C1804-C

THE 13TH LAWASIA INTERNATIONAL MOOT

ASIAN INTERNATIONAL ARBITRATION CENTER

2018

CHUIZI LEISHEN'S LLC

Claimant

v.

ROBUSTESSE ESPACIAL SOLUCION

Respondent

MEMORIAL FOR CLAIMANT

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STATEMENT OF JURISDICTION

The parties, Chuizi Leishen's LLC (hereinafter "**Claimant**") and Robustesse Espacial Solucion Corp (hereinafter "**Respondent**") have agreed to submit the present dispute to arbitration in Siem Reap, Cambodia in accordance with the Asian International Arbitration Center Arbitration Rules (hereinafter "**AIAC Rules**").

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QUESTION PRESENTED

I. Whether the agreement to arbitrate is incapable of being performed due to impecuniosity of Respondent.

II. Whether the request of the Claimant to join Vader as a party to the Arbitration should be granted.

III. Whether there was a valid acceptance of Claimant's offer.

IV. What relief the Tribunal should grant.

STATEMENT OF FACTS

The Claimant, Chuizi Leishen's LLC, is a Chinese commercial company specializing in construction. From 2013, under the direction of its Chief Executive Officer ("**CEO**") – Ms. Le Qiang Bi, Claimant started to explore South East Asian markets, in which it came into contact with Respondent.

The Respondent, Robustesse Espacial Solucion Corp, is a Limited Company duly incorporated under the laws of Cambodia in January 2013. It is a wholly owned subsidiary of Vader Ltd ("**Vader**"), whose CEO - Mr. Auld Chap ("**Chap**") looked towards the Asian market on the off-chance of Brexit. Both companies produce and sell bricks.

February 2013	Claimant and Respondent contacted a business agent to set up a meeting to discuss business.
29 May 2013	The CEOs came to an accord on most of the terms of their future venture although a formal contract should be executed in due course. For this purpose, both parties hired their own representative. Claimant hired a Malaysian-Indian construction specialist, Mr. Kalai Deewarvala ("**Deewarvala**"), while Mr. Armando Paredes ("**Paredes**") was employed as that of Respondent.
September 2013	Mr. Deewarvala and Mr. Paredes concluded the contract, which included a total sale of 1,200,000,000 bricks (USD$0.50 per unit) to be made in four deliveries during 2014.

March - September 2014	The first three deliveries were carried out satisfactorily.
October 2014	Vader’s business began to feel the effects of an upcoming Brexit. As a result, Vader’s Board of Directors resolved that the operations of Respondent should remain independent.
November 2014	Both parties agreed by handshake on a 15% price increase provided Respondent would continue with 4 more deliveries in 2015. Later, the fourth delivery of 2014 was also performed with the increased price.
November 2015	The agreement was extended throughout 2016 for 4 more deliveries and a second 15% price increase although no formal contract was executed.
23 June 2016	Brexit annihilated Vader’s business in the EU. Consequently, the company’s Board of Directors passed a motion by which no further financing, compliance monitoring, or directives would be given by Vader to Respondent.
July 2016	For 4 months, the parties tried to seek a new round of negotiations to no avail. During the negotiating process, the first 3 deliveries of 2016 were completed successfully.
23 November 2016	The representatives had a final Skype call. Mr. Paredes demanded a substantial price increase of 35% in exchange for further

	commitment from Respondent. Mr. Deewarvala responded by doing an Indian head nod which was interpreted as a refusal by Mr. Paredes.
March 2017	Respondent contacted Claimant for the new delivery. It was quickly realized by both parties that there was a misunderstanding.
15 August - 15 September 2017	Claimant served the Notice of Arbitration which was responded accordingly by Respondent. The matter was brought before the AIAC.
15 December 2017	A 3-member Arbitral Tribunal was constituted. The 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 while Claimant made full payments for both parties.
February 2018	In the preliminary meeting, Respondent opined that the agreement to arbitrate cannot be performed due to its impecuniosity, which also led to its inability to submit counterclaims. Additionally, Claimant wished to join Vader albeit being met with Respondent's objections. The arbitration now continues in Siem Reap, Cambodia pursuant to the AIAC Rules.

