C 1813-C

THE 13TH LAWASIA INTERNATIONAL MOOT COMPETITION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

2018

BETWEEN

CHUIZI LEISHEN'S LLC

(CLAIMANT)

AND

ROBUSTESSE ESPACIAL SOLUCION CORP

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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The parties, Chuizi Leishen's LLC ("**CL**") and Robustesse Espacial Solucion Corp ("**RES**"), have agreed to submit the present dispute to arbitration in Cambodia in accordance with the Kuala Lumpur Regional Centre for Arbitration 2017 Rules.

QUESTIONS PRESENTED

1. Whether the arbitration agreement is incapable of being performed due to the impecuniosity of RES:

    a. Whether financial impecuniosity renders an arbitration agreement incapable of being performed; and

    b. Whether RES is able to conduct an effective defence.

2. Whether Vader Ltd ("**Vader**") should be joined to the arbitration proceedings:

    a. Whether Vader is *prima facie* bound to the arbitration agreement; and

    b. Whether there will be any prejudice to any of the parties if Vader is joined to the arbitration.

3. Whether CL had validly accepted RES's offer:

    a. Whether Armando Paredes ("**Paredes**") knew or could not have been unaware of Kalai Deewarvala's ("**Deewarvala**") subjective intention to accept the Offer when the latter did the Indian head nod; and

    b. Whether a reasonable person of the same kind as Paredes would understand the Indian head nod to mean acceptance.

4. Whether CL should be granted the relief sought:

    a. Whether a declaration that the Contract is existent and enforceable should be granted; and

b. Whether an order for specific performance of the deliveries due should be granted; and

c. Whether an order to set the terms of the Contract in writing should be granted.

STATEMENT OF FACTS

1. The Claimant, CL, was incorporated in the People's Republic of China ("**China**"). CL's main business is construction. It has developed construction projects in China for ten years. From 2013, CL began exploring opportunities in Southeast Asia arising from China's Belt and Road Initiative ("**B&R**").

2. The Respondent, RES, is a wholly-owned subsidiary of Vader incorporated in Cambodia in 2013. Vader specialises in the sale and production of bricks within the European Union ("**EU**"). In anticipation of a possible Brexit, RES was established to carry out Vader's business in Asia.

3. A meeting between the CEOs of CL and Vader was arranged by a business agent at the Kuala Lumpur Regional Centre of Arbitration ("**KLRCA**") in May 2013. At that meeting, they agreed on most of the terms of their future venture but decided that a formal contract should be executed after their legal counsels and representatives had reviewed it.

4. Subsequently, Deewarvala, a Malaysian-Indian construction specialist living in Singapore, was employed as CL's representative and was authorised to execute agreements relating to CL's B&R projects and handle communications with RES. Similarly, Paredes, a Mexican specialist in baking bricks and building walls, was employed as RES's Managing Director and was authorised to execute agreements in ASEAN.

5. In September 2013, Deewarvala and Paredes ("**Representatives**") successfully drafted, revised, and signed an exclusive distribution agreement ("**Contract**") based on the terms agreed upon by the CEOs of CL and Vader. The Contract provided for four

deliveries of bricks by RES during 2014 and payment by CL five days before each delivery date.

6. The first three deliveries and corresponding payments in 2014 were performed successfully. It was only in October 2014 when Vader's business in the EU started declining because of the possibility of Brexit that Vader's Board of Directors resolved that RES's operations would remain independent.

7. In November 2014, CL offered a 15% price increase ("**First Incentive**") if RES committed to four deliveries in 2015. RES accepted the offer and the Representatives shook hands. The last delivery of 2014 and the four deliveries of 2015 were performed successfully. In November 2015, the Representatives extended the agreement throughout 2016 for four more deliveries and a further 15% price increase. No formal contract was executed on either occasion.

8. By this point, the Representatives developed a solid relationship of trust and good faith. In early 2016, RES considered the possibility of contracting with a new counterpart due to the rising price of bricks in Asia. However, it decided not to.

9. In July 2016, Vader's profits plunged owing to Brexit. In light of this, Vader resolved to cease further financing, compliance monitoring, or directives to RES.

10. The first three deliveries of 2016 were successfully completed. The Representatives negotiated for four months in the hope of extending the agreement to 2017. This culminated in a Skype call which lasted for more than four hours in November 2016.

11. Paredes made a final offer to Deewarvala ("**Offer**") proposing to commit to two more years instead of the usual one-year term for a 15% price increase and a 35% bonus at the end of each year ("**Second Incentive**"). CL understood that the Second Incentive

was for two editions only. Deewarvala repeated the Offer to clarify the terms. After Paredes confirmed the terms, Deewarvala did an Indian side-ways head nod to convey acceptance. However, Paredes interpreted the head nod as a refusal instead.

12. The last delivery of 2016 was performed successfully. No communications were exchanged between CL and RES ("**Parties**") until March 2017 when CL contacted RES to confirm the date of the next delivery. The Parties realised the misunderstanding at that point.

13. CL then commenced arbitration in Cambodia to enforce the Contract. CL paid the full security deposit of USD$25,000.00 since RES refused to pay its share. RES asserted that the arbitration agreement had become null and incapable of performance since it was unable to raise counterclaims due to the costs of the arbitration. RES failed to obtain third-party funding which it claimed was due to its precarious financial position given it had operated with no profits since its incorporation. Despite this, Paredes had hired a team of in-house counsel and several local Cambodian nationals to manage the administration of RES.

14. Despite the payments and incentives for 2016 having been agreed upon in a prior agreement, RES is counterclaiming for three editions of the Second Incentive which it viewed to be owed even at the end of 2016.

SUMMARY OF PLEADINGS

A. The arbitration agreement is capable of being performed

The arbitration agreement is capable of being performed since RES's financial impecuniosity is immaterial to the capability of performance of an arbitration agreement. Financial impecuniosity only amounts to an inability of one of the parties to perform its obligations to arbitrate. Alternatively, even if financial impecuniosity does affect the capability of performance of an arbitration agreement, the arbitration agreement is still capable of being performed since RES is able to raise an effective defence. There is no breach of the right of access to justice or the principle of equality merely because RES cannot raise its counterclaims.

