THE 13TH LAWASIA INTERNATIONAL MOOT COMPETITION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

SIEM REAP, CAMBODIA

2018

BETWEEN

CHUIZI LEISHEN'S LLC

(CLAIMANT)

AND

ROBUSTESSE ESPACIAL SOLUTION CORP

(RESPONDENT)

MEMORIAL FOR RESPONDENT

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STATEMENT OF JURISDICTION

Chuizi Leishen's LLC ("Claimant") and Robustesse Espacial Solution Corp ("Respondent") have consented to submit the dispute to arbitration in accordance with the Kuala Lumpur Regional Centre for Arbitration Arbitration Rules (KLRCA Arbitration Rules).

QUESTIONS PRESENTED

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

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

3. Whether the Contract was validly formed during the Skype call.

    a. Whether the Claimant's sideway nod was a valid acceptance or was otherwise a rejection

    b. Whether the Contract was validly formed given that the Parties attach two different meanings to the Contract

STATEMENT OF FACTS

1. The Claimant, Chuizi Leishen's LLC ("CL", "Claimant", or "Buyer") is the People's Republic of China commercial company specializing in construction. 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.

2. The Respondent, Robustesse Espacial Solucion Corp ("RES", "Respondent", or "Seller") is a limited Company duly incorporated under the laws of Cambodia which is a wholly owned subsidiary of United Kingdom company Vader Ltd "Vader". RES's main activity is the production and selling of brick

3. By September 2013, Mr. Parades (Representative of RES) and Mr. Deewarvala (Representative of CL) (individually as a "Representative" and jointly as"Representatives") signed a contract ("the Contract") which requires four deliveries of bricks in 2014 (on the last working day of March, June, September, and December)

4. The delivery started in 2014. The first three deliveries and payments were successful

5. On November 2014, the representatives met and the Buyer offered "First incentive" which is 15% price increase for the 4th delivery of 2014 and four more deliveries in 2015.

The performance of the deliveries and payments of 4th delivery in 2014 and 4 deliveries in 2015 were successful.

6. The parties continued the agreement of four deliveries throughout 2016 with 15% price increase but no formal contract was executed.

7. On June 2016, Vader passed a motion such that no further financing, compliance monitoring or directives would be given to RES. Mr. Paredes had full control over RES.

8. The first three deliveries of 2016 were successful and the representatives talk to make moves throughout 2017 and 2018. On November 23th 2016, the representatives negotiated about “Second Incentive” which is 15% price increase for 2017 and 35% bonus at the end of the year and the Seller promised for 8 more deliveries for 2017-2018

10. Mr. Deewarvala accepted but did the sideway head shake which meant he agreed but the Seller thought that the Buyer refuses his proposal and thought that Contract was terminated. After that, the last delivery of 2016 was delivered.

12. In March 2017, the Buyer contacted the Seller to confirm the deliveries for 2017. The representatives knew that there was misunderstanding.

13. The Buyer filed a claim to AIAC requesting relief which is

a. To declare that the contract was existent and enforceable

b. To order the respondent to perform the deliveries

c. To set terms of contract in writing

14. AIAC requested USD 25,000 security deposit. The Claimant paid 50% of security deposit and the Respondent refused to pay the share.

15. Respondent claimed that the contract is already terminated and the agreement to arbitrate had become null because Respondent is incapable to perform it but if the contract is still enforceable the respondent will file counterclaim.

16. The Respondent counterclaim is mainly about the payment of the second incentive and brick delivering, Interests for the payment, the counsel's fees and the costs of arbitration. The problem is the respondent cannot file the counterclaim due to the cost of arbitration.

17. Claimant denied the Respondent's counter-claims and requested that Vader join the Seller's party to support the costs of the arbitration.

18. The parties now request for the Hearing which will take place on November 2-5, 2018 in the Kingdom of Cambodia. The applicable law shall be the UNIDROIT Principles and KLRCA Arbitration Rules.

SUMMARY OF PLEADING

A. The agreement to arbitrate is incapable of being performed due to the impecuniosity of the respondent.

The agreement to arbitrate is incapable of being performed. KLRCA rules 2017 states that if the security deposit is not paid in full, the Director shall terminate arbitral procedures. Since the respondent is impecunious and unable to pay for the security deposit, the arbitral procedures cannot be proceeded which makes the agreement to arbitrate incapable of being performed. Even the arbitral procedures can proceed because the claimant pay for the share, the respondent will be denied the right to access arbitral justice because the respondent is still unable to pay for the counterclaims.