SUMMARY OF PLEADINGS

I. THE AGREEMENT TO ARBITRATE IS NOT INCAPABLE OF BEING PERFORMED DUE TO IMPECUNIOSITY OF THE RESPONDENT

Respondent seeks to challenge the arbitration agreement on the basis of its own impecuniosity, thus it bears the burden of proof to establish its financial situation. In any case, Respondent is neither impecunious nor did it try in good faith to exhaust all funding options for the arbitration. Even if it is impecunious, the "incapable of being performed" standards do not encompass situations of impecuniosity. Alternatively, continuing the arbitration is permissible because it does not violate Respondent's procedural rights.

II. THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION SHOULD BE GRANTED BY THE TRIBUNAL

Rule 9(1) AIAC requires that the additional party - Vader be *prima facie bound* by the arbitration agreement in order for it to be joined. Vader is hereby bound by such agreement alternatively on the basis of (1) implied consent, (2) agency, (3) alter ego, or (4) estoppel. In furtherance of that, the arbitral tribunal shall have regard to any relevant circumstances or any prejudice that may affect the additional party according to Rule 9(1) AIAC and Article 17(5) UNCITRAL Arbitration Rules 2013. In any event, joining Vader does not violate any transnational norm therefrom.

III. THERE WAS A VALID ACCEPTANCE OF THE RESPONDENT'S OFFER

Article 2.1.6 UNDROIT Principles stipulates that an acceptance is a "statement made by or other conduct of the offeree indicating assent to an offer". By responding to Mr. Paredes's offer with an Indian head nod, Mr. Deewarvala indicated his intent to be bound by the terms of the offer. In accordance with Article 4.2(1) UNIDROIT, Claimant's subjective intention prevails in this case

considering the Defendant knew and could not have been unaware of such intention. Even if the reasonableness test under Article 4.2(2) applies, the Indian nod shall still be construed as an act of commitment.

IV. RELIEF THAT THE TRIBUNAL SHOULD GRANT

Claimant sought the following reliefs: (i) to declare that the Contract was existent and enforceable; (ii) to order the Respondent's performance (the first two deliveries of 2017); (iii) to set the terms of the Contract in writing. There are *substantial grounds* for these claims. As to the first relief, the imposition of duty to negotiate in good faith in accordance with Article 2.1.15 UNIDROIT shall be applied to establish the formation of contract. In the absence of any clause invalidating the agreement, this agreement is binding and enforceable upon the Parties according to Article 1.3 UNIDROIT. Regarding the second relief, Claimant contends that it is entitled to specific performance under Article 7.2.2 UNIDROIT due to Respondent's failure to perform. Finally, Claimant has the right to seek reformation of contract on the basis of equitable intervention.

PLEADINGS

ISSUE 1: THE AGREEMENT TO ARBITRATE IS NOT INCAPABLE OF BEING PERFORMED DUE TO IMPECUNIOSITY OF THE RESPONDENT

I. Respondent is not impecunious

a. The burden of proof rests on respondent

1. The AIAC has the power to decide *prima facie* if the party has sufficiently demonstrated that it does not have enough funds to contribute to the advance on costs.[1] A well-established rule is that the alleging party must prove its allegations. Accordingly, Respondent seeks to challenge the arbitration agreement on the basis of its own impecuniosity[2] so it is wholly required to present supporting evidence.[3]

2. Further, international practice establishes that the standard of proof must be set high with respect to impecuniosity,[4] where the tribunal must not satisfy itself with a mere balance of probabilities.[5] Instead, a party must show that it has tried in good faith and failed to obtain third-party funding for the procedural costs associated with pursuing arbitration in accordance with the evidential burden of *sufficient evidence* to make out a *prima facie* case.[6] This means the production of documents with the respective explanation and interpretation.[7] In such instance, Respondent is expected submit a letter from a litigation funder that has declined to fund.[8]

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[1] Fabbri, p. 80.
[2] Record, para. 57.
[3] Moyano, p. 645-47.
[4] GOELER, p. 78
[5] *See* Kudrna.
[6] BOJCZUK, p. 57.
[7] *Supra* note 1, p. 81-82.
[8] *Supra* note 4.

b. Respondent fails to establish its impecuniosity and alternatively, it did not exhaust all options in good faith

3. Respondent fails to present any hard evidence that it did, in fact, seek third-party funding to negate its impecuniosity. Assuming *arguendo* that such evidence does exist, Respondent was in bad faith because it did not exhaust all available options. First, Respondent did not make an attempt at after-the-event insurance that might still allow for respondent to obtain funding where a dispute has already commenced.[9] Second, even if Vader no longer holds *de jure* control over Respondent, it never contacted Vader as a third-party source to fund its litigation. Finally, being given as much as 6 months, and considering the booming business of third-party funding, it is unreasonable that Respondent could not manage to find a funding source.