B. Vader should be joined to the arbitration proceedings

Vader should be joined to the arbitration proceedings under Rule 9(1) of the KLRCA Rules. Vader is *prima facie* bound to the arbitration agreement on three alternative bases. First, the group of companies doctrine applies since RES and Vader was one and the same economic entity. Secondly, Vader had impliedly consented to the arbitration agreement since it played a substantial role in the negotiations and performance of the contract such that all parties objectively intended for Vader to be part of the arbitration agreement. Thirdly, RES was apparently authorised to enter into the Contract on behalf of Vader because Vader had given an impression that it had authorised RES to do so. Furthermore, since the relevant circumstances show that there will be no prejudice to any of the parties if Vader is joined to the arbitration, Rule 9(5) of the KLRCA Rules does not preclude the joinder.

C. CL had validly accepted RES's offer

Deewarvala's Indian head nod is as an indication of assent under Article 2.1.6 of the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**") that amounts to valid acceptance. Paredes could not have been unaware of Deewarvala's subjective intention to accept the Offer when the latter did the Indian head nod because his intention behind the gesture was easy to discern in the context of their negotiations. Alternatively, even if Paredes could have been unaware of Deewarvala's subjective intention, a reasonable person of the same kind as Paredes would understand the Indian head nod as acceptance in light of Paredes' professional appointment in RES, his relationship with Deewarvala, and the context of the negotiation.

D. CL should be granted the relief sought

A declaration that the Contract is existent and enforceable should be granted because there is an obvious presence of an existing controversy between CL and RES over whether the Contract was successfully concluded between them. An order for specific performance of the deliveries due should also be granted because CL has the right to specific performance under Article 7.2.2 of the UNIDROIT Principles since none of the exceptions apply. Furthermore, the Tribunal should set the terms of the Contract in writing because such an order is necessary to remove the existing uncertainty between the Parties over the Second Incentive of the Contract.

PLEADINGS

I. THE ARBITRATION AGREEMENT IS CAPABLE OF BEING PERFORMED

1. RES has contended that the arbitration agreement is incapable of being performed.[1] This is a challenge to the tribunal's jurisdiction.[2] Pursuant to Article 23 of the Kuala Lumpur Regional Centre for Arbitration Rules 2017 ("**KLRCA Rules**")[3] and Article 24 of the Commercial Arbitration Law of the Kingdom of Cambodia ("**CALC**"),[4] the arbitral tribunal has the power to rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement.

2. The arbitration agreement is capable of being performed since RES's financial impecuniosity is immaterial (**A**). Alternatively, the arbitration agreement is still capable of being performed since RES can raise an effective defence (**B**).

A. The arbitration agreement is capable of being performed since RES's financial impecuniosity is immaterial

3. An arbitration agreement is capable of performance unless the arbitration cannot be effectively set into motion[5] because of "an obstacle which cannot be overcome even if the parties are ready, able, and willing to perform the agreement".[6] The "incapability of

[1] Moot Problem at [57].
[2] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at [5.99].
[3] Kuala Lumpur Regional Centre for Arbitration Rules 2017.
[4] Commercial Arbitration Law of the Kingdom of Cambodia 2006.
[5] Stephan Kroll, "The 'Incapable of Being Performed' Exception in Article II(3) of the New York Convention in Practice" in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (E. Gaillard and D. Di Pietro eds) (Cameron May, 2008) at p.326; UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) 2016 Edition at [112].
[6] *Trunk Flooring Ltd. v HSBC Asset Finance (UK) Ltd., Costa Rica SRL* [2015] NICA 68 at [19]. Lord Mustill and Stewart Boyd QC, *Commercial Arbitration* (Butterworths, 2nd Ed, 1989) at p.465.

performance" must be inherent in the arbitration agreement, and is not the incapability of the parties to perform their part of the agreement.[7]

4. The irrelevance of financial impecuniosity to the capability of performance of an arbitration agreement is recognised in jurisdictions such as England and Wales, Uganda, and Australia.[8] As explained in *Janos Paczy v Haendler & Natermnan GmbH*, this position is consistent with contractual principles. A contract for the sale of land, for instance, does not become incapable of being performed if the purchaser subsequently becomes impecunious and cannot afford the purchase price.[9] Similarly, an arbitration agreement is not incapable of being performed simply because one party no longer has the money to finance the arbitration.[10] One party to an arbitration agreement cannot "rely on his own inability to carry out his part of the arbitration agreement" to turn an agreement which is perfectly capable of being performed to one which is not.[11]

5. A small minority of jurisdictions, including Germany, have recognised the contrary position, allowing financial impecuniosity to render an arbitration agreement incapable of being performed.[12] The underlying rationale for this position is that it would cause a denial of justice to enforce the arbitration agreement if a party is unable to present its case in arbitral proceedings where there is no legal aid.[13] This widely-criticised

[7] *Trunk Flooring Ltd. v HSBC Asset Finance (UK) Ltd., Costa Rica SRL* [2015] NICA 68 at [19].
[8] Uganda No 1, *Fulgensius Mungereza v PricewaterhouseCoopers Africa Central*, Volume XXXV Yearbook Commercial Arbitration, Kluwer Law International 2010 (Supreme Court of Uganda 2004); *Bakri Navigation Co. Ltd. v Ship Golden Glory, Glorious Shipping S.A.* [1991] FCA 306; *Janos Paczy v Haendler & Natermann GmbH* 1 Lloyd's Law Reports 302.
[9] *Janos Paczy v Haendler & Natermann GmbH* 1 Lloyd's Law Reports 302 at 307.
[10] *Ibid*.
[11] *Ibid*.
[12] Patricia Zivkovic, "Impecunious Parties in Arbitration: An Overview of European National Courts' Practice" Croatian Arbitration Yearbook (December 2016) at pp.40–41.
[13] Patricia Nacimiento *et als*, *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2nd Ed, 2015) at [52].

approach[14] should not be followed for three reasons. First, the sanctity of the binding nature of arbitration agreements would be undermined if they it be destroyed unilaterally by one party.[15] Secondly, in light of the fundamental policy rationale underlying arbitration to allow parties to resolve their disputes by way of a contractually agreed neutral forum,[16] the approach would erode the efficacy of arbitration if a party is forced to pursue its claims in the local courts because of a counterparty's financial situation. Thirdly, the approach gives inadequate weight to the possibility that financial impecuniosity would be easily used as a procedural strategy.[17]

6. A more principled way of addressing the concerns underlying the German position is adopted in French law,[18] which deals with any possible violations of access to justice or equality between the parties arising from financial impecuniosity exclusively at the enforcement stage.[19] This approach correctly respects an arbitral tribunal's jurisdictional authority over the validity of an arbitration agreement.[20]

7. Here, RES's sole ground for to challenging the capability of performance of the arbitration agreement is financial impecuniosity.[21] Specifically, RES alleges that since its impecuniosity renders it unable to afford the costs of pursuing its counterclaims, it can escape the arbitration completely.[22] However, in practice, arbitrations do often

