAYER FOR RELIEF

1. For the foregoing reasons, the Respondent respectfully requests the Tribunal's ruling that:
 - a. The arbitration cannot be continued though CL has already paid the deposit, and
 - b. Vader shall not be seen as a joinder in this situation, and
 - c. The contract is invalid and unenforceable, and
 - d. The Claimant shall give compensation to the Respondent.

COUNSEL FOR THE RESPONDENT