II. Assuming *arguendo*, impecuniosity is not a legitimate basis for the "incapable of being performed" standards.

4. The expression is attributable to a situation in which "the arbitration cannot be effectively set in motion" because of a physical or legal impediment.[10] The issues of impecuniosity is invariably based on domestic law, either the law of the place where the award will be made, or the law of the underlying contract.[11] The applicable law in the present dispute is definitely Cambodian Law on Commercial Arbitration as the contract, along with the arbitration agreement, was signed and performed in Cambodia. However, Cambodian legislation does not shed further light to the term "incapable of being performed", thus we are led to examine international practice instead.

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[9] *Id.*, p. 12.
[10] Mertcan İPEK, p. 712; ERK, p. 71; KRÖLL, p. 326.
[11] *Supra* note 3, p. 642 – 43; Choi, p. 110–111; *Bulgarian*, 25 BERG; 28 BERG, p. 883; BORN, p. 506.

5. Cambodia Commercial Arbitration Law is largely based on the provisions of ULM,[12] and the term "incapable of being performed" at issue was neither taken over in the context of comment or discussion from Article II(3) of the New York Convention, nor was it discussed at the 1958 New York Conference.[13] However vague the term might be, it has been widely established that an inability to pay advances on the costs of the arbitration should not mean that an arbitration clause is incapable of being performed.[14] In other words, an allegation of impecuniosity should not be allowed as an excuse not to comply with the arbitration agreement.[15] Parties are therefore obligated to honor their agreement in accordance with the principle of *pacta sunt servanda*.[16] This position has been adopted by various national jurisprudence, prime examples being the USA, English and French system.[17]

III. Assuming *arguendo*, continuing the arbitration is permissible

a. Respondent's procedural rights are not violated regarding its financial position to submit counterclaims

6. Firstly, by accepting the decision to be rendered by an arbitral tribunal, the respondents are leaving the "protective umbrella of the state". They are hence solely liable for the financing of the chosen forum. In the case *Portugal No. 1, A (Netherlands) v. B & Cia. Ltda., C and others*, the appellants were impecunious, and were unable to submit their counterclaims in the arbitration. The Portuguese Court held that international public policy under the New

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[12] RESPONDEK/FAN, p. 43.
[13] *See* BROCHES.
[14] *See* REDFERN/HUNTER.
[15] *Supra* note 1, p. 74-76.
[16] KRÖLL, p. 341; Mertcan İPEK, p. 715.
[17] *Trunk Flooring* (2015); *See* Chin; Janos Paczy (1981); ERK, p. 531; *See* Segesser.

York Convention does not include: "*a principle which would provide for complementing the insufficient [financial] means of [an entity] that by nature only exists because and to extent that it has the economic means necessary for its existence.*" [18] It further explained that parties to the arbitration agreement should have been aware of future costs which arbitration proceedings would entail. Henceforth, international policy was not violated and the award was enforced.[19]

7. A *prima facie* standard was seemingly established where the only exception is when the impecunious party *subsequently* finds itself *without fault* in financial difficulties "*that makes access to justice totally impossible where the obligation to submit to the arbitral tribunal still exists*", and that the burden of proof rests squarely on Respondent to prove its faultlessness.[20] In any event, however, Respondent is entirely responsible for its business practice. Firstly, Respondent should have understood and anticipated any loss or profit arising thereof. The state of impecuniosity is thus attributable to Respondent's own actions. Secondly, though indirectly affected through Vader, both Respondent and Vader must have foreseen the possibility of Brexit and adjust their commercial operations accordingly, as much as Respondent should "have been aware of the future costs which arbitration proceedings would entail". Any argument made on Brexit as the cause of Respondent's predicament is hence unjustifiable.

[18] *Portugal* (2003), 32 BERG, p. 474 – 479.
[19] Zivkovic, p. 202.
[20] *Supra* note 18.

b. Respondent's procedural rights are not violated regarding its effective defence (notwithstanding the submission of counterclaim)

8. Respondent may advance allegations on the grounds of its effective defense. The costs which are necessary for respondent's effective defense include, but are not limited to, attorney's fees, travel fees, technical advisers' fees and the readjustment of the advance on costs, etc.[21] Amidst waning business however, Respondent was still capable of hiring in-house council to take care of its legal matters and delegating attorneys to present in the current arbitration. This is enough proof that Respondent can still guarantee its defense.