[14] Detlev Kuhner, "The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany" (2014) 31 J. Intl. Arb. 807 at 816; Juan Pablo Moyano, "Impecuniosity and the Courts' Approach to the Validity of the Arbitration Agreement" (2017) 34 J. Intl. Arb. 631 at 651–652; Gary Born, *International Commercial Arbitration* Vol 1 (Wolters Kluwer, 2nd Ed, 2014) at p.73.
[15] Juan Pablo Moyano, "Impecuniosity and the Courts' Approach to the Validity of the Arbitration Agreement" (2017) 34 J. Intl. Arb. 631 at 651–652.
[16] Gary Born, *International Commercial Arbitration* Vol 1 (Wolters Kluwer, 2nd Ed, 2014) at p.73.
[17] Detlev Kuhner, "The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany" (2014) 31 J. Intl. Arb. 807 at 816.
[18] *Société Lola Fleurs v Société Monceau Fleurs*, No. 12/12953 (Paris Court of Appeal, 2013).
[19] *Ibid*.
[20] Juan Pablo Moyano, "Impecuniosity and the Courts' Approach to the Validity of the Arbitration Agreement" (2017) 34 J. Intl. Arb. 631 at 645.
[21] Moot Problem at [57].
[22] Moot Problem at [57].

proceed notwithstanding the fact that the defendant is unable to raise its counterclaims.[23] Therefore, the arbitration itself can nevertheless still be set in motion because proceedings may continue despite not hearing RES's counterclaim.

8. Thus, the arbitration agreement is capable of being performed since RES's financial impecuniosity is immaterial.

B. Alternatively, the arbitration agreement is capable of being performed since RES has not shown that it cannot raise an effective defence

9. Even if the Tribunal adopts the approach that financial impecuniosity should be relevant, the limited support for this approach only renders an arbitration agreement incapable of performance when the financial impecuniosity is so severe that it is impossible for the impecunious party to effectively defend itself against a claim.[24]

10. This was recognised in *Pirelli & Co v Licensing Projects* where the French Supreme Court, albeit in the enforcement context, observed that counterclaims would only form part of the effective defence when they are "inseparable from the main claim".[25] A counterclaim is inseparable from the main claim where it is "so closely connected with the plaintiff's demand that it would be manifestly unjust to allow him to enforce payment without taking into account the crossclaim".[26] However, where the counterclaim is not inseparable from the main claim, the defendant's inability to submit counterclaims as a result of financial impecuniosity does not violate the principle of

[23] Patricia Zivkovic, "Impecunious Parties in Arbitration: An Overview of European National Courts' Practice" Croatian Arbitration Yearbook (December 2016) at p.47.
[24] *Id*, at p.51.
[25] *Ibid*; Pirelli *& Co. v Licensing Projects*, Pourvoi No. 11-27.770 (Court of Cassation of France, 2013).
[26] *Dole Dried Fruit and Nut Company v Trustin Kerwood Limited* [1990] 2 Lloyd's Rep 309 at [19].

equality.[27] In such a situation, the respondent's right to reply to the claim and raise an effective defence is not affected.[28] This position is adopted even in Portugal,[29] despite Portugal's Constitution guaranteeing that "justice shall not be denied to anyone due to lack of financial means".[30]

11. Here, RES's counterclaims are not inseparable from the main claim because the counterclaims can be dealt with separately from the main claim without any manifest injustice arising from prejudice to RES in a subsequent proceeding. Manifest injustice may arise from prejudice in subsequent proceedings,[31] for instance, through the operation of the principle of *res judicata* which states that a tribunal's conclusive adjudication of a conflict is final and binding such that the subject matter in dispute cannot be re-litigated.[32]

12. However, this does not apply because there will be no conclusive adjudication over the merits of the counterclaims if RES is unable to raise the counterclaims. The cause of action underlying the counterclaim which is the alleged breach of the delivery payments and the Second Incentive is distinct from the cause of action underlying the main claim which is the failure of RES to deliver the goods.[33] Findings of fact concerning a breach of the obligations on the part of RES to deliver the goods would not have an adverse

[27] Patricia Zivkovic, "Impecunious Parties in Arbitration: An Overview of European National Courts' Practice" Croatian Arbitration Yearbook (December 2016) at p.51.
[28] *Ibid*.
[29] *Portugal No. 1, A (Netherlands) v B & Cia. Ltd., C and others* (Supreme Court of Justice Portugal) (2003).
[30] Constitution of the Portuguese Republic 1976, Art 20(1).
[31] *Decor Floors Engineering Ltd. & others v Wing Hong Contractors Ltd. & Another & Tai Fong Engineering Hong Kong Co. Ltd.*, [2005] HKEC 1044 at [40], [74].
[32] Gretta Walters, "Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?" (2012) 29(6) J. Intl. Arb. 651 at 652.
[33] Moot Problem at [45], [58].

impact on the facts RES might rely on to prove the breach of CL's obligation to pay for the counterclaim to succeed.

13. In any case, RES has not met its burden of proof to show its inability to raise funds for the counterclaim. A party alleging financial impecuniosity must adduce evidence to prove conclusively that obtaining funds has become impossible.[34] Far from adducing such clear evidence, RES has given contradictory accounts of its financial situation.

14. On one hand, RES has refused to pay its share of the security deposit and has claimed to have insufficient funds to bring the counter-claims due to its "tense financial situation".[35] On the other hand, RES has indicated that it would try to bring claims in the local courts if not for the arbitration,[36] in spite of the costs that would inevitably be associated with such a claim. RES also has business assets[37] whose value is unknown. Though they are not freely disposable at the moment,[38] RES has also not explained the timing in which it would become disposable.

15. Furthermore, RES continues to have the financial capability to sustain the employment of three experienced lawyers from a leading Cambodian law firm and several Cambodian nationals to take care of all administrative issues.[39] In addition, since the price of bricks in Asia was increasing[40] and RES was not only under the impression that there was no Contract but also had considered accepting another counterpart on more competitive terms,[41] RES likely obtained significantly improved profits from any

[34] *Portugal No. 1, A (Netherlands) v B & Cia. Ltd., C and others* (Supreme Court of Justice Portugal) (2003) at [11].
[35] Moot Problem at [48], [59], [61].
[36] Moot Problem at [60].
[37] Clarifications to the Moot Problem Q11.
[38] Clarifications to the Moot Problem Q11.
[39] Moot Problem at [26], [52].
[40] Moot Problem at [25], [40].
[41] Moot Problem at [25], [40].

new contract it entered into. It should hence not be liberally inferred that RES is indeed so financially impecunious such as to violate its right to access of justice.

