

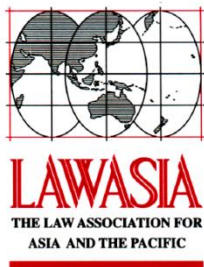


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# 13<sup>th</sup> LAWASIA International Moot

## MOOT PROBLEM 2018

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Organiser of the LAWASIA International Moot Competition

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## DEFINITIONS

Term	Meaning
<b>AIAC / KLRCA</b>	Asian International Arbitration Centre known as the Kuala Lumpur Regional Centre for Arbitration before 28 February 2018
<b>B&amp;R</b>	Belt & Road Initiative
<b>Cambodia</b>	Kingdom of Cambodia
<b>CEO/CEOs</b>	Ms. Lee Qiang Bi and Mr. Auld Chap
<b>China</b>	People's Republic of China
<b>Claimant / Buyer / CL</b>	Chuizi Leishen's LLC
<b>Contract</b>	The agreement executed by CL and RES in September 2013
<b>EU</b>	European Union
<b>First Incentive</b>	A 15% price increase in exchange for 4 future deliveries
<b>Parties</b>	CL and RES
<b>Representatives</b>	Mr. Kalai Deewarvala & Mr. Armando Paredes
<b>Respondent / Seller / RES</b>	Robustesse Espacial Solucion Corp
<b>Second Incentive</b>	A 35% bonus for successful completion of 4 deliveries
<b>UK</b>	United Kingdom
<b>Vader</b>	Vader Ltd

# MOOT PROBLEM

## I. The Claimant

1. *Chuizi Leishen's LLC* (hereinafter referred to interchangeably as "**CL**", "**Buyer**" or "**Claimant**") is a commercial company duly incorporated under the laws of the People's Republic of China ("**China**") in 2000.
2. CL's main commercial activity is construction. CL has developed construction projects in different regions of China for the last 10 years under the direction of its Chief Executive Officer ("**CEO**"), Ms. Lee Qiang Bi.
3. Since 2013, CL has begun to explore the markets in the Southeast Asian countries as China's Belt & Road Initiative ("**B&R**") offers many construction opportunities outside of China. CL intends to expand its business by successfully tendering in many B&R projects.

## II. The Respondent

4. *Vader Ltd* ("**Vader**") is a commercial company duly incorporated under the laws of the United Kingdom (the "**UK**") in 1950.
5. Vader has been a very strong participant in the brick producing and selling market for many years. After the formation of the European Union ("**EU**"), Vader's portfolio expanded to include clients from different European countries.
6. At the beginning of 2013, Vader's CEO, Mr. Auld Chap, saw the possibility of the UK leaving the EU and decided to prepare for the off chance of a Brexit. Vader decided to go into the Asian market and quickly established a subsidiary in the Kingdom of Cambodia ("**Cambodia**") to carry out its Asian business.
7. *Robustesse Espacial Solucion Corp* (hereinafter referred to as "**RES**", "**Respondent**" or "**Seller**") is a Limited Company duly incorporated under the laws of Cambodia in January 2013.
8. RES is a wholly owned subsidiary of Vader. Both companies' main business activity is the production and selling of bricks.

