THE 13TH LAWASIA INTERNATIONAL MOOT COMPETITION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

2018

BETWEEN

CHUIZI LEISHEN'S LLC

(CLAIMANT)

&

ROBUSTESSE ESPACIAL SOLUCION CORP

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF JURISDICTION

The parties, Chuizi Leishen's LLC and Robustesse Espacial Solucion Corp, have agreed to submit the following dispute in the Kingdom of Cambodia in accordance with the Kuala Lumpur Regional Centre of Arbitration Rules 2017[1]. The applicable law of contract shall be the UNIDROIT Principles.

[1] Moot Problem at 15(f).

QUESTIONS PRESENTED

1. Whether the agreement to arbitrate is incapable of being performed due to the impecuniosity of the Respondent.
2. Whether the request of the Claimant to join Vader as a party to the Arbitration be granted by the Tribunal.
3. Whether there was a valid acceptance of the Claimant's offer.
4. What relief should the Tribunal grant?

STATEMENT OF FACTS

1. Chuizi Leishen's LLC (hereinafter referred to interchangeably as **"CL"** or **"Claimant"**) is a commercial company duly incorporated under the laws of the People's Republic of China in 2000.
2. Robustesse Espacial Solucion Corp (hereinafter referred to as **"RES"** or **"Respondent"**) is a Limited Company duly incorporated under the laws of Cambodia in January 2013. RES is a wholly owned subsidiary of Vader Ltd, a commercial company incorporated under the laws of the United Kingdom in 1950.
3. RES was established to carry out Vader's Asian business as Vader's CEO, Mr. Auld Chap saw the possibility of the United Kingdom leaving the European Union. RES's main business activity is the production and selling of bricks.
4. In February 2013, the CEOs of Vader and CL met to discuss business. During their discussion, they found a mutual business opportunity and they came to an accord on most of the terms for their future venture. They decided that a formal contract should be executed at a later point in time by their respective representatives.
5. Mr. Kalai Deewarvala, a Malaysian-Indian living in Singapore was appointed by CL as their representative for the purpose of negotiating the contract between CL and RES (collectively, "**The Parties**") and to head all Belt and Road projects.
6. Mr. Armando Parades, a Mexican was employed as Managing Director of RES and appointed the representative of Vader. His position empowered him to execute any and all agreements on behalf of RES in Cambodia and ASEAN.
7. By September 2013, Mr. Parades and Mr. Deewarvala (collectively, the "Representatives") had concluded and signed a contract between CL and RES. The contract was structured as an exclusive distribution agreement.

8. The Contract provided for four deliveries of bricks by RES in 2014, on the last working day of March, June, September and December with payment for these deliveries to be made by CL five days before each delivery.
9. The Contract included an arbitration agreement that would govern disputes arising out of the contract.
10. The respective parties then agreed to extend the contract for four more deliveries in 2015 with a 15% price increase in the price of bricks (the "**First Incentive**").
11. The same was done for a further four deliveries in 2016.
12. Meanwhile, on 23rd June 2016, Vader's board of directors passed a motion such that no further financing, compliance monitoring, or directives would be given by Vader to RES. Thereafter, Mr. Parades had full control over RES's activities.
13. In 2016, the parties begun to negotiate for further deliveries of bricks in 2017. Negotiations lasted 4 months till 23rd November 2016, when the disputed events occurred.
14. Mr. Parades proposed for a 35% bonus (the "**Second Incentive**") to be thrown in at the end of each year, and a 15% price increase in the price of bricks to which RES would agreeing to 4 deliveries in 2017 and 4 deliveries in 2018.
15. Mr. Deewarvala responded to this offer with an Indian head nod, a side-ways nod.
16. Mr. Deewarvala was of the view that they had reached an agreement whereas Mr. Parades was of the view that they had failed to reach an agreement.
17. The misunderstanding was realised in mid-March 2017 when CL contacted RES to confirm the date of the next delivery.
18. CL served RES with a Notice of Arbitration on 15th August 2017 leading to the arbitration proceedings today.