16. Thus, the arbitration agreement is still capable of performance since RES has not shown that it cannot raise an effective defence.

II. VADER SHOULD BE JOINED AS A PARTY TO THE ARBITRATION

17. This Tribunal may join Vader to the arbitration under Rule 9 of the KLRCA rules if Vader is *prima facie* bound to the arbitration agreement. Furthermore, the Tribunal must consult all parties and have regard to "any relevant circumstances".[42]

18. Vader is *prima facie* bound to the arbitration agreement (**A**). There is also no prejudice to any of the parties if Vader is joined to the arbitration agreement (**B**).

A. Vader is prima facie bound to the arbitration agreement

19. Under Rule 9(1) of the KLRCA Rules, a party is *prima facie* bound to an arbitration agreement as long as there is a reasonable possibility that a common arbitration agreement might exist between all the parties.[43] A reasonable possibility exists if the non-signatory, on the face of evidence before an arbitration tribunal, appears to be a party to the arbitration agreement.[44]

20. Vader is *prima facie* bound to the arbitration agreement on three alternative bases: first, the group of companies doctrine permits the extension of the arbitration agreement to Vader; secondly, Vader impliedly consented to being part of the arbitration agreement; and, thirdly, RES had apparent authority to enter into the Contract on behalf of Vader.

[42] KLRCA Rules 2017, Rule 9(5).
[43] Gordon Smith, "Comparative Analysis of Joinder and Consolidation Provisions under Leading Arbitral Rules" (2018) 35 J. Intl. Arb. 173 at p.190.
[44] Jennifer Fong, "The New SIAC Rules 2016: Making Arbitration Quicker and More Efficient" *Law Gazette, Official Publication of the Law Society of Singapore* (October 2016) at p.14.

(1) The group of companies doctrine permits the extension of the arbitration agreement to Vader

21. The group of companies doctrine permits joinder of a non-signatory company within a group of companies if the companies within that group operate so closely that they are "one and the same economic reality",[45] giving rise to the inference that the non-signatory was objectively intended to be bound by the arbitration agreement.[46] Whether this objective intention exists is a multifactorial inquiry[47] which takes into account factors such as: whether one party exercised ownership and control over its subsidiaries; whether that party was effectively and extensively involved in the negotiation or performance of the substantive contract; and whether the parties attached any significance to the importance of who signed the substantive contract.[48]

22. Some commentators and national courts have doubted the existence of the group of companies doctrine.[49] Their objections rest primarily on the view that the doctrine ignores the concept of a separate legal liability of a company by treating all companies within the group as a "single economic entity" and that commercial parties set up subsidiary companies precisely to limit the liability of the parent company.[50]

23. However, despite these criticisms, there are good reasons why the group of companies doctrine, which has been widely applied by arbitral tribunals, [51] should apply here. First, the group of companies doctrine is justified on the basis that ordinary commercial

[45] *Interim Award in ICC Case No. 4131,* (1984) 9 Y.B. Comm. Arb. 131.
[46] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p.1444.
[47] *Interim Award in ICC Case No. 4131,* (1984) 9 Y.B. Comm. Arb. 131.
[48] *Id*, at pp.133–134.
[49] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p.1542.
[50] *Bank of Tokyo Ltd. v Karoon* [1987] AC 45 at p.64; *Adams v Cape Indus.* [1990] Ch. 433 at p.538.
[51] *Interim Award in ICC Case No. 6610*, (1994) 19 Y.B. Comm. Arb. 162; *Final Award in ICC Case No. 6519*, (1991) 2(2) ICC Ct. Bull. 34; *Partial Award in ICC Case No. 5894*, (1991) 2(2) ICC Ct. Bull. 25; *Award in ICC Case No. 5103*, (1988) 115 JDI (Clunet) 1206.

parties desire efficacy in their arbitration agreements.[52] This is best achieved by extending the arbitration agreement to parties which, though not signatories to the arbitration agreement, were objectively intended to be bound by the arbitration agreement.[53] Secondly, the group of companies doctrine does not disregard the separate legal entity doctrine. The group of companies doctrine only applies if it is the "mutual intention of all parties"[54] that the non-signatory be bound by the arbitration agreement. The non-signatory is thus bound by the obligation of another party to arbitrate, notwithstanding the fact that it did not execute the contract.[55]

24. Here, Vader can be joined to the arbitration agreement under the group of companies doctrine for three reasons. First, RES and Vader are a group of companies because Vader wholly owns RES and is the sole shareholder of RES.[56] RES was also set up for the sole purpose of expanding Vader's business into the Asian market.[57] Further, Vader exercises control over RES by monitoring compliance and giving financing and directives to RES.[58] Secondly, Vader had effectively participated in the negotiation of the Contract between RES and CL since it was the CEO of Vader who had agreed to almost all the terms of the Contract with CL before informing CL that their "representatives" would formally execute the Contract.[59] Thirdly, given that RES was the representative who subsequently came in to "draft, revise and [sign]" the Contract based on the terms that were previously agreed by the CEOs of CL and Vader,[60] CL and RES did not attach any importance to who signed the Contract.

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[52] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p.1454.
[53] *Ibid*.
[54] *Interim Award in ICC Case No. 4131,* (1984) 9 Y.B. Comm. Arb. 131 at p.136.
[55] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p.1445.
[56] Moot Problem at [8].
[57] Moot Problem at [6].
[58] Moot Problem at [27].
[59] Moot Problem at [10].
[60] Moot Problem at [10], [13].

25. Thus, the group of companies doctrine permits the extension of the arbitration agreement to Vader.

(2) Vader impliedly consented to being party to the arbitration agreement

26. A non-signatory has impliedly consented to an arbitration agreement where it played a substantial role in the negotiations and the performance of the underlying contract, such that all the parties objectively intended that the non-signatory will be a party to the arbitration agreement.[61]

27. This was recognised in *E. Holding v Z. Ltd*., where the tribunal joined the second Respondent to the arbitration proceedings due to the "active and critical role" that the second Respondent had played in both the negotiation and performance of the contract.[62] There, the second Respondent, a non-signatory, had played a critical role in the negotiation of the contract because it had always been the one negotiating with the Claimant.[63] The first Respondent only appeared to sign the contract after all the terms had already been discussed between the second Respondent and the Claimant.[64] Furthermore, the second Respondent had greatly assisted the first Respondent in the performance of the obligations arising under the contract despite having no obligations under the contract.[65]

28. Here, Vader was heavily involved in the negotiation of the Contract. As earlier mentioned, it was Vader's CEO who had met with CL's CEO to negotiate and agree upon the main terms of the Contract.[66] It was only after most of the important terms

[61] *E. Holding v Z. Ltd.* (UNCITRAL Tribunal, 2011).
[62] *Id*, at [339], [340].
[63] *Id*, at [340].
[64] *Ibid.*
[65] *Id*, at [355].
[66] Moot Problem at [10].

were concluded that the CEOs agreed "their representatives" would review the terms of the proposed Contract and formally execute it.[67] Given that this Contract was the first contract signed by CL outside of China and the first contract signed by RES since its incorporation,[68] it was likely that CL saw Vader's heavy involvement in the negotiation of the Contract as being critical to their participation in the venture.

