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 RESPONDENT

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STATEMENT OF JURISDICTION

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 is a practical obstacle that renders an arbitration agreement incapable of being performed; and

    b. Whether the breach of RES's right to equality renders the arbitration agreement incapable of being performed.

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 ("**Parades**") 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 also have understood the Indian head nod to mean acceptance.

4. Whether CL should be granted the relief sought:

    a. Whether an order for specific performance of the deliveries should be ordered; and

    b. 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**") and is mainly involved in construction. In 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 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. Although they discussed the terms of their future venture, they decided that a formal contract should be executed only when their legal counsel and representatives had reviewed it.

4. Subsequently, Deewarvala, a Malaysian-Indian construction specialist living in Singapore, was employed as CL's representative. He 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. Paredes was raised and educated in Mexico. He only moved to Cambodia in 2013 after RES hired him.

5. In September 2013, Deewarvala and Paredes ("**Representatives**") drafted, revised and signed an exclusive distribution agreement ("**Contract**"). The Contract provided for four deliveries of bricks by RES during 2014 and payment by CL five days before each delivery date. Vader was not a signatory to the Contract.

6. The first three deliveries and corresponding payments in 2014 were performed successfully. In October 2014, Vader's business in the EU started to decline because of the possibility of Brexit. Vader's Board of Directors then resolved for RES's operations to continue remaining independent.

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

8. In early 2016, the price of bricks rose in Asia, such that it would be profitable for RES to contract with a new counterpart. However, RES decided against it, in light of the good business relationship it had with CL.

9. After the occurrence of Brexit in July 2016, Vader's Board of Directors further resolved to cease financing, compliance monitoring and directives given to RES. Parades had full control over RES's activities.

10. The first three deliveries of 2016 were successfully completed. CL and RES ("**Parties**") then contemplated extending the agreement to 2017. However, they were unable to come to terms despite negotiating for more than four months. On 23 November 2016, the Representatives had a final Skype call. Again, they were unable to come to an agreement despite negotiating for more than four hours.

11. Paredes made a final offer to Deewarvala ("**Offer**"), proposing the continuation of the agreement for two more years, with a 15% increase in price after every year and a 35%

bonus at the end of each year ("**Second Incentive**"). Parades intended for there to be three instalments of the Second Incentive.

12. Deewarvala repeated the Offer to clarify the terms. Paredes confirmed his understanding of the terms and asked for a "Yes" or "No". In response, Deewarvala did an Indian side-ways head nod, which Parades interpreted to mean a rejection.

13. The last delivery of 2016 was performed successfully. No communications were exchanged between the Parties until March 2017 when CL contacted RES to confirm the date of the next delivery. The Parties then realised the misunderstanding.

14. CL then commenced arbitration in Cambodia. RES is unable to raise its counter-claims due to the cost of arbitration. Consequently, RES attempted to obtain third-party funding. However, this failed owing to its precarious financial position given that it had operated as a new offshore company with no profits since its incorporation.

15. Despite this, CL maintains that the arbitration agreement is capable of being performed and has requested for the tribunal to join Vader to the Arbitration to support the costs of arbitration.

SUMMARY OF PLEADINGS

A. The arbitration agreement is incapable of being performed

RES's financial impecuniosity renders the arbitration agreement incapable of being performed since it is a practical obstacle which effectively prevents the arbitration agreement from being effectively set in motion. Alternatively, the breach of RES's right to equality renders the arbitration agreement incapable of being performed, since it will be manifestly unfair for RES if the tribunal were to hear the claims of CL without hearing the counterclaims of RES.

B. Vader should not be joined to the arbitration proceedings

Vader should not be joined to the arbitration proceedings under Rule 9(1) of the KLRCA Rules because Vader is not *prima facie* bound by the arbitration agreement. First, the group of companies doctrine does not apply since it offends the fundamental principle of company law of having a separate legal entity. Secondly, Vader did not impliedly consent to be a party to the arbitration agreement because it was not involved in the performance of the contract. RES was not an agent of Vader because it did not give an impression to CL that it had authorized RES to contract on its behalf. Even if one of the joinder theories apply, the relevant circumstances to be considered under Rule 9(5) of the KLRCA Rules preclude the Tribunal from joining Vader to the arbitration agreement because there would be prejudice to one of the parties.

C. There was no valid acceptance of RES's offer by CL

Deewarvala's Indian head nod was not an indication of assent that amounts to acceptance within the meaning of Article 2.1.6(1) of the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**"). Paredes did not know

and could not have been aware of Deewarvala's subjective intention to accept the Offer when the latter did the Indian head nod. Alternatively, a reasonable person of the same kind as Paredes would also not have understood the Indian head nod to mean acceptance.

D. The Tribunal should not grant the relief sought by CL

The Tribunal should not order RES to perform the deliveries because two of the exceptions under Article 7.22 of the UNIDROIT Principles apply. It would be unreasonably burdensome for RES to perform this contract since it is likely that RES has already engaged with another party to sell bricks and will no longer have the capacity to continue performing the contract with CL. Furthermore, specific performance should not be granted since CL can also reasonably obtain an alternative source of bricks within Cambodia. Additionally, the Tribunal should not set the terms of the Contract in writing, as it would be a breach of natural justice for the tribunal to decide on a matter that was not pleaded by the parties.

PLEADINGS

I. THE ARBITRATION AGREEMENT IS INCAPABLE OF BEING PERFORMED

1. The Tribunal has jurisdiction over the arbitration agreement only if it is capable of performance.[1] The Tribunal has the power to rule on any objections with respect to the capability of performance of the arbitration agreement under Article 23 of the Kuala Lumpur Regional Centre for Arbitration Rules 2017 ("**KLRCA Rules**")[2] and Article 24 of the Commercial Arbitration Law of the Kingdom of Cambodia ("**CALC**").[3]

2. RES's financial impecuniosity is a practical obstacle that renders the arbitration agreement incapable of being performed (**A**). Alternatively, the breach of RES's right to equality renders the arbitration agreement incapable of being performed (**B**).