19. RES contend that their impecuniosity would render the arbitration agreement incapable of being performed.

SUMMARY OF PLEADINGS

The Claimant submits as follows:-

1. The agreement to arbitrate is capable of being performed even though the Respondents are impecunious.

Rule 14(1) to Rule14(7) of the KLRCA Rules 2017 lay out the different deposits to be paid in order to proceed with arbitration. These costs have been paid in full by the Claimant. Further, both parties have waived their right to a court action resulting in arbitration being the only way to resolve this dispute. Lastly, impecuniosity is not a sufficient ground to render an arbitration agreement incapable of being performed.

2. The request of the Claimant to join Vader as a party to arbitration should be granted.

In accordance with Rule 9(1) of the KLRCA Rules 2017, Vader can be joined as a party to arbitration as they are prima facie bound by the arbitration agreement on the basis that representatives of Vader played an essential part in the formation of a contract between RES and CL. Next, Vader is prima facie bound as Vader is the beneficiary and sole shareholder of their subsidiary RES. Further, RES is acting as an agent of Vader and therefore the effects of the contract and the arbitration agreement should be imputed to Vader.

3. There was a valid acceptance of the Respondents offer.

The conduct of Mr. Deewarvala by responding to Mr. Parades's offer with a sideways head nod amounted to an acceptance of the offer in accordance with Article 2.1.6 of the UNIDROIT Principles. This is because a nod is an up and down movement which is universally known to

signify assent. Further, Mr. Parades was aware or could not have been unaware of Mr. Deewaravala's intention to accept the offer and extend the contract. Alternatively, the reasonable person would interpret the head nod as an acceptance of the Respondents offer. Lastly, the conduct of Mr. Deewarvala amounts to an acceptance when analysed along with the preliminary negotiations between the parties who have been negotiating for a total of 4 months and 4 hours signifying the willingness of the parties to extend the contract.

4. The tribunal should grant the following reliefs.

With regards to the Claimants claims, firstly, the tribunal should declare that the contract was existent and enforceable as there was a valid acceptance of the Respondents offer as laid out in the 3rd pleading. Secondly, the Claimants request that specific performance of the first two deliveries of 2017 should be granted in accordance with Article 7.2.2 of the UNIDROIT Principles as none of the exceptions to specific performance laid out in Article 7.2.2 of the UNIDROIT Principles are applicable. Lastly, in order to facilitate the remainder of the deliveries, the terms of the contract should be set in writing by the tribunal. The rationale for this is because the time for 5 of the remaining 6 deliveries has come and gone between the notice of arbitration (August 2017) and now (November 2018).

With regards to the respondent's counter-claims, all their claims should be disallowed as they are all premature monetary claim which are yet to fall due as the Respondent has yet to perform any of their obligations under the extended contract.

PLEADINGS

The Claimant submits as follows: -

1. THE AGREEMENT TO ARBITRATE IS CAPABLE OF BEING PERFORMED

A. The required procedures and deposits to initiate and continue arbitration proceedings have been satisfied.

(i) Rule 14(1) of the KLRCA Rules 2017 provides that the director of the Kuala Lumpur Regional Arbitration Centre shall fix an advance deposit in an amount intended to cover the costs of the arbitration.

(ii) Rule 14(3) of the KLRCA Rules 2017 provides for either party to have the opportunity to make payments on these deposits if the other party has failed to pay such deposits.

(iii) The AIAC requested parties to deposit a total of USD$25,000.00 as a non-security deposit.[2]

(iv) The Claimant has paid this amount in full, inclusive of the Respondent's share of the deposit as the Respondent was unable to do so.[3]

(v) As the deposits have been paid in full, arbitration proceedings can continue and the agreement to arbitrate is capable of being performed.

B. Arbitration is the only way to resolves this dispute as the right to court has been waived by both parties.

(i) Freedom of Contract should be upheld. As both parties have agreed upon an arbitration clause[4], the courts and the tribunal should allow for the arbitration clause to be performed.