29. Furthermore, Vader was also involved in the performance of the Contract. Up until 2016, Vader had issued directives, performed compliance monitoring, and provided financing to RES,[69] aid which would likely have been essential to RES in performing its obligations under the Contract. Additionally, given that RES had heavy initial establishment and operational costs since its incorporation and would not have been able to seek other contracts to improve its financial situation since it was involved in an exclusive distributorship agreement with CL,[70] Vader's financial assistance would have been crucial to the performance of the Contract by RES.

30. Thus, Vader had impliedly consented to being party to the arbitration agreement.

(3) RES had apparent authority to enter into the Contract on behalf of Vader

31. Under the principle of apparent authority, a principal may be held liable to a counterparty for the performance of the contract where the putative principal created the appearance of authorisation through words or conduct, leading that counterparty to reasonably believe that such authorisation actually existed.[71]

[67] Moot Problem at [10].
[68] Moot Problem at [14].
[69] Moot Problem at [27].
[70] Moot Problem at [14], [26].
[71] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p.1427.

32. The principle of apparent authority was recognised by the Federal Supreme Court of Switzerland in *Case No. 188/1991*.[72] There, it was held that a Chinese company was party to the main arbitration agreement because its Chinese official had given such an impression to an Austrian company, which had in fact contracted with another Chinese company.[73] The court found that the two Chinese companies were exclusively controlled by one entity, and that their joint involvement in an economic purpose which were only separated by a "geographical division of responsibilities" had caused the Austrian company to reasonably believe in good faith that it had indeed contracted with the related Chinese company as the main contracting party.[74]

33. Here, Vader had caused CL to reasonably believe that it was the main contracting party in the Contract. RES was set up as a fully owned subsidiary of Vader in Cambodia to contract with companies such as CL for the sole purpose of carrying out Vader's business of brick production in Asia.[75] Given that RES was initially set up for the purpose of furthering Vader's businesses in the Asian market,[76] all that divided RES and Vader was indeed a "geographical division of responsibilities".

34. Additionally, while RES sought potential commercial partners through a business agent, it was the CEO of Vader who met the CEO of CL to discuss the business opportunity.[77] Following an accord on most of the terms of the Contract, the CEOs decided to execute a formal contract when their respective legal counsel and representatives could review

[72] *Award in Case No. 188/1991* of 11 February 1993, 14 ASA Bull. 623 (1996).
[73] *Id*, at 4(a).
[74] *Ibid*.
[75] Moot Problem at [6].
[76] Moot Problem at [6].
[77] Moot Problem at [9], [10].

it.[78] Parades, who was the Managing Director of RES, only entered subsequently to formally execute and sign the contract as a "representative" of Vader.[79]

35. Thus, RES had apparent authority to enter into the Contract on behalf of Vader.

B. There is also no prejudice to any of the parties if Vader is joined to the arbitration

36. Rule 9(5) of the KLRCA Rules requires a tribunal considering joinder to consult all parties, including the additional party, and to have regard to "any relevant circumstances". Joinder would be permitted if it did not result in prejudice to any of the parties involved in the arbitration.[80]

37. Tribunals applying similar provisions under other institutional rules have applied a number of factors, including the consideration of the stage of the proceedings, whether the non-signatory has the chance to present its views on the joinder, and whether the tribunal has already been constituted such that it unfairly deprives the non-signatory the right to participate in the constitution of the tribunal.[81] The tribunal will then holistically consider these factors in determining whether permitting the joinder would unfairly prejudice any party.[82]

38. Here, there is no prejudice to any of the parties involved as a result of the joinder. Currently, given that the arbitration proceedings so far have only involved discussing the preliminary and administrative matters[83] in which no findings on substantive issues have been reached, joining Vader at this stage will not result in substantial delay or

[78] Moot Problem at [10].
[79] Moot Problem at [13].
[80] KLRCA Rules 2017, Article 17(5).
[81] Manuel Gomez Carrion, "Joinder of Third Parties: New Institutional Developments" (2015) 31 Arb. Intl. 479 at 489.
[82] *Id*, at 502.
[83] Moot Problem at [49].

disruption to the proceedings. Furthermore, Rule 9(4) of the KLRCA Rules provides a mechanism for prospectively joined parties to be consulted, allowing Vader to make its views known to the Tribunal. In any event, even if Vader is to be joined to the arbitration, it is not deprived of the right to be involved in deciding the constitution of the Tribunal given that Article 10(3) of the KLRCA Rules allow a party to request the AIAC to revoke any arbitrator appointments and reappoint new arbitrators.

39. Thus, the circumstances do not demonstrate that Vader would be prejudiced from being joined to the arbitration proceeding.

III. CL VALIDLY ACCEPTED RES'S OFFER

40. Under Article 2.1.6(1) of the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**"), conduct indicating assent to an offer amounts to a valid acceptance. Article 4.2 of the UNIDROIT Principles further provides rules of interpretation to determine if a particular act is an indication of assent.

41. Deewarvala's Indian head nod is an indication of assent that amounts to acceptance because Paredes could not have been unaware of Deewarvala's subjective intention to accept the Offer when the latter did the Indian head nod (**A**). Alternatively, a reasonable person in Paredes' position would understand the Indian head nod as an indication of assent (**B**).