### III. The Contract between RES and CL

9. In February 2013, both the Seller and the Buyer (hereinafter referred to individually as a “**Party**” and jointly as the “**Parties**”) contacted a business agent to set up a meeting with potential commercial partners. A Russian national, Ms. Zolushka Pupkina arranged for Mr. Chap and Ms. Lee (“**CEOs**”) to meet to discuss business.
10. The CEOs met at the “Privacy and Confidentiality in Arbitration” talk on 29 May 2013 at the Kuala Lumpur Regional Centre of Arbitration (“**KLRCA**”).<sup>1</sup> Ms. Pupkina arranged for the CEOs to have dinner and discuss the terms of a possible agreement at The Orchid Conservatory of a nearby hotel. During the course of their discussions, the CEOs found a mutual business opportunity and they came to an accord on most of the terms of their future venture. Although the CEOs concluded their discussions, they decided that a formal contract should be executed at a later point in time when their respective legal counsels and representatives could review it.
11. For the purpose of negotiating the contract between CL and RES and to head all the B&R projects, the Buyer employed a Malaysian-Indian construction specialist living in Singapore. Thus, Mr. Kalai Deewarvala became the representative of CL. Mr. Deewarvala was duly authorised to execute any and all agreements regarding CL’s B&R projects and CL’s communications with RES.
12. To head all their commercial activities in Cambodia and ASEAN, the Seller employed a Mexican specialist in baking bricks and building walls. Thus, Mr. Armando Paredes became the Managing Director of RES. Mr. Paredes’ position empowered him to execute any and all agreements on behalf of RES in Cambodia and ASEAN.
13. By September 2013, Mr. Paredes and Mr. Deewarvala (collectively, the “**Representatives**”) had successfully drafted, revised and signed a contract (the “**Contract**”).
14. This Contract was the first contract signed by the Buyer outside of China and the first contract signed by the Seller since its incorporation. The Contract was structured as an exclusive distribution agreement even though the Seller wanted to contract with multiple counterparts.
15. This contract signed by and between the Buyer and the Seller included, among others, the following terms:
  - a) The production and sale by Seller to the Buyer of a state-of-the-art, special sized, tailor-

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<sup>1</sup> On 7 February 2018, a signing ceremony was held between the Government of Malaysia and the Asian-African Legal Consultative Organisation (AALCO) to rename the Kuala Lumpur Regional Centre of Arbitration to the Asian International Arbitration Centre (officially came into effect on 28 February 2018). In this problem the terms “KLRCA” and “AIAC” are used interchangeably.

- made and color-coated construction brick;
- b) A total sale of 1,200,000,000 bricks at a unit price of USD\$0.50 per brick;
  - c) Four deliveries during 2014 (on the last working day of March, June, September and December, respectively) consisting of 300,000,000 bricks per delivery;
  - d) Delivery of the bricks at the Seller's warehouse location in Cambodia;
  - e) Payment of the consideration for each delivery (i.e., USD\$150,000,000) at least 5 days before the delivery date through online deposit to the Seller's bank account; and
  - f) The following arbitration clause:
    - "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA Arbitration Rules.*
    - The Arbitral Tribunal shall consist of 3 arbitrators. Each party shall select one co-arbitrator. The co-arbitrators shall select the Presiding Arbitrator.*
    - The seat of arbitration shall be the Kingdom of Cambodia.*
    - The language to be used in the arbitral proceedings shall be English.*
    - The law applicable to the contract shall be the UNIDROIT Principles."*

#### IV. The B&R, the First Incentive, and the Brexit in 2016

- 16. In September 2013, the President of the People's Republic of China, Xi Jinping, unveiled the B&R – a development strategy that focused on the connectivity and the co-operation of China and Eurasian countries along the Silk-Road Economic Belt and the Maritime Silk Road.
- 17. The unveiling of the B&R increased RES's interest to pursue business opportunities in ASEAN and to strengthen its relationship with CL.
- 18. The first three deliveries and corresponding payments were performed successfully. The Buyer was satisfied with the quality and quantity of the goods delivered. The Seller was satisfied with the paid consideration.
- 19. On October of 2014, the business of Vader in the EU started to be affected by the possibility of an upcoming Brexit. The prognosis for future economic activities became nonpromising. As envisioned by Mr. Chap, the Brexit threatened the Seller's activities in Europe. At this moment, Vader's Board of Directors resolved that the operations of RES should remain independent.
- 20. On November 2014, the Representatives met in Paris at Mr. Deewarvala's request. The Buyer's representative, Mr. Deewarvala, explained that the operation with the Seller was very important to their company and they intended to increase the number of deliveries.
- 21. The Buyer offered to pay a 15% price increase (the "**First Incentive**") if the Seller commit-

ted to perform 4 more deliveries during 2015.