[2] Moot Problem at [48].
[3] Moot Problem at [48], Page 7, Additional Clarifications [2].
[4] Moot Problem at [15](f).

(ii) Article 5 of the Cambodian Arbitration Act[5] provides that no court shall intervene in the arbitration proceedings except in the circumstances provided for within the Act. Presently, the Act is bereft of anything that would imply that impecuniosity is a valid reason to justify the courts interference.

(iii) The Russian Supreme Court held that, "lack of funds could not be considered as grounds for incapable of performing an arbitration clause, because this was the normal commercial risk of a commercial company. The courts also noted that the impecunious party should have been aware of the potential costs implications when they agreed to the arbitration clauses."[6]

C. It would not be a denial of justice to proceed with arbitration proceedings.

(i) In the case of Deewer v Belgium[7], the European Court of Human Rights held that once an arbitration agreement has been entered into, the parties have willingly waived their rights to court therefore debunking the notion that it would be a denial of justice to proceed with arbitration proceedings.

(ii) Further, in the Portugal No. 1 Case[8], the courts held that the moment the parties step out of the realm of the court by waiving it in favour of arbitration, they are solely liable for financing the chosen forum. In other words, they are leaving the "protective umbrella of the state" by accepting the decision to be rendered by an arbitral tribunal.

(iii) Therefore, arbitration proceedings should continue as it would not be a denial of justice to the Respondents in any event.

[5] Article 5, Cambodian Arbitration Act 2006.
[6] Case No. A56-50929/2015, Russian Supreme Court.
[7] Deewer v Belgium A/35. ECHR 1 [1980]. Application No.6903/75
[8] Portugal No. 1, A (Netherlands) v. B & Cia. Ltda., C and others, Supremo Tribunal de Justiça 1647/02

2. THE REQUEST OF THE CLAIMANTS TO JOIN VADER AS A PARTY TO ARBITRATION SHOULD BE GRANTED.

A. Vader is prima facie bound by the arbitration agreement.

(i) Rule 9(1) of the KLRCA Rules 2017 provides that "any party to arbitration may request for an additional party to be joined as a party to the arbitration if the additional party is prima facie bound by the arbitration agreement.

(ii) Vader is prima facie bound by the arbitration agreement as the most of the terms of the contract were concluded by Vader's CEO, Mr. Auld Chap[9]. Further, Mr. Parades, who signed the final contract was referred to as a representative of Vader[10].

(iii) The CEO of CL, having concluded oral agreements and terms with the CEO of Vader, would legitimately expect that Vader too would be bound by the Arbitration Agreement as Vader is a financially stable company with a history of more than 68 years, while RES is a fairly new, financially unstable company.

B. RES is an agent of their principal, Vader.

(i) Article 2.2.2(1) of the UNIDROIT Principles defines agency as an implied authority that exists whenever the principal's intentions to confer authority on an agent can be inferred from the principal's conduct.

(ii) On the facts, Vader has conferred authority on RES to run its business in the Asian market[11]. Ultimately, the initial contract was negotiated by the CEO of Vader who then conferred authority on his representative, Mr. Parades, to finalize and sign the contract.[12]

[9] Moot problem at [10].
[10] Moot problem at [13].
[11] Moot problem at [6].
[12] Moot problem at [10].

(iii) The Cambodian Civil Code defines agency as "A relationship where a representative enters into a contract with another party stating that he is acting on behalf of a principal within the scope of the agency authorization. The effects of the contract are then imputed directly to the principal.[13]

(iv) Similarly, RES acting on behalf of Vader, entered into the contract with CL. The effects of this contract should then be directly imputed to Vader as well.

(v) English common law allows for agency relationships to bind a non-signatory to arbitration.[14] The courts held that, "In commercial terms the creation of a corporate structure is by definition designed to create separate legal entities for entirely legitimate purposes which would be defeated by general agency relationship".