A. Paredes could not have been unaware of Deewarvala's subjective intention to accept the Offer

42. Under to Article 4.2(1) of the UNIDROIT Principles, the conduct of one party must be interpreted according to that party's intention if the other party could not have been unaware of that intention. Where the party making the conduct subjectively intended to accept the offer and the other party had constructive knowledge of that intention, the conduct must be interpreted as acceptance.[84] A party is deemed to have constructive knowledge of that subjective intention if the intention behind the conduct is easy to discern in its context.[85] Under Article 4.3 of the UNIDROIT Principles, this context

[84] Donald J. Smythe, "Reasonable Standards for Contract Interpretations under the CISG" (2016) 25 Cardozo J. Intl. & Comp. L. 1 at 10.
[85] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015) at p.584; Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4th Ed, 2016) at p.152.

encompasses "all the circumstances" such as the pre-contractual negotiations and the parties' background.[86]

43. Thus, in *BRI Production "Bonaventure" v Société Pan African Export*, a court interpreting an *in pari materia* rule under the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**"),[87] held that one party's intention for a distribution restriction to be imposed between the parties was easy to discern in light of one party repeatedly expressing concern of the "ultimate client's address" for delivery of the goods.[88] One party's negligence or "violation of due care" in misunderstanding intention which is easy to discern is not an excuse.[89]

44. Here, it is not in dispute that Deewarvala's Indian head nod was subjectively intended by Deewarvala to mean acceptance to the Offer.[90] The intention was also easy to discern given the nature of the Indian head nod, the context of the negotiation, and Paredes' background taken cumulatively.

45. First, while Paredes interpreted Deewarvala's side-ways Indian head nod as a refusal,[91] the gesture should not be equated with one of rejection. The side-way head movement is widely used as a gesture of affirmation in numerous countries including Bulgaria, Turkey, India, Iran and Greece.[92] At best, the gesture was ambiguous. Under Article 4.2(1) of the UNIDROIT Principles, parties are compelled to inquire when faced with

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[86] Alexander Komarov, "Contract Interpretation and Gap Filling from the Prospect of the UNIDROIT Principles" (2017) Unif. L. Rev 29 at 33–34.
[87] United Nations Convention on Contracts for the International Sale of Goods 2010.
[88] *BRI Production "Bonaventure" v Société Pan African Export* (French Court of Appeal, 1995).
[89] Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4th Ed, 2016) at p.151.
[90] Moot Problem at [37].
[91] Moot Problem at [36].
[92] Brian Hurn, "Body Language – A Minefield for International Business People" (2014) 46(4) Journal of Industrial and Commercial Training 188 at 190; Poppy Levin, "Finger Wiggles and Head Bobbles: A Guide to Yes and No Gestures Around the World" *Skipping Stones* (July-September 2015) Vol. 27 Issue 3 at p.26.

patent ambiguity.[93] A party which fails to inquire in such circumstances would be imputed with knowledge of the other party's intention. Here, even if Paredes was unsure, he should have inquired further instead of simply assuming that the gesture indicated refusal.[94]

46. Secondly, the context of the negotiation shows why there is even more reason to find that the Indian head nod conveyed acceptance. There was no objection to any of the terms proposed nor any mention by Deewarvala that the 35% bonus was too high.[95] All Deewarvala did was to repeat the Offer and confirm the terms.[96] Furthermore, the Offer made by Paredes was favourable to CL in that he proposed to extend the Contract for eight more deliveries instead of the usual four.[97]

47. Thirdly, it is also significant that Paredes is an experienced businessman who was appointed by Vader to head RES's entire business in ASEAN,[98] likely requiring him to communicate with businessmen of other nationalities. Additionally, Paredes had a "solid" relationship with Deewarvala.[99] Paredes was likely to have some awareness of Deewarvala's cultural nuances and should not have taken the Indian head nod to mean a rejection immediately.

48. In any event, as earlier mentioned,[100] a party is compelled to inquire in the face of ambiguity. If Paredes was unclear about the gesture, he should have but failed to inquire

[93] *Case No. 11 O 4187/95* (District Court of Germany, 1996)
[94] Moot Problem at [36].
[95] Moot Problem at [34].
[96] Moot Problem at [34].
[97] Moot Problem at [34].
[98] Moot Problem at [12].
[99] Moot Problem at [25], [28].
[100] See [45] of this Memorial.

into its meaning. Taking these facts in totality, the intention behind Indian head nod was easy to discern as acceptance.

49. Thus, Parades could not have been unaware of Deewarvala's intention to accept the Offer.

B. Alternatively, a reasonable person of the same kind as Paredes would understand the Indian head nod to mean acceptance

50. Under Article 4.2(2) of the UNIDROIT Principles, if a common intention cannot be established, then the conduct of a party shall be interpreted according to the understanding of a reasonable person. The hypothetical reasonable person must be of the same kind as the other party and in the same circumstances.[101] Relevant circumstances that should be considered include the other party's business experience, linguistic knowledge, technical skills, and other subjective traits.[102]

51. The standard of a reasonable man was applied by the Spanish Court of Appeal in *Case No. 862/2003-B* in the context of a rule *in pari materia* to Article 4.2(2).[103] The case concerned a failure to provide metal inspection covers of a certain specification. The buyer alleged that the models of covers presented in the seller's catalogue misled the buyer into understanding they were the same as those provided for in the contract. However, taking into account the fact that the buyer was a "qualified public works

[101] Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 4th Ed, 2016) at p.153.
[102] Alexander Komarov, "Contract Interpretation and Gap Filling from the Prospect of the UNIDROIT Principles" (2017) Unif. L. Rev 29 at 33–34.
[103] *Case No. 862/2003-B* (Spanish Court of Appeal, 2004).

contractor", the court held that a reasonable person in the shoes of the buyer would have understood that the specifications in the catalogue and the contract were different.[104]

52. As earlier argued,[105] the Indian sideways head nod is widely known as a gesture of affirmation. The reasonable person in Parades' position would have understood this gesture to be an acceptance in light of his professional appointment in RES and his background, his relationship with Deewarvala, and the context of the negotiation.

53. First, Parades was appointed Managing Director of RES and was required to head RES's entire business in ASEAN.[106] He was also empowered to "execute any and all agreements on behalf of RES".[107] Parades had also worked in Asia for at least three years and travelled to multiple Asian countries for business.[108] It is likely that a businessman with this level of experience would have some awareness of the business customs and practices of other businessmen in the region he dealt with.

54. Secondly, Paredes' strong and longstanding relationship with Deewarvala[109] further supports the conclusion that a reasonable person would have understood the head nod to mean an acceptance. As acknowledged by the Austrian Supreme Court in *Case No. 7 Ob 275/03x*, the criteria for cases in which an addressee would be expected to have knowledge and understanding of terms written in a foreign language, for instance, are "length, intensity and economic importance of the business relations between the parties".[110] Given the three-year period that Paredes and Deewarvala had communicated and the importance of the exclusive distributorship relationship,[111] a

[104] *Case No. 862/2003-B* (Spanish Court of Appeal, 2004).
[105] See [45] of this Memorial.
[106] Moot Problem at [12].
[107] Moot Problem at [12].
[108] Clarifications to the Moot Problem Q6.
[109] Moot Problem at [25], [28].
[110] *Case No. 7 Ob 275/03x* (Supreme Court of Austria, 2003).
[111] Moot Problem at [13], [20], [28].

reasonable person of the same kind as Paredes would be expected to have at least some knowledge and understanding of the idiosyncrasies and differences in the way Deewarvala communicates.