A. RES's financial impecuniosity is a practical obstacle that renders the arbitration agreement incapable of being performed

3. The financial impecuniosity of one party renders an arbitration agreement incapable of being performed unless the impecuniosity arises from the fault of that party.[4] In the arbitration process, financial impecuniosity refers to a situation characterised by the impossibility of obtaining or lack of funds to pay the costs of arbitration.[5] Financial

[1] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed., 2015) at [5.99]; The Commercial Arbitration Law of the Kingdom of Cambodia 2006, Article 8.
[2] Kuala Lumpur Regional Centre for Arbitration ("KLRCA") Rules 2017, Article 23.
[3] The Commercial Arbitration Law of the Kingdom of Cambodia 2006.
[4] *Case Law on UNCITRAL Text No. 404* (Federal Court of Justice of Germany, 2000) at p.8; Patricia Zivkovic, "Impecunious Parties in Arbitration: An Overview of European National Courts' Practice", Croatian Arbitration Yearbook Volume 23 (2016) at p.41; *Portugal No. 1, A (Netherlands) v B & Cia. Ltd., C and others* (Supreme Court of Justice Portugal, 2003).
[5] Juan Pablo Moyano, "Impecuniosity and the Courts' Approach to the Validity of the Arbitration Agreement" (2017) 34 J. Intl. Arb. 631 at 633.

impecuniosity has been recognised as a practical obstacle which prevents the arbitration from being effectively set in motion.[6] The only exception where the arbitration agreement is still capable of being performed notwithstanding financial impecuniosity is when such impecuniosity results from one's own fault.[7] A party is not at fault if it found itself in financial difficulties after the arbitration agreement was concluded, making access to justice impossible.[8]

3. Although there is contrary authority in France and England that takes the view that financial impecuniosity is immaterial to the capability of performance of an arbitration agreement,[9] this Tribunal should not follow that approach because it does not adequately preserve the right of equal access to justice. Cambodia places a heavy emphasis on the right of equal access to justice in arbitral proceedings since Article 26 of the CALC explicitly guarantees that "each party shall be given a full opportunity to present his case, including representation by any party of his choice".[10]

4. Here, RES is clearly financially impecunious. RES had been operating with no profits since its incorporation.[11] RES's attempts to seek third-party funding were unsuccessful specifically because of its "precarious financial situation (i.e., excessive debts, no reported profits since incorporation, and financial statements [which] indicate that expenses outweigh income)".[12] Reliance on third-party funding has been held to be

[6] *Case Law on UNCITRAL Text No. 404* (Federal Court of Justice of Germany, 2000) at p.8; Stefan 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) (Cameron May, 2008) at p.326; *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte. Ltd.* [2017] 3 SLR 267 at [155].
[7] *Portugal No. 1, A (Netherlands) v B & Cia. Ltd., C and others* (Supreme Court of Justice Portugal, 2003).
[8] *Janos Paczy v Haendler & Natermann GmbH* 1 Lloyd's Law Reports 302 (Court of Appeal, 1980); *Pirelli & Co. v Licensing Projects and other* (French Court of Cassation, 2013).
[9] *Ibid*.
[10] The Commercial Arbitration Law of the Kingdom of Cambodia 2006.
[11] Moot Problem at [26].
[12] Moot Problem at [61].

evidence of an inability to meet a cost order and hence a factor in support of a finding of financial impecuniosity in the context of security for costs.[13] Further, Vader had passed a resolution in 2016 that "no further financing" would be granted to RES.[14] In that situation, RES did not pay the USD$25,000 for the security deposit and has maintained it cannot afford the costs of the arbitration, which will be increased if the counterclaims are raised.[15] Hence, the financial impecuniosity of RES is a practical obstacle which prevents the arbitration from being effectively set in motion.

5. Additionally, RES's financial impecuniosity arose subsequent to the conclusion of the arbitration agreement.[16] At the time the arbitration agreement concluded, Vader had full control over RES and was providing financing to it.[17] RES was not at fault because its inability to pay the initial deposit or the costs to raise the counterclaims likely arose from the implications of Brexit.[18] Brexit annihilated Vader's business in the EU, and while Vader had predicted the possibility of an off chance of Brexit,[19] neither RES nor Vader could have predicted it would affect Vader's business to such an extent. This resulted in Vader having to focus its full attention on withdrawing its business and representation from Europe and alienating RES by not providing any further support.[20] This is crucial because it would likely have been possible for RES, being a subsidiary to rely on financing from the parent company for dispute resolution if not for Brexit.

[13] *AV Asia Sdn. Bhd. v Measat Broadcast Network Systems Sdn. Bhd. & Anor.* [2010] 1 LNS 1601.
[14] Moot Problem at [27].
[15] Moot Problem at [48] and [57].
[16] Moot Problem at [61].
[17] Moot Problem at [27].
[18] Moot Problem at [27], [48] and [59].
[19] Moot Problem at [6] and [27].
[20] Clarifications to the Moot Problem at [9].

6. Thus, RES's financial impecuniosity is a practical obstacle that renders an arbitration agreement incapable of being performed.

B. Alternatively, the breach of RES's right to equality renders the arbitration agreement incapable of being performed

7. Since fairness is a necessary ingredient of the arbitral process,[21] an arbitration agreement is incapable of being performed if it cannot be performed fairly. Under Article 17 of the KLRCA Rules and Article 26 of the CALC, a tribunal must conduct an arbitration in such a manner that treats the parties with equality and ensure that each party is given a reasonable opportunity to present its case.