[21] *Supra* note 19, p. 206.

ISSUE 2: THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION SHOULD BE GRANTED BY THE TRIBUNAL

9. Pursuant to Rule 9(1) AIAC Rules, the request of joinder shall be granted provided that the additional party is *prima facie bound* by the arbitration agreement. In doing so, the arbitral tribunal shall have regard to any relevant circumstances and any prejudice that may affect the additional party according to Rule 9(1) AIAC Rules and Article 17(5) UAR 2013.

I. Vader is *prima facie* bound by the arbitration agreement

10. A joinder of an additional party into arbitral proceedings in the present case shall justify itself on grounds of (1) implied consent, (2) agency, (3) alter ego, and (4) estoppel and can be sought by either signatories or non-signatories.[22]

a. Through implied consent.

11. Arbitral jurisdiction based on implied consent involves a non-signatory that should reasonably expect to be bound by (or benefit from) an arbitration agreement signed by someone else.[23] Moreover, joinder extends the basic paradigm of mutual assent to situations in which the agreement shows itself in behavior rather than words,[24] including *through the negotiation* of the contract, or related agreements; or non-signatories may have benefit from the contract, or may acted in such way that it would be inequitable for a party to avoid arbitration of the dispute.[25]

[22] Park, paras. 1.11, 1.48, 1.56; Hosking, p. 482.
[23] Pociute, p. 15; Park, p. 4.
[24] UNIDROIT principles, Article 2.1.1 states that a contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.
[25] POUDRET/ BESSON, para. 251.

12. In this case, although Vader did not sign the arbitration agreement, it is evident that Chap - CEO of Vader – did in fact enter negotiations with the CEO of Claimant. Together, they even came to an accord on most of the terms of their future venture.[26] Since Chap's intentions reflects that of Vader, this proves that Vader had played an active[27] and significant[28] role in contract formation as it started the entire venture for Respondent. In this sense, any later agreements between Claimant and Respondent are mere recreations of Vader's and Respondent's designs. The deliberations and intentions between Vader and Claimant are sufficient to justify Vader being bound by the arbitration agreement.

b. Under the agency doctrine.

13. Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act". If a party signs an agreement in the capacity of a non-signatory's agent, the non-signatory may be bound by the agreement's arbitration requirement.[29] An agency relationship may be demonstrated by "written or spoken words or conduct, by the principal, communicated either to the agent (actual authority) or to the third party (apparent authority)".[30] In other words, when the case lack an express agreement, the tribunals must look at the conduct of the party.[31]

14. When incorporated in January 2013, Respondent was envisioned to be Vader's extended arm in the Asian market and it complied as such. Under Vader's authority, Respondent was

[26] Record, para. 10.
[27] If the prime contractor's controlling shareholder had participated actively in negotiating the original agreement, it might be argued that the parties' true intent (albeit implied) had always been that the parent should be responsible for paying for any extra work. *See* Park, p. 5.
[28] *ICC No. 11160*, joining a non-signatory that played a significant role at the time of contract formation.
[29] *Srivastava* (2000), p. 353, 369; *Bridas* (2003), p. 345, 347.
[30] *Hester* (1989), p. 170, 181; *Arriba* (1992), p. 528, 536.
[31] *Supra* note 23, Pociute, p. 18.

effectively representing Vader in trade. This is supported by the fact that Respondent intentionally arranged Chap for the initial negotiation, who was also disclosed[32] about the subsequent agreement. This position is further strengthened by the fact that Vader and Respondent both produce and commercialize the same type of bricks. Respondent was merely assigned to carry out the contract originally intended by Chap and Claimant.

c. Under the alter ego doctrine.

15. The alter ego doctrine binds the dominant non-signatory party to the arbitration agreement of the dominated signatory party.[33] The doctrine precludes a legal entity from hiding behind the company that signed the agreement as a way to avoid its responsibility.[34]

16. The starting point for analysis lies in the law of the place of incorporation,[35] in this case Cambodian Law on Commercial Enterprise. However, Cambodian legislation does not provide an application of the doctrine, hence transnational norms[36] will be examined. As such, the Powell test[37] shall be examined to determine whether there is disregarding of corporate personality: (1) inadequate capitalization;[38] (2) parent finances the subsidiary;[39] (3) parent caused the incorporation of the subsidiary;[40] (4) subsidiary receives no business except that given to it by the parent.