55. Thirdly, as argued above,[112] the context of the negotiation clearly showed that there was no objection to any of the terms by Deewarvala. Rather, the Offer was one that was favourable to Deewarvala in that he proposed to extend the Contract for eight more deliveries instead of the usual four.[113] A reasonable person could not have taken the Indian head nod to be a rejection in light of all these factors.

56. Thus, a reasonable person of the same kind as Paredes would understand the Indian head nod to mean acceptance.

[112] See [46] of this Memorial.
[113] Moot Problem at [34].

IV. CL SHOULD BE GRANTED THE RELIEF SOUGHT

57. Since the KLRCA Rules do not prescribe the specific remedies that the Tribunal may award, the substantive law governing the contract will guide the provision of remedies.[114] Here, the aforementioned substantive law chosen by the parties,[115] the UNIDROIT Principles, thus governs the remedies.

58. The Tribunal should make a declaration that the Contract is existent and enforceable (**A**). Additionally, the Tribunal should order specific performance of the deliveries due by RES (**B**). Lastly, the Tribunal should set the terms of the Contract in writing (**C**).

A. A declaration that the Contract is existent and enforceable should be granted

59. Unless parties have expressly agreed that declaratory relief should not be granted by the tribunal, or a mandatory provision of the *lex arbitri* forbids the tribunal from granting it, the tribunal will have power to grant such relief.[116]

60. Here, the Parties' arbitration agreement is silent on the types of relief that a tribunal may grant.[117] The CALC also does not limit tribunals' powers to grant declaratory relief.[118] As such, the Tribunal has jurisdiction to make the declaratory order sought by CL.

61. For a tribunal to grant declaratory relief to the parties, the party seeking the relief must demonstrate that it has an actual interest in obtaining such a relief.[119] The necessity of

[114] Richard Garnett, Henry Gabriel, Jeff Waincymer, and Judd Epstein, *A Practical Guide to International Commercial Arbitration* (Oceana Publications Inc, 2000) at p.94.
[115] Moot Problem at [15].
[116] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p.3076.
[117] Moot Problem at [15].
[118] Commercial Arbitration Law of the Kingdom of Cambodia 2006.
[119] Stefan Leimgruber, "Declaratory Relief in International Commercial Arbitration" (2014) 32 ASA Bulletin 467 at 483.

actual interest is predicated on the fact that the purpose of declaratory relief is to clarify the parties' legal positions and settle live disputes between them.[120] The tribunal will analyse factors such as the presence of an existing controversy and the purpose of seeking the declaration to determine if a party has an actual interest in seeking the declaration.[121] The tribunal will thus only refuse to grant declaratory relief if it can be shown that there is no actual dispute between the parties, or that the declaration sought by the party was merely hypothetical.[122]

62. Here, there is an obvious presence of an existing controversy between CL and RES over whether the Contract was successfully concluded between them.[123] CL's purpose in obtaining the declaration is to clarify its rights and obligations under the Contract. Additionally, the declaration will have serious and tangible financial impacts on both CL and RES.[124]

63. Thus, the Tribunal should grant a declaration that the Contract is existent and enforceable.

B. An order for specific performance of the deliveries due by RES should be granted

64. Under Article 7.2.2 of the UNIDROIT Principles, a party is entitled to specific performance of a non-monetary obligation as of right unless any of the specific exceptions in the Article applies.

[120] *Ibid*; Edwin M. Borchard, "The Declaratory Judgment – A Needed Procedural Reform" (1918) 28 Yale L. J. 105 at 110.
[121] Stefan Leimgruber, "Declaratory Relief in International Commercial Arbitration" (2014) 32 ASA Bulletin 467 at 483–488.
[122] *Id*, at p.483.
[123] Moot Problem at [44].
[124] Moot Problem at [55], [58].

65. If the Contract is found to be existent and enforceable, CL is entitled to specific performance from RES. The burden of proof lies on the party seeking to rely on any exception.[125] Here, RES cannot discharge its burden to show that any exception is applicable.

66. First, performance is not impossible in law or in fact. Instances of legal impossibility include contracts that requires acts that are prohibited by law such as those contrary to public policy or trade restrictions.[126] Instances of factual impossibility include contracts requiring the sale of goods which have perished or never existed.[127]

67. In the preliminary, it cannot seriously be contended that the sale of bricks is prohibited by law. Furthermore, although RES is struggling financially,[128] performance is also not factually impossible. During the negotiations in November 2016, it was RES's representative that proposed a two-year extension of the Contract for a total of eight more deliveries.[129] This is clearly indicative of RES's ability to continue producing bricks despite its current financial status. Performance is not rendered factually impossible because of financial difficulty.[130] Thus, even if RES would have required more funds to expand brick production, it cannot rely on the exception of factual impossibility.

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[125] KLRCA Rules 2017, Article 27(1); Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015) at p.891.
[126] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015) at p.892.
[127] *Ibid*.
[128] Moot Problem at [60].
[129] Moot Problem at [34].
[130] Oliver Armas and Thomas Hall, "Contracts Are Binding in Good Times, and Bad: Contractual Impossibility, Material Adverse Change Clauses and Adequate Assurances during Economic Crisis" (2009–2010) 42(3) Uniform Com. Code L.J. 283 at 287.

68. Secondly, performance of the Contract is not unreasonably burdensome or expensive. For this exception to apply, it has to be shown that performance, although possible, has become so onerous that it will run counter to the general principle of good faith and fair dealing to require it.[131] Performance will be deemed to have become so onerous if the cost of performing the contract now far outweighs the benefit to be gained.[132] The court must "balance the harm to the plaintiff from denying the relief against any notable harm to the defendant from granting the relief" [133] and ensure that ordering specific performance would not be "disproportionate to the advantages gained".[134] In *3615 Corporation v New York Life Insurance Co*, the US Court of Appeal held that it would been inequitable and oppressive to require a party to expend more than $1,000,000 to perform a $35,000 contract.[135]

69. Here, RES has not shown that performance has become so onerous. Although RES has provided evidence of financial difficulty and lack of profits,[136] this is not equivalent to showing a difficulty in producing bricks. Even after Vader had distanced itself from RES in 2016, RES was still able to make 2 deliveries.[137] RES has not shown any drastic change in circumstances such that performing the deliveries is now unreasonably burdensome or expensive.