(vi) Therefore, even though Vader is not a signatory to the contract, the agency relationship between Vader and RES would bind Vader to the contract and the arbitration agreement.

(vii) The agency relationship between RES and Vader would prima facie bind Vader to the arbitration agreement therefore satisfying Rule 9(1) of the KLRCA Rules 2017 to join Vader as a party to arbitration.

C. Vader is prima facie bound because it is the beneficiary and sole shareholder of RES.

(i) In the Austrian Supreme Court[15], the court prevented a non-signatory to the arbitration agreement from circumventing the effects of an arbitration clause in the agreement by incorporating a 100% subsidiary which they would benefit from.

[13] Article 364, Cambodian Civil Code.
[14] Peterson Farms Inc v C&M Farming Ltd [2004] APP.L.R. 02/04
[15] Austrian Supreme Court, Case No. 1 Ob 49/01i, 2001.

(ii) Similarly, given that RES is the 100% subsidiary of Vader and Vader would clearly benefit from the success of RES, Vader should be disallowed from circumventing the effects of the arbitration clause.

(iii) Vader would benefit from the aspects of dividends as well as the expansion of their reach in the Asian market via the success of RES.

(iv) Therefore, via this beneficiary/subsidiary relationship between Vader and RES, Vader is prima facie bound by the arbitration agreement thus satisfying the requirement for Vader to be joined as a party to arbitration under Rule 9(1) of the KLRCA Rules 2017.

3. THERE WAS A VALID ACCEPTANCE OF THE RESPONDENTS OFFER.

A. The conduct of Mr. Deewarvala for the Claimants amounted to an acceptance of the offer.

(i) The UNIDROIT principles define acceptance as "statement made or other conduct of the offeree indicating assent to an offer".[16]

(ii) The Claimant, Mr Deewarvala, responded to the offer of RES with a sideways head nod. Though sideways, a nod dictates an up and down movement which is universally accepted as the motion for assent.

(iii) The Journal of Humanities and Social Sciences states that a head nod is a vertical up and down movement universal for assent or a 'yes'.[17]

(iv) However, this provision has to be interpreted in accordance with Article 4.2 of the UNIDROIIT Principles which will be elaborated upon in depth below.

[16] Article 2.1.6, UNIDROIT Principles.
[17] Journal of Humanities and Social Sciences, International Organization of Scientific Research, 2017.

B. The Respondent was aware or could not be unaware of the Claimant's intention to accept the offer to extend the contract.

(i) Article 2.1.6 (1) of the UNIDROIT Principles states that "The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention."

(ii) The representative of the respondent, Mr. Parades, is clearly aware of the Claimant's intention to accept the offer and extend the contract.[18]

(iii) Further, throughout the conversation between Mr. Parades and Mr. Deewarvala, Mr. Parades has no legitimate reason to differ from his original understanding that the Claimants intend to extend the contract.

(iv) The Respondents may contend that the intentions of the Claimant's may change consequent to the introduction of the 35% bonus[19]. However, the suggestion of a bonus originated from the Claimants[20] who therefore had every intention to proceed with a bonus.

(v) Therefore, considering all these facts, in no circumstance could Mr. Parades and the Respondents have been unaware of the Claimant's intentions to accept and extend the contract.

(vi) Even if the intention of the parties is inconclusive, the conduct of the Claimants has to be interpreted according to the interpretation of a reasonable person in accordance with Article. 4.2 (2) of the UNIDROIT Principles. This is submitted further below.

[18] Moot problem at [31]
[19] Moot problem at [32]
[20] Moot problem at [31]

C. The reasonable person in the shoes of the Respondent would interpret the head nod as an acceptance.

(i) As submitted earlier on, the universal motion of assent would be a nod[21]. Similar to the actions of Mr. Deewarvala, the motion of this nod would lead the reasonable person to interpret it as a yes.