17. First, Vader only injected just enough funds for Respondent to be established and begin initial operations. It did not leave leeway for any other expected liabilities – most notably

[32] Sentner, p. 66.
[33] Loban, p. 19; Yaraslau, p. 173; MacHarg et al., p. 16 (2007).
[34] Park, p. 16.
[35] *Id.*, 18
[36] *See* Rodler.
[37] Corrie, p. 58; *see* also generally Loban; *supra* note 32.
[38] Matheson, p. 1130.
[39] POWELL, p. 9.
[40] *Ibid.*

the reality that Respondent was barely breaking even in its activities. Second, because of that, Respondent was entirely dependent on Vader's capital, so much so that it was operating with no profit. Third, Vader caused the incorporation of Respondent where Vader was the sole shareholder, the negotiations between Vader and Claimant merely resulted in the contract between Respondent and Claimant. Finally, the subsidiary Respondent is only able to carry out the business originally assigned to it without being able to conduct anything else as evidenced from the record.

18. From the above considerations, Vader has had such extraordinary control[41] over Respondent for 3 deliveries that this alone is sufficient to establish the alter ego doctrine. Additionally, it would be unreasonable to claim that by later motioning for Respondent's independence, Vader has absolutely no responsibilities since Vader has been benefiting from the 3 deliveries already.

19. Assuming *arguendo* that further examination requires notwithstanding the control/dominance elements, it is important to note that Respondent incorporation was intentionally implemented by Vader as a hit and run tactic. Vader could deny all responsibilities wherever it deems convenient while Claimant and Respondent are left to handle all damages. In other words, Respondent merely acts as Vader's shield, and could be discard when the latter sees fit. Therefore, Vader is bound by the arbitration agreement.

d. By estoppel.

20. The estoppel principle denotes a situation where a non-signatory is barred (estopped) from asserting inapplicability of an arbitration clause because has received a *direct benefit* from

[41] *Supra* note 38, p. 1125.

the contract containing the arbitration clause.[42] The doctrine has also been expanded in use to cover situations where third party beneficiaries of a contract containing an arbitration clause evade liability on the mere basis of being a non-signatory.[43]

21. Here, it was not after 3 deliveries that Vader started to cut ties with Respondent. This means that for the duration from March to September, Vader had been continually benefiting from Respondent's business. This is a direct violation of equity. Even in the event that Vader did not receive money from Respondent, the former was already able to establish its presence and prestige in the Asian market. These benefits, although non-financial, are benefits nonetheless. The doctrine of estoppel thus disallows Respondent to refuse joining Vader to the arbitration.

II. Granting the request for joinder is permissible under public policy

a. The joinder complies with the principle of parties' equality

22. Under the UAR Article 17(1), parties must be 'treated with equality'; and equal treatment is of course not a mechanistic concept, but rather imports the requirement of treating the parties fairly in the light of all the circumstances, especially the constitution of the arbitral tribunal.[44] However, it is also widely accepted that any person entering into an arbitration agreement under the 2013 Rules is deemed to have accepted that it might be joined after the arbitrators have been chosen.[45] The argument that Vader's procedural rights are violated thus cannot be raised as it was effectively waivered.

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[42] *Supra* note 34, p. 13.
[43] Pavic, p. 224.
[44] REVISION, para. 116.
[45] *See* UNCITRAL Report of 49th Session, para. 130; and APRAG Report of 49th Session, para. 95.

23. Alternatively, the formulation of the term "prejudice" under Article 17(5) UAR 2013 indicates the direction of the tribunal's inquiry in two respects: first, the test is a high one – 'prejudice' is clearly stronger than 'convenience'; secondly, the test is formulated as an exception – if the tribunal does have jurisdiction over the person to be joined, that person being a party to the arbitration agreement, the presumption under article 17(5) is that the tribunal should exercise its jurisdiction 'unless' this would prejudice any party.[46]

24. In this sense, Vader's rights to constitution of the arbitral tribunal is only truly prejudiced if it has a distinct and opposing interests with the existing arbitrators, and that joining Vader would be grossly against its interest. Here, there is no evidence to suggest that at least 1 of the arbitrators has opposing interests with Vader. The constitution of the arbitral tribunal does not amount to prejudice but rather convenience at most.