8. The right to equality is violated where a respondent's financial impecuniosity results in a tribunal's refusal to hear counterclaims which are inseparable from the main claim.[22] The rationale behind this approach is to prevent the denial of justice arising from a party's inability to raise meritorious counterclaims which should be heard together with the main claim.[23]

9. The claim and the counterclaim are inseparable as long as they arise out of the same transaction and are so "connected" that it would be "manifestly unjust" for one to be "enforced without taking account of the other".[24] Thus, in *Dole Dried Fruit Nut v. Trustin Kerwood Limited*, the court held that the plaintiff's claim for the price of goods sold and delivered under a series of sales contracts was inseparably connected with the defendant's counterclaim for breach of the agency agreement because the sales

[21] *Gatoil International Inc. (Panama) v National Iranian Oil Company (Iran*) (1992) XVII Yearbook Commercial Arbitration 587.
[22] *Pirelli & Co. v Licensing Projects and other* (French Court of Cassation, 2013).
[23] Patricia Zivkovic, "Impecunious Parties in Arbitration: An Overview of European National Courts' Practice" *Croatian Arbitration Yearbook* (December 2016) at p.49.
[24] *Dole Dried Fruit and Nut Company v Trustin Kerwood Limited* [1990] 2 Lloyd's Rep 309 at p.2.

contracts were concluded in fulfilment of the agency agreement.[25] The court found that it was manifestly unjust to allow the plaintiff to enforce payment of the sales contracts without taking into account the defendant's counterclaim for damages for breach of the agency agreement.[26]

10. Here, the counterclaim and the main claim not only arise from the same transaction, but are also so inseparably connected that the main claim ought not to be enforced without taking into account the counterclaim. CL's main claim is for the performance of the delivery obligations under the alleged Contract.[27] RES counterclaims, in the event that the Contract is existent and enforceable, for three payments of the Second Incentive under the same Contract for December 2016, 2017, and 2018 and the amounts corresponding to the four deliveries scheduled for 2017 and 2018 with interest.[28] The counterclaims for the breach of CL's monetary obligations under the Contract arise clearly from the same transaction as the main claim for the breach of RES' delivery obligations under the Contract.

11. If CL's main claim for specific performance is allowed, it would be manifestly unjust not to hear RES's counterclaims since CL will be able to receive the two deliveries of bricks without having to pay the Second Incentive or delivery prices which were agreed upon by the Parties. This contradicts the terms of the alleged Contract which stipulates that CL should make payment 5 days before each delivery.[29] It would also be manifestly unjust to deny RES the opportunity to raise its meritorious counterclaims.

[25] *Dole Dried Fruit and Nut Company v Trustin Kerwood Limited* [1990] 2 Lloyd's Rep 309 at p.3.
[26] *Ibid*.
[27] Moot Problem at [45].
[28] Moot Problem at [58].
[29] Moot Problem at [15(c)].

12. If the Tribunal declares that the arbitration agreement is incapable of being performed, RES is willing to resolve the dispute in the local courts.[30] Although it is not desirable for CL to have to bring the claims in the local courts, proceedings in the local courts would not violate RES's right to equality. RES will be able to bring its counterclaims in local proceedings because the cost of arbitration is far greater than the cost of local proceedings. According to Schedule 1 of the KLRCA Rules, the cost of the arbitration amounts to the sum of USD$1,258,477.40. However, judicial aid may be granted to "a person who lacks financial resources to pay the costs necessary for preparing for and proceeding with an action" in Cambodian litigation proceedings under Article 69 of the Code of Civil Procedure of Cambodia.[31] In contrast, there is no legal aid available in private arbitration proceedings.[32]

13. Thus, the breach of RES's right to equality renders the arbitration agreement incapable of being performed.

[30] Moot Problem at [60].
[31] The Code of Civil Procedure of Cambodia 2006.
[32] Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure*, (Wolters Kluwer, 2016) at pp.57–58.

II. VADER SHOULD NOT BE JOINED AS A PARTY TO THE ARBITRATION

14. Under Rule 9(1) of the KLRCA Rules, the Tribunal can only join Vader to the arbitration if it is *prima facie* bound by the arbitration agreement. Rule 9(5) of the KLRCA Rules further states that the Tribunal has the discretion to refuse the joinder application if it would not be appropriate in the circumstances.

15. Failing a choice of law by the parties, the tribunal should apply the law of the seat as the law governing such an agreement.[33] The seat of the arbitration here is Cambodia.[34] Under Cambodian law, Vader is not *prima facie* bound by the arbitration agreement. (**A**). Alternatively, Vader would be prejudiced by being joined to the arbitration (**B**).

A. Under Cambodian law, Vader is not prima facie bound to the arbitration agreement

16. A party is *prima facie* bound to an arbitration agreement only if there is a reasonable possibility that a common arbitration agreement might exist between all the parties.[35] Such a reasonable possibility will not exist unless, on the face of evidence before an arbitration tribunal, the non-signatory appears to be a party to the arbitration agreement.[36]

17. Here, Vader is not *prima facie* bound to the arbitration agreement since: first, Vader cannot be joined to the arbitration under the group of companies doctrine; secondly,

[33] Gary Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at [38]; *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [115].
[34] Moot Problem at [15(f)].
[35] Gordon Smith, "Comparative Analysis of Joinder and Consolidation Provisions under Leading Arbitral Rules" (2018) 35 J. Intl. Arb. 173 at p.190; KLRCA Rules 2017, Rule 9(1).
[36] 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.

Vader did not impliedly consent to being part of the arbitration; and, thirdly, Vader did not authorise RES to be its agent.

(1) Vader cannot be joined to the arbitration under the group of companies doctrine

18. The group of companies doctrine is a highly controversial basis for joinder, rejected by most jurisdictions.[37] The doctrine originated in the French arbitral decision of *Interim Award of ICC Case 4131*,[38] and purports to permit the joinder of a non-signatory company within a group of companies simply on the basis that the group operated as if it were a "single economic entity".[39]

19. The controversy surrounding the doctrine owes to the wide criticism that it unjustifiably violates the concept of companies being separate legal entities, a fundamental tenet of company law.[40] It was further recognised that it is usual commercial practice for businesses to set up subsidiaries as separate legal entities to limit their liability to that company only.[41]

20. Consequently, while the doctrine was initially applied by a number of arbitral tribunals,[42] major arbitral jurisdictions such as Switzerland, England and the U.S.A.