(ii) However, regard has to be had to the common intention that exists between the parties. The common intention of both parties was to extend the contract.[22] Both parties are also respectively aware of each other's intentions to extend the contract.[23]

(iii) Further, both parties have been negotiating with one another for a period of 4 months and 4 hours.[24]

(iv) This indicates that both parties are willing and hoping to continue with the contract, which would lead the reasonable person to conclude that the contract had been accepted and concluded.

(v) Moreover, a reasonable person in the shoes of the Respondent would conclude that the offer was accepted as the contract was of great benefit to the Respondent with a 35% bonus and a 15% price increase[25], that would generate the Respondent a turnover of more than 150% in the year 2017 and 2018.

D. It is an acceptance when analysed along with preliminary negotiations between the parties.

(i) Article 4.3(a) of the UNIDROIT Principles state that "In applying article 4.2, regard shall be had to all the circumstances, including preliminary negotiations between the parties.

[21] Journal of Humanities and Social Sciences, International Organization of Scientific Research, 2017.
[22] Moot problem at [32], [34].
[23] Moot problem at [32], [34].
[24] Moot problem at [28].
[25] Moot problem at [34].

(ii) Both parties have been negotiating with one another for 4 years and 4 hours.[26]

(iii) Both parties have a mutual intention of continuing with the contract.[27]

(iv) Therefore, all preliminary negotiations in accordance with Article 4.3 of the UNIDROIT principles indicate that both parties are hoping to continue the contract and which would lead the reasonable person to conclude that the Claimant had accepted the contract, or in the possible scenario that one thought it was a rejection, clarify the position.

4. WHAT RELIEF SHOULD THE TRIBUNAL GRANT?

The Claimant's requests.

(i) The Claimants seek for the contract to be declared existent and enforceable, for specific performance for the first 2 deliveries of 2017, and for the terms of the contract to be set in writing.[28]

A. Declaration

(i) On the first request for the declaration of an existent and enforceable contract, as submitted earlier on within this memorial[29], there was a valid acceptance of the Respondents offer. Therefore, the contract is existent and subsequently enforceable. The Respondent therefore has to satisfy their obligations of delivery under the contract.

[26] Moot problem at [28].
[27] Moot problem at [32], [34].
[28] Moot problem at [45].
[29] Page 16 of the Claimant's memorial.

B. Specific Performance

(ii) The UNIDROIT Principles lay out the parameters of specific performance.[30]

(iii) The UNIDROIT Principles state that;

> *"Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless*
>
> *(a) performance is impossible in law or in fact;*
>
> *(b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;*
>
> *(c) the party entitled to performance may reasonably obtain performance from another source;*
>
> *(d) performance is of an exclusively personal character; or*
>
> *(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.*

(iv) Concerning the award of specific performance, none of the above exceptions would apply for the following reasons.

(v) Firstly, the performance sought is not impossible in law or in fact. The Respondents would still be able to produce these bricks upon the award of specific performance as their sole business relies on brick making. Further, a reasonable amount of time should be allocated to the Respondents in order to allow for the production of these bricks, leading to the inapplicability of the second exception.

(vi) Performance is not unreasonably burdensome or expensive. Following the initial contract, a reasonable amount of time of 3 months[31] should be allocated to the

[30] Article 7.2.2, UNIDROIT Principles.
[31] Moot problem at [15].

Respondents to produce these bricks thus maintaining the Respondents status quo and not placing additional burdens on the Respondents.

(vii) Thirdly, the Claimants are not reasonably able to obtain performance from another source. As the bricks in the present scenario are state-of-the-art, special sized, tailor-made and colour-coated construction bricks[32], it would be difficult for the Claimants to seek the production of these bricks elsewhere.

(viii) The fourth exception is inapplicable as it does not apply to contracts undertaken by companies as clearly laid out in the commentary to Article 7.2.2 of the UNIDROIT Principles.[33]

(ix) Lastly, the Claimants do seek performance within a reasonable time after the Claimants became aware of the respondent's non-performance. The Claimants have brought the claim within a period of five months[34] which is reasonable given that the Claimants would naturally take time to deliberate and decide on the best way to proceed with the non-performance of a multi-billion-dollar contract.