b. The joinder complies with the principle of equity (due process)

25. Under the principle of equity, where adding an additional party places a minimal burden on the original parties and the risk or cost to an existing or third party of not permitting joinder or intervention is *high*, the arbitral tribunal should strongly consider letting the third party into the action.[47]

26. The following equitable factors shall be taken into account to determine whether the request for joinder should be granted: (1) significant or irreparable harm to an existing or third party if joinder is refused; (2) the existence of a contractual link between an existing party and the third party; (3) efficiency of arbitration as a dispute resolution mechanism, (4) the cost (in money, time, judicial resources, etc.) of having multiple hearings.[48]

[46] PAULSSON/ PETROCHILOS, p. 141.
[47] Strong, p. 981.
[48] Id., 986.

27. First, Vader is able to provide funding for the arbitration as implicated in the present dispute. Secondly, the joinder would greatly enhance the efficiency of arbitration and increase cost efficacy. If this is done correctly, Claimant will not have to undergo 2 arbitral proceedings, each with Vader and Respondent respectively, not to mention having inconsistent awards or *res judicata* effects.[49] Moreover, Claimant would not be required to reprove its case on the second proceeding should it take place. Therefore, the joinder is of utmost necessity in this case.

[49] *See* BORN, p. 2584, Chapter 18; *Supra* note 46, p. 35.

ISSUE 3: THERE WAS A VALID ACCEPTANCE OF THE RESPONDENT'S OFFER

28. Article 2.1.6 UNDROIT Principles stipulates that an acceptance is a "statement made by or other conduct of the offeree indicating assent to an offer". During a negotiation session through Skype call on 23 November 2016, Mr. Deewarvala responded to Mr. Paredes's offer by doing an Indian head nod.[50] Such gesture subjectively serves as an indicia to his assent to the offer.

I. Claimant subjectively indicated its intent to be bound by the terms of offer

a. The subjective test is solely applicable to the interpretation of the Claimant's conduct.

29. Article 4.2 UNIDROIT lays out two tests of interpretation of which the subjective test prevails in this case. The subjective test is based on the actual intentions of the parties.[51] In line with this, Article 4.2(1) provides that preference is to be given to the intention of the party concerned, provided that the other party knew or could not have been unaware of that intention. This may be the case that "the parties either already had strong business ties or knew each other well, or the statements and conduct of each could be known and decoded by the other party".[52]

30. The extent to which Mr. Paredes acknowledged Mr. Deewarvala's actual intention when using the Indian head nod depends not only on Mr. Paredes's sphere of knowledge at the time of negotiation, but also on the gesture itself – and the extent to which it was communicated to Mr. Paredes.

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[50] Record, para. 30, 35.
[51] Grigoleit/Canaris, p. 5.
[52] *ICC No. 8324*.

31. First, both parties had already established strong business ties prior to the negotiation. The representatives first met in September 2013 and has since been good business partners.[53] They even met further discussed their business opportunity in Paris on November 2014.[54] Mr. Paredes had had many opportunities to get to know Mr. Deewarvala on both professional and personal terms, thereby familiarizing himself with Mr. Deewarvala's ways of communication. Mr. Paredes himself even acknowledged Respondent's reliance on such strength of the relationship in 2016.[55] As a result, the representatives must have known each other well.

32. Second, the Indian head nod is a common gesture found in South Asian cultures, most notably in India as a way to respond in the affirmative, meaning "yes" to an offer;[56] people may expect to encounter it often when doing business in India or with an Indian counterpart. In such context as intercultural business negotiations, it is unlikely that Mr. Paredes was unfamiliar with the Indian background and communication style of his business partner.

33. With all due regards, there is clear indication that Mr. Paredes was aware that Mr. Deewarvala, by doing the Indian head nod, had agreed on the proposed terms and intended to maintain their contractual relationship. This acknowledgment of Respondent's representative laid the present case squarely within Article 4.2.1 UNIDROIT. Thus, the Indian nod shall be interpreted according to Claimant's intention, which is to accept Respondent's offer.