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[37] *Award in ICC Case No. 5281*, 7 ASA Bull. 313 (1989); *Adams v. Cape Indus.* [1990] Ch. 433; *Award in ICC Case No. 2138*, in S. Jarvin & Y. Derains (eds.), Collection of ICC Arbitral Awards 1974-1985 at p.242; *Interim Award in ICC Case No. 6610*, XIX Y.B. Comm. Arb. 162 (1994); *Peterson Farms Inc. v C&M Farming Ltd* 1 Lloyd's Law Reports 603; *Final Award in ICC Case No. 9839,* XXIX Y.B. Comm. Arb. 66 (2004).
[38] *Interim Award in ICC Case No. 4131,* (1984) 9 Y.B. Comm. Arb. 131 at 134.
[39] E. Gaillard and J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), at [500ff]; Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed., 2015) at [2.43].
[40] *Peterson Farms Inc. v C&M Farming Ltd* 1 Lloyd's Law Reports 603; *Caparo Group Ltd v Fagor Arrasate Sociedad Coop.* (2000) Arb. & Disp. Res. L.J. 254; John Gaffney, "The Group of Companies Doctrine and the Law Applicable to the Arbitration" (2004) 19(6) Mealey's Int'l Arb. Rep. 47; Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed., 2014) at p.1453.
[41] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed., 2015) at p 86.
[42] *Award in ICC Case No. 5103*, (1988) 115 J.D.I. (Clunet) 1206; *Interim Award in ICC Case No. 6610*, XIX Y.B. Comm. Arb. 162 (1994); *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.

have subsequently rejected the application of the group of companies doctrine to join non-signatories to the arbitration.[43] Even subsequent French arbitral decisions have rejected the continued application of the group of companies doctrine; in the subsequent decision of *Interim Award of ICC Case 11405/2001*, the tribunal stated that "there is no general rule in French international arbitration law that would provide that non-signatory parties of the same group of companies would be bound by an arbitration clause".[44]

21. Permitting the group of companies doctrine to take root in Cambodia will run counter to Cambodian principle and policy, given that Cambodia has enshrined the concept of a separate legal entity in its Civil Code.[45] The Tribunal should thus not extend Cambodian law in an unprincipled manner by applying the group of companies doctrine here.

22. Even if this Tribunal were to ignore the salient criticisms of the doctrine and elect to apply it, the group of companies doctrine does not permit joinder here. As laid out in *Interim Award of ICC Case 4131*, the doctrine requires a multi-factorial inquiry to determine if the group was truly acting as a "single economic entity".[46] The factors relied on the tribunal included: whether one party exercised ownership and control over its subsidiaries; whether that party was effectively and extensively involved in not only the negotiation, but also, crucially, the performance of the substantive contract; and

[43] *Interim Award in ICC Case No. 4504*, 113 J.D.I. (Clunet) 1118 (1986); *Ad Hoc Award in Geneva of 1991*,10 ASA Bull. 202 (1992); Judgment of 29 January 1996, 14 ASA Bull. 496 (Swiss Federal Tribunal); *Peterson Farms Inc. v C&M Farming Ltd* [2004] Lloyd's Law Reports 302; *Award in ICC Case No. 8385*, J. Arnaldez, Y. Derains & D. Hascher, Collection of ICC Arbitral Awards 1996-2000 (2003); *Award in Geneva Chamber of Commerce of 24 March 2000*, 21 ASA Bull. 781.
[44] *ICC Interim Award Case No. 11405/2001,* unreported.
[45] The Civil Code of Cambodia 2003.
[46] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at pp.1428, 1452.

whether all the parties disregarded who was actually named as signatories to the main contract.[47]

23. First, it is not disputed that Vader has full ownership of RES.[48] Secondly, Vader was only minimally involved in the negotiations leading up to the execution of the formal contract between RES and CL. In all subsequent contracts that were executed between CL and RES, Vader had no role in negotiating these contracts.[49] Furthermore, the facts do not demonstrate that Vader had ever been involved in the performance of the contract. It was only RES who performed its substantive obligations to CL.[50] Thirdly, the Parties placed importance on who were named as signatories to the Contract. Considering that the Contract was "drafted, revised and signed" after four months and the Contract did not envision any role for Vader at all,[51] it is clear that the Parties intended that it was only RES and not Vader who was a party to the Contract.

24. Thus, Vader cannot be joined to the arbitration under the group of companies doctrine.

(2) Vader did not impliedly consent to being party to the arbitration agreement

25. A non-signatory can only be shown to have impliedly consented to an arbitration agreement where it played an "active and critical" role in negotiations and the performance and substantive contract.[52] Unlike in the group of companies doctrine, the substantial involvement of the non-signatory in both negotiations and performance of the contract is not merely a factor but a prerequisite to finding implied consent.[53] It is

[47] *Interim Award in ICC Case No. 4131,* (1984) 9 Y.B. Comm. Arb. 131 at 134.
[48] Moot Problem at [8].
[49] Moot Problem at [20], [22], [24].
[50] Moot Problem at [15].
[51] Moot Problem at [10], [13], [15].
[52] *E. Holding v Z. Ltd., Mr. G.* (UNCITRAL Tribunal, 2011).
[53] *Ibid*; Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed., 2014) at pp.1428, 1445.

not sufficient to show that parties were merely involved in the incidental performance of the contract or demonstrated an awareness that such a contract existed.[54]

26. Here, as earlier mentioned, Vader's involvement in the Contract as a whole was limited entirely to only the very start of negotiations.[55] Thereafter, Vader was not involved in any further negotiations that Paredes, RES's representative, conducted when he "drafted, revised and signed" the eventual Contract.[56] Vader was also not involved in any communications leading to the subsequent extensions of the contract between the Parties.[57] All obligations owed to CL were held solely by RES, the named counterparty in the Contract.[58] Further, Vader's resolution for RES to "remain independent"[59] is a clear indication that Vader and RES were treated as independent entities throughout the term of the Contract, rather than parties actively cooperating in the performance of the Contract.