22. Mr. Paredes accepted Mr. Deewarvala's offer and the two gentlemen shook hands.
23. The fourth delivery of 2014 and the 4 deliveries of 2015 (at the 15% price increase) were performed according to the terms agreed by the Representatives in Paris.
24. In November of 2015, the Representatives crossed emails and decided to extend the agreement throughout 2016 for 4 more deliveries and a second 15% price increase. No formal contract was executed by the Representatives to record this agreement.
25. During the first half of 2016, the Seller realized that the price of bricks in Asia had risen considerably due to increased demand in the area. For the Seller, the terms of the Contract with Buyer were acceptable but Mr. Paredes was aware that an entry level negotiation with a new counterpart would signify an increase in income (that is, greater profits would be attainable if an agreement was entered into with another counterpart). However, given that a solid relationship of trust and good faith had been established between the Representatives, Mr. Paredes did not look for an alternate counterparty. Instead, Mr. Paredes relied on the strength of this relationship to continue generating a steady income and focused on the administration of RES.
26. The Seller, as a starting offshore company, had been operating with no profits since its incorporation. The heavy establishment and operational costs of RES meant that its income barely allowed it to break even against its immediate expenses and overheads (e.g. taxes, insurance, utilities, rent, etc.). This meant that RES did not have a loosened financial situation or any leeway on its expenditure allocation. On top of the enormous sunken costs, Mr. Armando Paredes hired a number of local Cambodian Nationals to take care of all administrative issues in the best manner possible, including the hiring of a team of In-House Counsels.
27. On the other hand, back in England, Mr. Chap's suspicions became true: Brexit annihilated the business of Vader in the EU. After the referendum of 23 June 2016 (where 72.2% of the UK's electorate voted for the UK to leave the EU), Vader's profits plunged. Vader started to pull out of the EU market and its focus shifted to undertaking due diligence on its European operations. As a consequence, Vader's Board of Directors passed a motion such that no further financing, compliance monitoring, or directives would be given by Vader to RES. This meant that Mr. Paredes had full control over RES's activities.

## V. The Second Incentive

28. The Parties started to communicate and to seek a new round of negotiations since July 2016. The Parties' representatives, whilst maintaining a very good relationship between them, were unable to come to terms for more than 4 months.
29. While negotiations between Mr. Deewarvala and Mr. Paredes continued, the 3 first deliveries of 2016 were completed successfully, and in accordance with the agreement of the Representatives in November 2015. The deliveries were made at the end of March 2016, June 2016 and September 2016.
30. On the 23 November of 2016, the Representatives had a final Skype call. The Representatives negotiated for more than 4 hours.
31. As the Buyer knew that the Seller wanted to terminate the Contract, Mr. Deewarvala proposed to maintain the First Incentive (i.e. 15% price increment per year and 4 more deliveries) and to give a bonus to the Seller after 4 compliant and timely new deliveries as a second incentive (the "**Second Incentive**").
32. As the Seller knew that the Buyer wanted to extend the Contract, Mr. Paredes demanded to increase the price substantially before committing to further deliveries. Mr. Paredes intended to set the Second Incentive at a 35% of the price.
33. Over the course of their 4 hour conversation, the Representatives discussed many varied topics on the subject matter in question. Both parties took tea breaks from time to time and maintained their composure throughout the discussions.
34. Just before the Representatives terminated their Skype call, they had the following exchange:

–**Mr. Paredes:**

"Mr. Deewarvala, I restate my client's intention to continue to deliver every quarter of 2017 - we like this Contract. However, the price has to go up... We need more money... a lot more ... and the bricks are much more expensive now. You know this. So, if you accept to continue with the annual pricing rule – I mean, we increase the brick price in 15% for 2017 – and if you give us a 35% bonus at the end of each year from now on... we will commit to 4 more deliveries... Actually, Kalai, we will commit to 8 if you meet those terms..."

–**Mr. Deewarvala:**

"Let me get this straight. You are telling me... that if I throw in a 35% bonus... 35% of the total amount of the contract per year... to be paid at the end of each year... you



will commit not only to 4 but to 8 deliveries... this is, you would continue the supply for 2017 and 18? Is my understanding correct?"