(x) As the exceptions to Article 7.2.2 of the UNIDROIT Principles are inapplicable, the request for specific performance by the Claimants should be granted.

C. Setting the Terms of Contract in Writing

(xi) After the order of specific performance of the first 2 deliveries, the Respondents' have yet to make 6 more deliveries. However, between the period of service of notice of arbitration (August 2017) and now, (November 2018), the time for five deliveries has come and gone.

[32] Moot problem at [15]
[33] Comment 3(d), Article 7.2.2, UNIDROIT Principles.
[34] Moot problem at [44]

(xii) This leads to the third relief sought by the Claimant, to the terms of the contract in writing. Consequent to the two deliveries within the order of specific performance, the Claimants request the further six deliveries be made in the same time period since 2013, three months apart following the same time period adopted by the parties since 2013.[35]

(xiii) Payments for these deliveries would then also need to be made in accordance with the original contract, five days before the date of delivery.[36]

A. The respondent's counter-claims.

(i) The respondent's counter-claims should be disallowed as the respondent's have yet to make payments on the deposits for their counter-claims.

(ii) Rule 14(6) of the KLRCA Rules 2017 states that "where counterclaims are submitted by the Respondent, the Director may fix separate advance deposits on costs for the claims and counterclaims. When the Director has fixed separate advance deposits on costs, each of the Parties shall pay the advance deposit corresponding to its claims.

(iii) Accordingly, the Respondents counter-claims should only be taken into consideration once payments and deposits for their counter-claim worth more than 3 billion is made. Given the impecuniosity of the respondent[37], it is highly unlikely that the Respondents will be able to afford the arbitration fees and deposits.

(iv) Assuming that the Respondents are able to make payments on these deposits, the Respondents have claimed for the following.

1. Payment on the 35% bonus in 2016, 2017, and 2018.
2. Payments for all 8 deliveries in 2017 and 2018.
3. Interest on all their monetary claims.

[35] Moot problem at [15].
[36] Moot problem at [15].
[37] Moot problem at [61].

4. Costs of arbitration and legal fees.

(v) Firstly, the request for the 35% bonus in 2016 by the Claimants should be disallowed. This is due to the fact that the bonus in 2016 was never a term to the new contract. The new contract was for four deliveries in 2017 and four deliveries in 2018[38]. Therefore, the bonuses should only be payable in respect of those years. With regard to the claim for the 35% bonus in 2017 and 2018, payments for these bonuses should only be made as and when they fall due, after every four deliveries.

(vi) Secondly, the request for payments on all eight deliveries should be disallowed. It is highly premature on part of the Respondents to demand payment for all eight deliveries as they have yet to make even one delivery. Payments for these deliveries should be made five days before the date of delivery in accordance with the terms now set in writing according to the deferred dates, as submitted earlier on.[39]

(vii) Thirdly, as the Respondents should be disallowed from any of their monetary claims above, their request for interest on these late payments should be disallowed as well. In any event, should the tribunal agree to award interest for late payments, the claimant would be entitled in law to damages for late delivery against the Respondent's interests claims.

(viii) Lastly, the KLRCA Rules 2017 governs the costs of arbitration.[40] It states that "The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. Therefore, the Respondents claim for costs shall be borne by the unsuccessful party upon the award by the tribunal.

[38] Moot problem at [24]
[39] Claimants memorial at [21].
[40] Article 42, KLRCA Rules 2017.

PRAYERS FOR RELIEF

For the aforementioned reasons, the Claimant respectfully requests the tribunal to find that:

1. the agreement to arbitrate is capable of being performed even though the Respondent is impecunious.
2. the request of the Claimant to join Vader as a party to arbitration be allowed.
3. there was a valid acceptance of the Respondents offer.
4. the contract is existing and enforceable.
5. specific performance for the first two deliveries of 2017 be granted.
6. the counter-claims of the Respondents be dismissed.

The Claimant respectfully requests the tribunal to award in favour of the Claimants.