27. Thus, Vader did not impliedly consent to being party to the arbitration agreement.

(3) Vader did not authorise RES to be its agent

28. An agency relationship between two entities can be established when the agent has actual or ostensible authority to act on behalf of its principal.[60]

29. RES did not have actual authority to act on Vader's behalf. An entity has actual authority if it is authorised, expressly or impliedly, to enter into a contractual relationship on behalf of the principal.[61] Article 365 of the Cambodian Civil Code

[54] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed., 2014) at pp.1421–1423.
[55] Moot Problem at [10].
[56] Moot Problem at [13].
[57] Moot Problem at [13], [22], [24], [34].
[58] Moot Problem at [15].
[59] Moot Problem at [19].
[60] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at pp.1420–1425.
[61] *Id*, *at* p.1420.

enshrines the requirement that an agency relationship premised on actual authority must be created between the principal and the agent by contract or statute. Here, it is untenable that actual authority was given by Vader since there is absolutely no indication that there was any contract entered into between RES and Vader for the purpose of agency. Further, no Cambodian statute prescribes that a subsidiary must be an agent of the parent company.

30. RES also did not have ostensible authority to act on Vader's behalf. An entity only has ostensible authority if the alleged principal gives the impression to a third party that the entity has the capacity to enter into a relationship on its behalf.[62] Cambodian law specifically provides this in Article 372(3) of the Cambodian Civil Code. This provision further states that where the counterparty negligently believes there to be an agency relationship where there is none, the principle cannot be held liable for the performance of the contract. Negligence occurs when a party, in light of its profession or experience, fails to exercise due care.[63]

31. CL was never given the impression that RES was an agent of Vader. Vader was only preliminarily involved in the negotiation of the Contract at 2014.[64] Thereafter, it was Paredes who had handled the negotiations of the Contract,[65] and, as earlier argued,[66] it was exclusively RES who had carried on the performance of the Contract without there being any involvement from Vader.

[62] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at pp.1425.
[63] The Civil Code of Cambodia 2003, Article 31(2).
[64] Moot Problem at [10].
[65] Moot Problem at [13].
[66] See [23], [26] of this Memorial.

32. Furthermore, even if CL was given the impression that RES may have been an agent of Vader, CL was negligent in assuming this to be true. The facts show that RES was a starting offshore company that had been operating with no profits since its incorporation.[67] CL, meanwhile, was an experienced commercial party with 13 years of experience prior to dealing with RES,[68] but yet chose not to clarify whether Vader would be willing to support RES financially in the main contract or the arbitration agreement, or to insist that Vader should be a party to either agreement. CL further did not name Vader in the notice of arbitration.[69] Given that the first known instance of CL's perception of Vader as a principal only emerged in the present proceedings,[70] the allegation that RES is an agent is likely an afterthought developed after CL realised that RES had no funds to move forward with the arbitration.

33. Thus, Vader did not authorise RES to be its agent.

B. Alternatively, Vader's joinder would cause prejudice

34. Under Rule 9(5) of the KLRCA, a tribunal must consult all parties and have regard to any relevant circumstances before deciding on whether a non-signatory should be joined to the arbitration. The tribunal cannot permit joinder if it will result in prejudice to any of the parties.[71]

35. Tribunals applying similar provisions under other institutional rules have applied a holistic inquiry to determine if prejudice would be caused,[72] and have considered

[67] Moot Problem at [26].
[68] Moot Problem at [1], [3].
[69] Moot Problem at [44].
[70] Moot Problem at [44], [62].
[71] KLRCA Rules 2017, Article 17(5).
[72] Manuel Gomez Carrion, "Joinder of Third Parties: New Institutional Developments" (2015) 31 Arb. Intl. 479 at 502.

factors including 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.[73]

36. Here, Vader would be prejudiced since it had no chance to present its views to the Tribunal on whether it should be joined to the arbitration. Under Rule 9(3)(e) of the KLRCA Rules, a Request for Joinder has to be served on all parties to the arbitration and the party to be joined. Upon receiving such a Request for Joinder, a party must, within 15 days, indicate their consent or objection to the Request.[74] The tribunal is then required to consult the party to be joined on their position and views.[75] While CL had indicated its intention to file a Request for Joinder, the preliminary meeting was only between the Parties and the Tribunal,[76] and nothing suggests that Vader had been served with the Request. Given that only the Parties are to present arguments on the issue of joinder and Vader is not represented at the hearing,[77] Vader cannot be assumed to have been consulted by the Tribunal at any point. Crucially, once a decision of joinder has been made, the parties are taken to have irrevocably waived their rights to any form of appeal, review or recourse on the basis on joinder.[78] As such, making any determination on the merits of joinder at this stage without the involvement of Vader will necessarily result in prejudice to Vader.

37. Furthermore, Vader's joinder will cause prejudice to at least one of the parties. Under Article 10(1) of the KLRCA Rules, where there are multiple parties as a claimant or

[73] Manuel Gomez Carrion, "Joinder of Third Parties: New Institutional Developments" (2015) 31 Arb. Intl. 479 at 489.
[74] KLRCA Rules 2017, Rule 9(4).
[75] KLRCA Rules 2017, Rule 9(5).
[76] Moot Problem at [62], [64].
[77] Moot Problem at [65].
[78] KLRCA Rules 2017, Rule 9(9).

respondent, the multiple parties shall jointly appoint an arbitrator. The assurance of this right coheres with the consistent practice of international arbitral tribunals.[79] Ignoring this right would violate the right to equality between the parties and generally offend the public policy of the seat of arbitration.[80] Here, the Tribunal has already been constituted, and present proceedings simultaneously concern the issue of joinder and other issues on merits.[81] On one hand, joining Vader to the arbitration without reconstituting the Tribunal would result in Vader being prejudiced because it did not jointly nominate an arbitrator with RES, in breach of Article 10(1). On the other hand, even if the Tribunal is subsequently reconstituted in accordance with Article 10(3) of the KLRCA Rules, CL and RES may be prejudiced from the need to rehear evidence and submissions on substantive issues already heard. Reconstituted tribunals can elect to repeat prior proceedings, particularly since their absence at an advanced stage of proceedings is highly problematic.[82] Further, as earlier argued,[83] RES is in a financially precarious position and the costs incurred through reconstitution would further prejudice it.