B. The request of the claimant to join Vader as a party to the arbitration should not be granted by the tribunal

The tribunal should not granted the request of the claimant to join Vader as a party to the arbitration due to the fact that The tribunal cannot proceed to resolved the request because KLRCA procedural rule and Vader is not binding to the contract

C. There is no valid acceptance of the Claimant's offer

1.The Contract was not validly formed during the Skype call because the sideway nod was not a valid acceptance

The Claimant's sideway nod was not a valid acceptance given it is interpreted under UNIDROIT Principles Art 4.2 and objective test. Therefore the Contract was not validly formed due to lack of acceptance.

2.Even if the Claimant's sideway nod was a valid acceptance, there was no valid contract because the Parties' lack of mutual assent.

The Claimant and the Respondent attached different meaning to the same contract showing the lack of mutual assent between the Parties. Neither of the Parties knew or had a reason to know the meaning attached by the other party. Therefore there is no basis for holding one of the parties responsible for knowing the correct term, then there is no valid contract

PLEADING

I. The agreement to arbitrate is incapable of being performed due to the impecuniosity of the respondent.

1. The parties agreed to settle the dispute, controversy or claim arising out of the contract by arbitration procedures. After the misunderstanding occurred between the claimant and the respondent, the case shall be settled by arbitration and the agreement to arbitrate is capable of being performed because respondent is impecunious and unable to pay for the security deposit [A]. Respondent is impecunious and unable to file counterclaim [B]. Respondent is denied the rights to access arbitral justice.

A. Respondent is impecunious and unable to pay for the security deposit.

2. The parties agreed to use KLRCA rules 2017 to settle the dispute, controversy or claim arising out of the contract. The procedural law governed the contract shall be KLRCA rules 2017.

According to KLRCA rules 2017, rule 14[1]

14(6) Notwithstanding Rule 14(4), where counterclaims are submitted by the Respondent, the Director may fix separate advance preliminary deposits on costs for the claims and counterclaims. When the Director has fixed separate advance preliminary deposits on costs, each of the parties shall pay the advance preliminary deposit corresponding to its claims.

14(7) If the required deposits are not paid in full, the Director shall give the other party an opportunity to make the required payment within a specified period of time.

[1] KLRCA rules 2017, 14

If such payment is not made, the arbitral tribunal may, after consultation with the Director, order the suspension or termination of the arbitral proceedings or any part thereof.

14(8) Notwithstanding the above, the Director shall have the discretion to determine the proportion of deposits required to be paid by the parties.

3. Since the respondent is impecunious and does not have enough funds to pay for the deposit, the Director my order suspension or termination of the arbitral proceedings which makes the agreement to arbitrate in capable of being performed. Moreover, in this case the Respondent is also filing counterclaims which means the director may fix separate advance preliminary deposit. This causes the respondent to pay for the deposit by its own and the claimant would not be able to pay for the respondent's share. Although rule 14(7) gives other party a chance to pay for other party's share in case that the payment is not made, the discretion to determine the proportion of deposit is still belongs to the Director which means the claimant may or may not be able to pay for the respondent's share. The agreement to arbitrate is incapable of being performed.

B. The respondent is denied right to access justice if the agreement to arbitrate is still capable of being performed.

According to KLRCA rules 2017 article 13(7)[2]

4. The arbitrator's fees and the KLRCA administrative fees under Schedule 1 are determined based on the amount in dispute. For the purpose of calculating the amount in dispute, the value of any counterclaim and/ or set-off will be taken into account.

[2] KLRCA rules 2017, s 13(7)

5. According to the fact statement, the respondent is also filing counterclaims which would add in the arbitration costs. Even though the claimant pays for the security deposit and the arbitration proceedings can continue, the arbitration should not be continued because the respondent would not have enough funds to file counterclaim and it would deny the respondent from the access of justice.

6. In a case of German Federal Court of Justice[3], a decision rendered on 14 September 2000, shortly after the entry into force of the revised German arbitration law in 1998. The German Federal Court of justice considered that in case of party impecuniosity, the arbitration agreement becomes incapable of being performed and that termination of the arbitration agreement was therefore no longer necessary. This decision was based on the then newly adopted provision of Article 1032 ZPO which, in relevant parts, provides the following: *"A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed"*

7. Since the respondent does not have enough funding to pay for the security deposit and probably will not have enough money to pay for filing the counterclaim, if the agreement to arbitrate is still capable of being perform, the respondent will be denied the right to access arbitral justice.