–**Mr. Paredes:**

"Yes, Kalai. That is what I am telling you, *amigo*... 35% every December and I deliver 8 more times – 4 times in 2017 and another 4 times in 2018. Yes or no?"

35. Mr. Deewarvala responded by doing an Indian head nod, a side-ways nod.
36. Mr. Paredes interpreted the side-ways nod as a refusal to his proposal.
37. Mr Deewarvala believed that his nod communicated his acceptance of Mr. Paredes' proposal.
38. After that, the two gentlemen expressed their gratitude for each other's time and said their goodbyes.

## **VI. The Parties' Positions**

39. Mr. Deewarvala was of the view that they had reached an agreement whereas Mr. Paredes was of the view that they had failed to reach an agreement.
40. From the Seller's point of view, the parties had mutually consented to the termination of the Contract. Mr. Paredes' understanding was that no further deliveries were required to be made to the Buyer after December 2016, and it was now acceptable for the Seller to engage another counterpart on more competitive terms.
41. From the Buyer's point of view, the Contract had been extended for 2 years (8 more deliveries) at the cost of paying the First Incentive and 2 editions of the Second Incentive. From Mr. Deewarvala's position, he had assured the supply and fixed the price of the bricks for a long period of time.
42. None of the parties had a reason to revisit the negotiation in the next few months. No communications were sent/received by and between the parties until the middle of March. Furthermore, the last delivery of 2016 was carried out without any mishap.
43. In mid-March of 2017, the Buyer contacted the Seller to confirm the date of the next delivery. The situation was brought to the attention of Mr. Paredes and Mr. Deewarvala who quickly realized that there was a misunderstanding.

## VII. The Arbitration

44. On 15 August 2017, the Buyer served the Seller with a Notice of Arbitration. A copy of said Notice of Arbitration with a receipt acknowledgement by the Seller was then filed with AIAC.
45. The Buyer, now acting as the Claimant, initiated the Arbitration proceedings and sought the following relief: (i) declare that the Contract was existent and enforceable, (ii) to order the Respondent's performance (the first two deliveries of 2017), and (iii) to set the terms of the Contract in writing.
46. On 15 September 2017, the Respondent served its Response to the Notice of Arbitration on the Claimant and AIAC, and it denied the Claimant's claim.
47. On 15 December 2017, a 3-member Arbitral Tribunal was constituted and the Parties continued the Arbitration procedure without setbacks.
48. As the claim had no specific Claim amount, AIAC requested the parties to deposit a total of USD\$25,000.00 as a non-specific security deposit. The Respondent refused to pay its share of the deposit and the Claimant paid its 50% of the Security Deposit on the first week of January of 2018.

## VIII. Preliminary Meeting

49. The Tribunal called for a preliminary meeting via conference call on the first week of February of 2018. Using the available technology in the AIAC's premises, the three members of the Tribunal and the representatives of both Parties joined a remote videoconference.
50. The three arbitrators were present and accompanied by members of their respective arbitration teams. The Presiding arbitrator led the meeting.
51. Mr. Kalai Deewarvala, was joined by some of the Buyer's officials and their local Cambodian counsel, attorneys from the Firm *Phalleap and Phalleap Partnership*.
52. Mr. Armando Paredes, was joined by some of the Seller's officials and their In-House Counsel team of 3 experienced lawyers, all former members of *Teng, Pok and Fineang Legal* (a leading Cambodian firm).
53. One of many points on the Tribunal's agenda was to determine what the value of the Claimant's Claim was and whether the Respondent would be filing a counterclaim.