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[53] Record, para. 13.
[54] Record, para. 20.
[55] Record, para. 25.
[56] *See* Cook.

b. The Indian nod was a valid acceptance pursuant to the subjective test

34. By doing the Indian head nod, the Claimant subjectively intended to be bound by the offer. This position was made in light of the context of the expression, taking all relevant circumstances into consideration.[57]

II. Assuming *arguendo* that the reasonableness test applies, the Indian nod is construed as an act of commitment

35. Here, one has to consider previous negotiations and correspondences between the parties. This is consistent with the provisions of Article 4.4 UNIDROIT which provide that regards shall be given to the preliminary negotiations between the parties and the general context of which the expression is deemed an integral part. Further, in the Arbitral Award granted on September 1998, the ICC Tribunal examined the previous behavior of the parties, more specifically the proposals and counterproposals formulated gradually prior to the meeting in order to determine the content of the settlement agreement.[58]

36. Mr. Deewarvala's interest in maintaining their business relationship was clear from the onset of the negotiation. He had expressed that their relationship was important to the Claimant and thus was willing to include more bonuses. Mr. Deewarvala spent 4 hours to patiently negotiate and convince the other counterpart – who he knew was no longer interested – to finalize the deal. To this ends, Mr. Deewarvala made sure to communicate such intention to Mr. Paredes.[59]

37. Further, the fact that Mr. Deewarvla restated the terms of the counter-proposal suggests that he actually considered the 35% bonus. After receiving confirmation of the deal, he

[57] Article 43, 44 UNIDROIT.
[58] *ICC No. 8908*.
[59] Record, para. 32.

immediately responded with the Indian head nod, without showing any signs of hesitation or complaint. Considering the gradual escalation of actions during the negotiation, a reasonable person in the same circumstance would construe the Indian head nod as an acceptance. To think the Buyer would terminate their agreement in one brief action despite having invested so much time and considerations into the deal is highly questionable, especially when the relationship between the two parties have always relied on trust and good faith.

38. To conclude, there was a valid acceptance by conduct. Claimant accepted immediately upon the oral offer,[60] thereby satisfies the requirement of time of acceptance under Article 2.1.7 UNIDROIT. The acceptance became effective at the moment the indication of assent reached the offeror.[61]

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[60] Record, para. 35.

[61] COMMENTARY, Comment 4 to Article 2.1.6.

ISSUE 4: RELIEFS THAT THE TRIBUNAL SHOULD GRANT

39. Claimant sought the following reliefs: (i) to declare that the Contract was existent and enforceable; (ii) to order the Respondent's performance (the first two deliveries of 2017); (iii) to set the terms of the Contract in writing.[62] There are *substantial grounds* for these claims.

I. The contract was existent and enforceable

40. A contract is concluded by the mere agreement of the parties, without further requirements.[63] The conclusion of a contract is not subject to any particular form.[64] Within the context of negotiations, the exact moment of contract formation is the time at which the parties reach a *point of no return* in the negotiation process and are bound by a contractual obligation.[65] This implied duty to negotiate in good faith can be found in Article 2.1.15 UNIDROIT and has been established in international practice.[66]

a. Respondent's conduct resulted in Claimant's reasonable reliance

41. When a *point of no return* is reached depends foremostly on the extent to which the other party, as a result of the conduct of the first party, had reason to rely on the positive outcome of the negotiations.[67] To this end, one may consider the circumstances surrounding the negotiations of the agreement and the conduct of the parties.[68]

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[62] Record, para. 45.
[63] Article 3.1.2 UNIDROIT.
[64] Article 1.2 UNIDROIT.
[65] Pannebakker, p.139.
[66] *ICC Case No. 8540/1996*; *CJEC C334/00* (2002), para. 56.
[67] *Supra* note 61, Comment 4 to Article 2.1.15.
[68] *ICC Case No. 8540*; *Id.*, Comment 2 to Article 2.1.2.

42. The negotiations between the representatives were developed in an intensive and cooperative manner.[69] As the conversation progressed, an extent of compromise started to emerge. At one point, Mr. Paredes discussed the desirable outcome concerning the value of the contract that his client expected from the distribution agreement.[70] He continued to reinforce his position and ultimately asked Mr. Deewarvala a final question of "Yes or no?" Such inquiry not only showed Mr. Paredes' strong commitment to the agreement but also reasonably induced Mr. Deewarvala to rely on the positive outcome of the negotiation, to the extent that it necessitated the imposition of the duty to negotiate in good faith.

b. The agreement was definite

43. When determining whether an agreement is reached during a negotiation, the definiteness of an agreement shall also be examined. [71]. To this end, one may consider the terms of the agreement at the time that it was made, including the number and significance of open terms.[72]

44. Although the representatives did not specify all the terms of the agreement during their talk, issues that are essential in reaching the consensus between the two including the parties' obligation and value of the contract were laid out clearly.[73] The missing terms can be taken from the Contract signed in September 2013 and previous agreements of the two companies over the years in accordance to Article 4.8.