70. Thirdly, performance may not be reasonably obtained from another source. The rationale for this exception is premised on practical and economic considerations of

[131] Official Commentary to Article 7.2.2 of the UNIDROIT Principles 2016.
[132] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015) at p.893.
[133] *Edge Group WAICCS LLC v Sapir Group LLC 705* F.Supp.2d 304 (2010) at p.320.
[134] *Atlantech Inc. v American Panel Corp.* 540 F.Supp.2d 274 (2008) at p.286.
[135] *3615 Corporation v New York Life Insurance Co.* 717 F.2d 1236 (1983) at p.1238.
[136] Moot Problem at [26], [59].
[137] Moot Problem at [27], [29], [42].

saving time and effort.[138] The standard is not of possibility but reasonableness; where a replacement transaction is possible but unreasonable, specific performance will still be awarded.[139]

71. An analysis of case law and commentary shows that where goods are unique or possess a special character,[140] or in contracts involving heavy reliance on suppliers, such as requirement contracts where an unstated amount of goods are supplied to one party based on their needs by an exclusive supplier, [141] it is unreasonable for the party to seek performance elsewhere.[142]

72. Here, given that the Contract between CL and RES provides for deliveries of "state-of the-art, special sized, tailor-made and colour-coated" construction bricks,[143] it is likely that such bricks are unique and not easily obtainable. Further, under this exclusive distribution agreement, CL has placed heavy reliance on RES for its supply of bricks for its B&R projects.[144] Thus, it will be unreasonable to place the burden on CL, the aggrieved party, to seek a replacement of a kind of bricks that is unlikely to be found elsewhere with the same quality and price.

73. Fourthly, performance is not of an exclusively personal character. Performance is of an exclusively personal character if it is not delegable and requires individual skills of an

[138] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015) at p.896.
[139] Ingeborg Schwenzer, "Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts" (1999) 1 Eur. J.L. Reform 289 at 298.
[140] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015) at p.897.
[141] *Laclede Gas Co. v Amoco Oil Co.* 522 F. 2d 33 (8th Cir. 1975).
[142] Ingeborg Schwenzer, "Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts" (1999) 1 Eur. J.L. Reform 289 at 298.
[143] Moot Problem at [15].
[144] Moot Problem at [3], [14].

artistic of scientific nature or if it involves a confidential and personal relationship.[145] Enforcing performance of such work would "interfere with personal freedom of the obligor" and might also "impair its quality".[146] Given that the bricks are mass produced,[147] the production and delivery of bricks is clearly not of an exclusively personal nature.

74. Fifthly, performance was demanded within a reasonable time after it fell due. This exception seeks to prevent a situation where the non-performing party is unreasonably left in a state of uncertainty as to whether performance may be required, and prevent unfair speculation by the aggrieved party as to potential favourable market developments.[148] The period of reasonable time varies and depends on each case.[149]

75. Here, the obligation to supply bricks fell due in March 2017.[150] Shortly after CL became aware of the misunderstanding in mid-March 2017, it served RES with a Notice of Arbitration in August 2017.[151] Taking into consideration the time required to settle administrative and procedural matters when initiating an arbitration proceeding, a period of less than five months is likely within reasonable time.

76. Thus, an order for specific performance of the deliveries due by RES should be granted.

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[145] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015) at p 899; E. Allan Fransworth, *Contracts* (Wolters Kluwer, 4th Ed, 2004) at p.744.
[146] Official Commentary to Article 7.2.2(d) UNIDROIT Principles 2016.
[147] Moot Problem at [8], [15c].
[148] Official Commentary to Article 7.2.2(e) UNIDROIT Principles 2016.
[149] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015) at p.899; E. Allan Fransworth, *Contracts* (Wolters Kluwer, 4th Ed, 2004) at p.901.
[150] Moot Problem at [43].
[151] Moot Problem at [44].

C. An order to set the terms of the Contract in writing should be granted

77. The Tribunal has the power to set the terms of the Contract in writing. As earlier argued,[152] where the institutional rules are silent as to the remedies applicable, those available in the substantive law will primarily apply. However, where the substantive law is also silent on the particular remedy sought, the tribunal is presumed to have broad remedial authority.[153] As held in *ZAB Inc. v Berenergy Corporation*, a court may determine whether the contract exists and, if so, the terms contained therein if the relief would "terminate the controversy or remove the uncertainty".[154] The court further observed that declaratory relief is not limited to "cases where the existence of an oral contract and the terms contained therein are admitted by all the parties".[155] Since an arbitral tribunal's broad discretion allows it to grant "relief that a Court could not",[156] this reasoning should *a fortiori* be applicable to this Tribunal.

78. If the Tribunal finds that the Contract is existent and enforceable, it should set the terms of the Contract in writing in order to give practical effect to the declaration sought above. Such an order is necessary to remove the existing uncertainty between the parties and clarify their obligations towards each other. This is especially since CL and RES do not agree on a crucial term of the Contract.[157] CL has interpreted the Contract to mean that there should be two editions of the Second Incentive whereas RES has interpreted that there should be three editions of the Second Incentive instead.[158] Setting the terms of

[152] See [57] of this Memorial.
[153] *Reliastar Life Ins. Co. v EMC National Life Co.*, 564 F.3d 81 (2d Cir. 2009) at p.86.
[154] *ZAB Inc. v Berenergy Corporation*, (Supreme Court of Colorado, 2006) at Part III.
[155] *Ibid*.
[156] *Konkar Maritime Enters., SA. v Compagnie Belge d'Affretement*, 668 F.Supp. 267, 271 (SDNY, 1987).
[157] Moot Problem at [41], [58].
[158] Moot Problem at [41], [58].

the Contract in writing would prevent a state of uncertainty over how the parties should fulfil their obligations.

79. Thus, an order to set the terms of the Contract in writing should be granted.

PRAYER FOR RELIEF

For the foregoing reasons, CL respectfully requests that the Tribunal finds that:

1. The arbitration agreement is capable of being performed;

2. Vader should be joined as a party to the arbitration;

3. CL validly accepted RES's offer; and

4. CL should be granted the relief sought, including:

    a. A declaration that the Contract is existent and enforceable;

    b. An order for specific performance of the deliveries due; and

    c. An order to set the terms of the Contract in writing.