54. The Claimant's representative started by briefly explaining the case to the Tribunal. At some instances, the Respondent's representative made a few clarifications and/or distinctions but the facts were, in general, agreed upon.
55. The Claimant set the value of its claim at USD\$456,262,500.00.
56. As the Claimant's representative's presentation came to an end, the Respondent's In-House Counsel, Ms. Pheroze Fineang commenced to explain the Respondent's position.
57. The Respondent's position was that the contract between the parties had terminated on 23 November 2016. In any event, the agreement to arbitrate had become null because Respondent is now incapable to perform it. Ms. Fineang explained that the Respondent has many counter-claims but is unable to raise them in arbitration due to the costs of Arbitration.
58. The Respondent's representative stated that in case the Claimant claims that the Contract is still enforceable, then the Respondent would counter-claim the following:
- a) Lost profits:
    - i. For the payment of the Second Incentive for December of 2016, consisting in 35% of the total contract amount paid on 2016, which adds to USD\$277,725,000.00;
    - ii. For the payment of the Second Incentive for December of 2017, consisting in 35% of the total contract amount paid on 2017, which adds to USD\$319,383,750.00;
    - iii. For the payment of the Second Incentive for December of 2018, consisting in 35% of the total contract amount paid on 2018, which adds to USD\$367,291,313.20;
    - iv. For the amount corresponding to 4 deliveries supposedly scheduled for 2017 for the amount of USD\$912,525,000.00 (including a 15% increase in price from the price set for 2016); and
    - v. For the amount corresponding to 4 deliveries supposedly scheduled for 2018 for the amount of USD\$1,049,403,752.00 (including a 15% increase in price from the price set for 2017).
  - b) Interest for:
    - i. The amounts referred to in (a)(i) to (a)(iii) above from their day of maturity until their payment date; and
    - ii. The amounts referred to in (a)(iv) and (a)(v) from their corresponding date of maturity until their payment date.
  - c) Costs for:
    - i. All the costs of arbitration and administrative fees; and
    - ii. All counsel's fees and expenses.

59. Ms. Pheroz also explained to the Tribunal that there remained an incommensurable procedural obstacle between the Respondent and relief - the Respondent does not have enough funds to bring the counter-claims in arbitration due to its tense financial situation. Bringing such counterclaims would elevate the costs of arbitration. Pursuant to rule 13(7) of the *AIAC Arbitration Rules 2018*, the calculation of the amount in dispute includes the value of any counterclaim or set-off. This would increase the quantum of the arbitrator's fees and the AIAC's administrative fees. To this point, the Respondent has not been able to contribute to the security deposits for this arbitration and it will not be in a position to further contribute in the near future.
60. Ms. Pheroz also explained that the Respondent would try to bring these claims in local court. However, given that arbitration proceedings are already underway between the Parties under the Contract, no court would assume jurisdiction and the Respondent would, again, be left defenseless.
61. The Respondent further explained that, to fund the arbitration proceeding, it had sought funding from a number of third-party sources. However, the Respondent's attempts failed due to its precarious financial position (i.e., excessive debts, no reported profits since incorporation, and financial statements indicate that expenses outweigh income).
62. The Claimant denied the Respondent's counter-claims and expressed its intention of filing a request for the Respondent's parent company, Vader, to join this arbitration under Rule 9 of the AIAC Arbitration Rules. From the Claimant's point of view, Vader would be able to support the costs of the arbitration.
63. The Respondent said, in response, that a Joinder request has to be resolved by the Tribunal and that implies moving ahead which seems impossible at this stage.
64. Notwithstanding the Respondent's funding issues, Preliminary Meeting Minutes were circulated between the Arbitral Tribunal and the Parties setting out how the matter would now proceed:
  - a) Any clarifications regarding the issues raised at the preliminary meeting must be submitted to the Tribunal by 6 April 2018;
  - b) A Hearing will be held on the issues raised at the preliminary meeting on the 2-5 November 2018 and the Tribunal will hear the arguments on the procedure and the merits; and
  - c) The Parties will not be required to make submission on matters pertaining to the contracting authority of the Representatives, the validity and/or scope of the arbitration agreement, the calculation of the quantum of the claim and/or counterclaim, or the applicable law.

## **IX. Issues to be presented before the Tribunal in the Hearing**

65. For the Hearing, the Parties are requested to present arguments on the following issues:
- a) Is the agreement to arbitrate incapable of being performed due to impecuniosity of the Respondent?
  - b) Should the request of the Claimant to join Vader as a party to the Arbitration be granted by the Tribunal?
  - c) Was there a valid acceptance of the Claimant's offer?
  - d) What relief should the Tribunal grant?