45. The parties' conduct during the negotiation resulted in the imposition of a duty to negotiate in good faith, leading to the formation of an agreement. It should be noted that while

[69] Record, para. 33, 38.
[70] Record, para. 34.
[71] *Supra* note 61, Comment 4 to Article 2.1.15.
[72] *ICC Case No. 8540*; Eisenberg, p. 1795.
[73] Record, para. 34.

mistake remains a question of validity, according to Article 3.2.4 UNIDROIT, a party shall not be entitled to the avoidance of the contract when the remedy of non-performance is invoked. In the absence of any cause invalidating the agreement, this agreement is binding and enforceable upon the Parties according to Article 1.3 UNIDROIT.

II. Respondent's failure to perform amounts to a non-excused non-performance entitling order of specific performance.

a. Respondent's failure to perform amounts to a non-excused non-performance

46. For the purpose of the UNIDROIT Principles, non-performance is defined as "failure by a party to perform any of its obligations under the contract, including defective performance or late performance."[74]

47. Respondent has failed to perform its first two deliveries of 2017.[75] Respondent cannot be excused of its non-performance because it was not subject to any interference from the other party, withholding performance or force majeure events.[76]

b. Claimant has the right to order the Respondent's performance

48. According to Article 7.2.2, with some exceptions, when a party who owes an obligation other than one to pay money does not perform, the other party may require performance. Claimant has the right to require performance because the circumstances in the case at hand do not fall within any exception clauses provided under the Article.

49. It is further submitted that one shall not rely on the delay in request in clause (e) to deprive Claimant's entitlement to performance. The clause was meant to prevent any risk that may

[74] Article 7.1.1 UNIDROIT.
[75] Record, para. 43.
[76] *Supra* note 61, Comment to Article 7.1.1.

arise from the obligor's the state of uncertainty as to whether performance will be required.[77] This was not the case here, considering the fact that Claimant's notice was already sent to the Defendant in the middle of March of 2017[78], giving rise to Defendant's acknowledgement of its obligations. Therefore, Claimant's conduct conforms with the requirement of time of request. This position was further supported in the case [79]

III. To set the terms of the Contract in writing

a. Reformation of contract should be employed

50. In the absence of the requested remedy under the UNIDROIT Principles, equitable intervention should be employed to ensure parties' true intentions are reflected in case of mistake.[80] According to a Singaporean decision, a party acting under a unilateral mistake may seek reformation if the mistake is fundamental and the other party had actual, constructive knowledge of his mistake.[81] This position is consistent with many rulings in the US and France.[82]

b. Claimant is entitled to reformation of contract

51. Article 3.4 of the UNIDROIT Principles defines mistake as "an *erroneous assumption* relating to facts or to law existing when the contract was concluded." *Erroneous assumption*, by virtue of article 3.2.3 UNIDROIT, is explicitly broadened to include "an error occurring in the expression of a declaration."

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[77] *Supra* note 61, Comment 3 to Article 7.2.2.
[78] Record, para.43.
[79] *ICC No. 9474*, p. 13.
[80] Sabbath, p. 829.
[81] *Chwee Kin Keong* (2005), paras. 75-76, 80.
[82] *Petit* (1899); Lecarpentier (1989)

52. In this case, there was indeed a mistake in expression as Mr. Deewarvala did an Indian head nod in response to Mr. Paredes's proposal. As has been established, so fundamental is this mistake that any reasonable person would have been aware of it.

PRAYER FOR RELIEF

In light of the foregoing considerations, Claimant respectfully requests the Tribunal to declare that:

I. The Agreement to arbitrate is not incapable of being performed due to impecuniosity of the Respondent

II. The request of the claimant to join Vader as a party to the arbitration should be granted by the Tribunal

III. There was a valid acceptance of the Respondent's offer

IV. The following reliefs should be granted:

i. To declare that the Contract was existent and enforceable;

ii. To order the Respondent's performance;

iii. To set the terms of the Contract in writing.

Respectfully submitted,

Chuizi Leishen's LLC, THE CLAIMANT