38. Thus, Vader's joinder to the arbitration would cause prejudice.

[79] KLRCA Rules 2017, Article 10(1); Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p.2584; *Sociétés BKMI et Siemens v Société Dutco* (French Court of Cassation, 1992) 10 ASA Bull. 295 at 297.
[80] Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p.2609; *Sociétés BKMI et Siemens v. Société Dutco* (French Court of Cassation, 1992) 10 ASA Bull. 295 at 297.
[81] Moot Problem at [47], [65].
[82] KLRCA Rules, Article 10(3); *Rolf A. Schütze, Insitutional Arbitration Article-by-Article Commentary*, (Hart Publishing, 2013) at p.97; Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at pp.1954–1956.
[83] See [4] of this Memorial.

III. CL DID NOT ACCEPT RES'S OFFER

39. Under Article 2.1.6(1) of the UNIDROIT Principles, valid acceptance can only be achieved through a statement or conduct which indicates assent to an offer. Article 4.2 of the UNIDROIT Principles further provides the rules of interpretation to determine if a particular conduct is an indication of assent.

40. Deewarvala's Indian head nod was not conduct which indicated assent under Article 2.1.6(1) of the UNIDROIT Principles. Paredes did not know and could have been unaware of Deewarvala's subjective intention to accept the Offer when the latter did the Indian head nod (**A**). A reasonable person of the same kind as Paredes would also not have understood the Indian head nod to mean an indication of assent (**B**).

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

41. Under Article 4.2(1) of the UNIDROIT Principles, the 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 party's intention. This Article has been referred to as the "subjective test",[84] where the primary aim of its application is to determine if both parties subjectively possessed a common understanding as to what the conduct in question meant.[85] In this regard, there must be evidence to prove that the first party intended for the conduct to convey a certain meaning, and further, that the other party

[84] Official Commentary to Article 4.2 UNIDROIT Principles 2016.
[85] *MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino, S.P.A.* (1999) 144 F.3d 1384 (US Court of Appeal, 1999); *Mitchell Aircraft Spares Inc. v European Aircraft Service AB* (1998) 23 F. Supp. 2d 915 (US District Court of Illinois, 1998).

actually knew of this meaning or that the other party constructively knew of this meaning because it could not have been unaware of it.[86]

42. CL thus bears the burden of proving both the subjective intention of Deewarvala to accept the Offer, and that Paredes had either actual or constructive knowledge of this intention.[87] The UNIDROIT Principles emphasise the "extremely difficult"[88] exercise of proving such subjective knowledge, and this is reflective of the high threshold needed to discharge the requisite burden of proof.

43. Preliminarily, it is not in dispute that Paredes interpreted the head nod "as a refusal".[89] It is thus not open to CL to assert that Paredes had actual knowledge of the intention behind the Indian head nod.

44. Paredes also did not have constructive knowledge of Deewarvala's intention. Constructive knowledge of the intention behind a particular conduct can only be found if said intention had been easy to discern, such that it would have been unreasonable for the recipient of the conduct not to have known it.[90]

45. In *Case No. IV CSK 215/13*, there was a dispute as to whether prepayment should have been made at the time the goods were made ready for shipping or before that time.[91] In interpreting the statements and conduct of the parties, the court applied Article 8(1) of the United Nations Convention on Contracts for the International Sale of Goods

[86] Donald J. Smythe, "Reasonable Standards for Contract Interpretations under the CISG" (2016) 25 Cardozo J. Int'l. & Comp. L. 1 at 10.
[87] *Ibid*.
[88] Official Commentary to Article 4.1 UNIDROIT Principles 2016.
[89] Moot Problem at [36].
[90] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015) at p.584.
[91] *Case No. IV CSK 215/13* (Supreme Court of Poland, 2013).

("**CISG**"),[92] an article that is *in pari materia* to Article 4.2 of the UNIDROIT Principles.[93] It held that the seller's intention for payment to be made "in advance" was easy to discern since the exact words, which were patently clear in meaning, were previously used between the parties thus making it obvious to the buyer that payment should be made before shipping.[94] Similarly, in several other cases also concerning disputed statements, constructive knowledge was only imputed where the intention behind these statements could be easily inferred from the statement itself,[95] or where the statement was "clearly worded".[96]

46. Here, it is not disputed that Deewarvala subjectively intended for his head nod to mean an indication of assent.[97] However, the nature of the Indian head nod, the Parties' previous communications, as well as the context of the Skype negotiation all show that the Indian head nod was by no means easy to discern on the facts.

47. First, the very action of the Indian head nod, a side-ways movement of the head, is misleading. Unlike the cases above, where the disputed statements had clear meaning, the Indian head nod in the present case is ambiguous in nature. The Indian head nod bears resemblance to the usual shaking of the head, an act that is commonly understood to mean disapproval or rejection instead of assent.[98] There is only a small minority of places where a side-way head movement is used as a gesture of affirmation.[99] Even

[92] United Nations Convention on Contracts for the International Sale of Goods 2010.
[93] Michael Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (Brill Publishers, 2nd Ed., 2014) at p.305.
[94] *Case No. IV CSK 215/13* (Supreme Court of Poland, 2013).
[95] *Case No. X ZR 111/04* (Federal Court of Justice of Germany, 2007).
[96] *Case No. 11 O 4187/95* (District Court of Germany, 1996).
[97] Moot Problem at [37].
[98] Stefania Moretti, Alberto Greco, "Truth is in the head: A nod and shake compatibility effect" Acta Psychologica 185 (2018) 203–218 at 203.
[99] 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.

then, such a practice has begun to change as people start to adopt the more universal gesture of the vertical head nod to convey acceptance or affirmation.[100] Hence, the intention behind the side-ways head nod which is ambiguous and misleading cannot be considered easy to discern.

48. Secondly, there is no indication of the use of the Indian head nod in the Parties' previous communications. The Parties had always expressed their intentions through extremely clear and unambiguous conduct. The initial Contract in 2013 was signed by electronic means through counterparts.[101] The first extension of the Contract in 2014 was through a handshake in Paris.[102] The second extension of the Contract in 2015 was made through email acceptance.[103] Seen in the light of the previous instances of concluding the Contract, the intention behind the Indian head nod was not something that Paredes could be expected to easily understand.