II. The request of the claimant to join Vader as a party to the arbitration should not be granted by the tribunal

[3] Bundesgerichtshof, 14 September 2000, III ZR 33/2000, BGHZ 145, 116

8. The tribunal should not granted the request of the claimant to join Vader as a party to the arbitration due to the fact that The tribunal cannot proceed to resolved the request because KLRCA procedural rule (A) and Vader is not binding to the contract (B)

A. the request cannot proceed because KLRCA arbitration rule

9. Due to the fact that ROBUSTESSE ESPACIAL SOLUCION CORP did not pay the security deposit yet. According to Rule 14 (3) of KLRCA arbitration rules 2017

"In the event that any of the parties fails to pay such deposit, the Director shall give the other party an opportunity to make the required payment within a specified period of time. The arbitral tribunal shall not proceed with the arbitral proceedings until such provisional advance deposit is paid in full"[4]

10. The tribunal cannot proceed any request included the request of claimant to join Vader as a party to the arbitration.

B. Vader is not binding to the contract

11. Vader is not binding to the contract because (i) Normally, Non-signatory is not binding to the contract and It clear that other conditions that can be bound non-signatory to the contract such as (ii)agency principle, (iii) Doctrine of direct benefit estoppel, (iv)Group of company doctrine and (v)alter ego doctrine is inapplicable in this case

[4] KLRCA ARBITRATION RULES, 2017 , 14(3)

(i) Normally, Non-signatory is not binding to the contract

13. It is a clear principle that an agreement is "signed by the parties"[5] [6]and non-signatories will generally not be bound to arbitration because there is no privity of contract[7]. In this case, Vader did not signed contract with Chuzi Leizhen's LLC. Vader should not be boned to the contract.

(ii) Respondent is not a Vader's agent

14. Agency relationship is one clause that can bound non-signatory to the contract[8]. Agent is "one individual or legal entity to enter into binding legal acts on behalf of another"[9].To form an agent, It need authorization by the principal may be express or implied[10]. However, there is no clear evidence on how Vader give authorizes to respondent; Therefore, Respondent is not an agent of Vader.

15. Even if Using the Doctrine of apparent authority, Respondent is still not an agent of Vader; because, this doctrine can only be used in the situation that third party, who is claimant, reasonably infers, from the principal's conduct, that the principal granted such power to the agent[11]. However, it is clear distinct between Vader and respondent because Vader and respondent use different commercial name[1213] (Vader Ltd. And Robustee Especial Solucion corp). Moreover, the

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[5]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art .2
[6]UNCITRAL Model Law on International Commercial Arbitration, Art. 7(2)
[7] Robert M. Nelson,' Guide – How to Bind Non-Signatories to an Arbitration Clause; Guide – How to Prevent Non-Signatories From Being Bound by an Arbitration Clause' <http://www.nelsonadr.ca/media.php%3Fmid=14> accessed 17 September 2018
[8] Denney v BDO Seidman LLP 412 F 3d 58, 71
[9]Gary born, International Commercial Arbitration: Commentary and Materials.Kluwer Law International, The Hague, 2nd Ed. 2001 p125
[10] CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS ,Art. 9
[11] Cornell Law School, 'apparent authority' <https://www.law.cornell.edu/wex/apparent_authority> accessed 18 September 2018
[12] Moot problem,Para 4

decision-making power in the contract is came from managing director of respondent not from Vader. Therefore, the doctrine of apparent authority is inapplicable is this case

(iii) Doctrine of direct benefit estoppel is inapplicable in this case

17. Under doctrine of direct benefit estoppel or another term "equitable estoppel"[14], "non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes"[15] However this doctrine is in applicable to this case due to (a) It is not widely accepted (b) Vader is not getting any benefit from this contract

(a.) The doctrine of direct benefit estoppel is not widely accepted

18. The doctrine of direct benefit is only recognized in common law and not recognized as legal institution in civil law[16]

(b.) Vader is not getting any benefit from this contract

19. Under doctrine of direct benefit estoppel, one thing to prove is how non-party get benefit from this contract however It is not clear that Vader got benefit from the contract because the contract is signed between respondent and claimant and

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[13] Moot problem,para 7
[14] HARTFORD LIFE INS. v. FORMAN, 13-08-00547-CV (Tex.App.-Corpus Christi 6-3-2009)
[15] In Re Kellogg Brown & Root, Inc., 166 S.W.3d 732 (Tex. 2005)
[16] Guoqing L, 'A Comparative Study of the Doctrine of Estoppel: A Civilian Contractarian Approach in China.' (2010) 2010 Canberra L Rev 1

clear enough to understand that Vader is not getting any direct benefit such as profit from selling brick.