49. Thirdly, the context of the Skype negotiation also shows why Deewarvala's intention behind the Indian head nod was not easy to discern. The Parties had been discussing a potential extension for over four months without progress, and the Skype negotiation itself lasted for over four hours.[104] Paredes wanted a substantial increase in price before committing to more deliveries, and demanded that the Second Incentive be at least 35% of the price.[105] The Parties were clearly unable to come to an agreement and Parades was likely aware that he had proposed a steep bargain. After a last attempt at restating

[100] Maria Angelova, "Why Do Bulgarians Shake Their Heads to Say Yes?", *Culture Trip* (21 November 2017) < https://theculturetrip.com/europe/bulgaria/articles/why-do-bulgarians-shake-their-heads-to-say-yes/> (accessed 17 September 2018).
[101] Clarifications to the Moot Problem Question 15.
[102] Moot Problem at [22].
[103] Moot Problem at [24].
[104] Moot Problem at [28], [33].
[105] Moot Problem at [32].

his terms,[106] it would only have been reasonable for Paredes to have understood Deewarvala's reaction as a rejection.

50. Thus, Parades did not know and could have been unaware of Deewarvala's subjective intention to accept the Offer.

B. A reasonable person of the same kind as Paredes would also not have understood the Indian head nod to mean acceptance

51. 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 a "reasonable person of the same kind of the other party". It is an objective inquiry[107] where the reasonable person is imputed with the relevant characteristics of the other party such as their business experience, linguistic knowledge, and technical skills.[108]

52. First, Paredes' Western upbringing and his limited exposure to Indian culture should be taken into account. Parades was raised and educated in Mexico, and completed an MBA in France.[109] He only moved to Asia in 2016 when RES hired him.[110] Even then, he has never personally conducted business in India or Malaysia where Deewarvala is from.[111] A reasonable person with almost no interaction with Indian culture prior to dealing with Deewarvala cannot be expected to know the meaning of the Indian head nod.

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[106] Moot Problem at [34].
[107] *Case No. IV CSK 215/13* (Supreme Court of Poland, 2013); Anton K. Schnyder, Ralf M. Straub, "The Conclusion of a Contract in Accordance with UNIDROIT Principles" (1999) 1 European Journal of Law Reform 243 at 246.
[108] Alexander Komarov, "Contract Interpretation and Gap Filling from the Prospect of the UNIDROIT Principles" (2017) Uniform Law Review 29 at 33–34.
[109] Clarifications to the Moot Problem Q6.
[110] Clarifications to the Moot Problem Q6.
[111] Clarifications to the Moot Problem Q6.

53. Secondly, the relationship between the Representatives was purely professional and Paredes cannot be said to have been familiar with Deewarvala and his mannerisms. Paredes met Deewarvala in person only once, in 2014.[112] Given that most of the communications between them were only on the topic of their extensions,[113] nothing suggests that the Parties had any interaction beyond their professional capacity. Thus, despite having dealt with Deewarvala for three years, it cannot be said that Paredes was well-acquainted with his cultural idiosyncrasies. A reasonable person of the same kind as Paredes would have easily misunderstood the side-way head nod.

54. Thirdly, Paredes' appointment in RES as the Managing Director empowered to execute any agreement in ASEAN[114] cannot mean that a reasonable person holding that position would be well-acquainted with Asian culture. Considering that Parades is a specialist in baking bricks and building walls,[115] his experience and expertise or even his strong business acumen and management skills could have been the reasons for his appointment. He was, after all, also an accomplished individual with not just a Degree in Engineering but also an MBA from France.[116]

55. Taking the above factors cumulatively, it is a stretch of logic to say that a reasonable person of the same kind as Paredes would understand the Indian head nod as an acceptance. Owing to the misleading nature of the Indian head nod when used to convey affirmation, it would take more than mere acquaintance with Indian culture for someone to instinctively understand the head nod as an acceptance especially where the circumstances were such that a rejection would have been more probable.

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[112] Moot Problem at [20].
[113] Clarifications to the Moot Problem Q15; Moot Problem at [24].
[114] Moot Problem at [12].
[115] Moot Problem at [12].
[116] Clarifications to the Moot Problem Q5.

56. Thus, a reasonable person of the same kind as Paredes would also not have understood the Indian head nod to mean acceptance.

IV. THE TRIBUNAL SHOULD NOT GRANT THE RELIEF SOUGHT BY CL

57. Since the KLRCA Rules do not refer to specific remedies that a tribunal may award, the substantive law governing the dispute will principally govern the remedies.[117] The aforementioned substantive law chosen by the Parties, the UNIDROIT Principles, [118] thus governs the remedies.

58. Under the UNIDROIT Principles, even if the Contract is held to be valid and to have been breached, the Tribunal should not grant an order for specific performance of the deliveries (**A**). Additionally, the Tribunal should not set the terms of the Contract in writing (**B**).

A. The Tribunal should not grant an order for specific performance of the deliveries

59. As long as any of the exceptions precluding specific performance in Article 7.2.2 of the UNIDROIT Principles apply, specific performance should not be ordered.[119] Here, at least two of the exceptions apply. First, the exception under Article 7.2.2(b) applies because performance has become unreasonably burdensome or expensive. Secondly, the exception under Article 7.2.2(c) applies because the Claimant may reasonably obtain performance from another source.

(1) Performance has become unreasonably burdensome or expensive

60. The exception under Article 7.2.2(b) of the UNIDROIT Principles can be invoked when performance has become unreasonably burdensome or expensive. The Official

[117] Richard Garnett, Henry Gabriel, Jeff Waincymer, and Judd Epstein, *A Practical Guide to International Commercial Arbitration* (Oceana Publications Inc., 2000) at p.94.
[118] Moot Problem at [15].
[119] Official Commentary to Article 7.2.2 of the UNIDROIT Principles 2016; Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed., 2015) at p.889.

Commentary to the UNIDROIT Principles explains that this exception usually applies where there has been a change of circumstances such that performance, although still possible, would become so onerous that it would undermine the general principle of good faith and fair dealing.[120] Good faith and fair dealing require that the hardship on the party compelled to specifically perform does not outweigh the other party's interest in obtaining specific performance.[121]

61. Here, the likely presence of a contract with another counterparty is a change of circumstances sufficient to render performance unreasonably burdensome. RES did not sell bricks to other parties before the end of 2016.[122] Given that the price of bricks in Asia rose in 2016 and RES was subsequently under the impression that it was acceptable to contract with another counterpart on more competitive terms,[123] it would have been commercially sensible for RES to have entered into another contract following its belief that the Contract had ended. RES had only been supplying bricks to one company,[124] CL, since its incorporation, and in its financially precarious state,[125] RES cannot be expected to expand its production of bricks to fulfil two separate contracts. Seen in this light, ordering specific performance would undermine the principle of good faith and fair dealing because it would compel RES to elect between breaching the contract with the other counterpart or unreasonably expanding its production capacity despite its financial situation. This hardship far outweighs any interest CL may have in obtaining specific performance.

[120] Official Commentary to Article 7.2.2 UNIDROIT Principles 2016.
[121] *William L. Patton Jr. Family Limited Partnership v Simon Property Group* (2005) 370 F.Supp.2d 846 (United States District Court Arkansas, 2005) at p.3.
[122] Clarifications to Moot Problem Q13.
[123] Moot Problem at [25], [40].
[124] Moot Problem at [14], [15].
[125] Moot Problem at [61].

62. Thus, performance of the deliveries has become unreasonably burdensome or expensive.

(2) Performance can be obtained from another source

63. The exception under Article 7.2.2(c) of the UNIDROIT Principles applies when the party seeking performance can reasonably obtain performance from another source.

64. If another source is reasonably available to the aggrieved party to obtain performance, it makes both economic and practical sense not to compel performance by the other party.[126] Even if the substitute purchase is more expensive, specific performance should not be ordered where damages are adequate to compensate the difference in cost of obtaining the substitute.[127]

65. Here, although the bricks produced by RES were described in the terms of the Contract as "state-of-the-art"[128] bricks, this does not mean that RES is the only company which is able to produce such bricks. Contract terms are interpreted according to their literal meaning unless parties intended otherwise.[129] "State-of-the-art", as applied to products, has the literal meaning of "the most up-to-date features"[130] and does not imply that the product is one-of-a-kind. Further, CL had been operating in China for 13 years prior to dealing with RES,[131] and must have had other suppliers in that period. Since there is a

[126] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015).
[127] *Exelon Generation Co LLC v General Atomics Technologies Corp* (2008) 599 F.Supp.2d 892 at [4].
[128] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2nd Ed, 2015).
[129] Article 4.1 UNIDROIT Principles 2016; Official Commentary to Article 4.1 of the UNIDROIT Principles.
[130] Patrick Hanks, The New Oxford English Dictionary of English ("Oxford Dictionary"), (Oxford University Press, 1998) at p.1816.
[131] Moot Problem at [1], [3].

market of bricks suppliers in Asia beyond RES,[132] nothing stops CL from obtaining comparable bricks, albeit at a possibly higher price.

66. Thus, performance can be obtained from another source.

B. The Tribunal should not set the terms of the Contract in writing

67. The terms of the Contract should not be set in writing because there remains a dispute on the content of the Contract for which no pleadings were made in these proceedings. Here, the Parties were not in agreement with regard to the Second Incentive. CL understood the Contract to include two editions of the Second Incentive[133] whereas RES understood the Contract to require three editions of the Second Incentive instead.[134] Setting the terms of a contract in writing is an exercise of a tribunal's declaratory function,[135] and would require a tribunal to clarify the rights between the parties. Here, to clarify the legal obligations under the Contract, the Tribunal would have to decide if the Second Incentive was for two or three editions. This is objectionable for two reasons.

68. First, it would be a breach of natural justice to require a tribunal to decide on a matter that was not pleaded by the parties, because it would violate the parties' rights to be heard.[136] An "arbitrator's award must not contain any surprises, especially novel theories of liabilities or an interpretation of facts that a party had no opportunity of contesting".[137] Here, setting the terms of the Contract in writing without hearing each

[132] Moot Problem at [25].
[133] Moot Problem at [41].
[134] Moot Problem at [58].
[135] *ZAB Inc. v. Berenergy Corporation*, (2006) 136 P.3d 252 at Part III.
[136] Austin I. Pulle, "Securing Natural Justice in Arbitration Proceedings" (2012) 20 Asia Pac. L. Rev. 63 at 78–79.
[137] *Id*, at 78.

party's evidence or submissions on the Second Incentive would be a "surprise" amounting to a breach of natural justice.

69. Secondly, the Tribunal has no jurisdiction to hear matters relating to rectification. Rectification refers to the extraordinary power of "rewriting the contract to reflect what one party claims to have been the agreement actually made".[138] Tribunals must be specifically empowered to hear on matters of rectification, and they are not liberally assumed to obtain such power from generic arbitration clauses.[139] Here, the Tribunal derives its jurisdiction from the arbitration agreement concluded between the Parties[140] which bears striking resemblance to the UNCITRAL model arbitration clause for contracts,[141] and is largely generic without specific authorisation to hear on rectification. CL's request for this Tribunal to set the terms of the Contract in writing goes further than interpreting the words "from now on" to rewriting to terms of the oral contract based on CL's version of the Second Incentive.

70. Thus, the Tribunal should not set the terms of the Contract in writing.

[138] Austin I. Pulle, "Securing Natural Justice in Arbitration Proceedings" (2012) 20 Asia Pac. L. Rev. 63 at 78.
[139] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed., 2015) at [9.64].
[140] Moot Problem at [15].
[141] UNCITRAL Arbitration Rules 2010, Annex.

PRAYER FOR RELIEF

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

1. RES's financial impecuniosity renders the arbitration agreement incapable of being performed; and

2. Vader should not be joined to the arbitration proceedings; and

3. There was no valid acceptance of RES's offer by CL.

In the event that the Tribunal finds that there was valid acceptance of RES's offer by CL, RES respectfully requests the Tribunal:

1. To refuse specific performance of the deliveries; and

2. To refuse the setting of the terms of the Contract in writing.