(iv) The group of companies doctrine is inapplicable in this case

20. Group of companies doctrine is also one of reason that can bound non-signatory to the arbitration clause.[17] The group of company theory relies on two elements, an objective and a subjective one. The first one refers to the actual existence of a group of companies under common ownership, operating and being managed closely by the parent company, and the second one is represented by the implied acquiescence of the parent company to the contracts entered by the subsidiary and the participation of the parent company in the formation, performance and/or termination of the contract**[18]** .

21. However, the group of companies doctrine is inapplicable in this case due to lack of objective and subjective element.

22. On objective element, there is no clear evidence on how respondent is being managed closely by parent company. Even though respondent is a wholly owned subsidiary of Vader[19] at first; however, decision-making power came from the managing director of respondent ,Mr. Armado Parades[20], not from Vader.

[17] Defining the Party: Who is a Proper Party in an Institutional Arbitration before the AAA and Other International Institutions. 34 Geo. Wash. Int"l L. Rev. 711 (2003)
[18] Boza, Rafael. "Caveat Arbiter: The U.S.-Peru Trade Promotion Agreement, Peruvian Arbitration Law, and the Extension of the Arbitration Agreement to Non-Signatories. Has Peru Gone Too Far?" Currents International Trade Law Journal 17 (2009): p. 68
[19] Moot problem,para 8

[20] Moot problem,Para 12

23. On subjective element, There is no clear evidence on how Vader participated in formation, performance and/or termination of the contract

24. Lastly, even though the group of companies doctrine is applicable in this case, the doctrine itself is not widely recognized outside France[21]. Swiss[22] and United stated[23] courts generally rejected joinder based on the group of companies doctrine.

(v) respondent is not an alter ego of Vader

25. The alter ego or another term "piercing the Corporate Veil doctrine"[24] is "Legal doctrine whereby the court finds a corporation lacks a separate identity from an individual or corporate shareholder, resulting in injustice to the corporation's debtors. Finding alter ego gives the court cause to pierce the corporate veil and hold individual shareholders personally liable for debts of the corporation."[25] The alter ego doctrine is also one reason that can bound non-signatory to the arbitration[26].

26. Generally, general test for piercing the Corporate Veil is (a); and (b) being used as a shield for fraudulent or improper conduct.

27. Condition (b) is important. Recognized, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the

[21] Park, William W., Non-Signatories and International Contracts: An Arbitrator's Dilemma (January 1, 2008). 2 Dispute Res. Int'l 84 (2008); Multiple Party Actions in International Arbitration 3 (Permanent Court of Arbitration, 2009); Extending the Arbitration Agreement to Non-Signatories, ch. 4 Int'l Commercial Arb. Practice: 21st Century Perspectives (H. Grigera Naón & P. Mason eds. 2010; 2d Ed. 2013); Adapted from Non-Signatories and International Arbitration, in Leading Arbitrators' Guide to International Arbitration 707 (L. Newman & R. Hill, 3d Ed. 2014); Boston Univ. School of Law, Public Law Research Paper No. 17-27.
[22] Saudi Butec Ltd. v. Al Vouzan Trading et al, 14 ASA Bull. p. 496 (1996)
[23] Sarhank Group v. Oracle Corp., 404 F. 3d 657 (2d Cir. 2005).
[24] Piercing the Corporate Law Veil: The Alter Ego Doctrine under Federal Common Law. (1982). Harvard Law Review, 95(4), 853-871. doi:10.2307/1340779
[25] Cornell Law School, 'Alter Ego' <https://www.law.cornell.edu/wex/alter_ego> accessed 18 September 2018
[26] *See* cases cited Supra note 8.

complete control of the parent and is nothing more than a conduit used by the parent to avoid liability[27]

28. Even though respondent is wholly owned and getting monitoring by Vader, it is not clear how Respondent is "completely dominated and controlled". Secondly, there is no clear example how Respondent is "being used as a shield for fraudulent or improper conduct." From these two reasons, Respondent is not an alter ego of Vader

III. There is no valid acceptance of the Claimant's offer

A. The Contract was not validly formed during the Skype call

29. Mr.Deewarvala's sideway nod was not a valid acceptance. **(i)** and even if the sideway nod was a valid acceptance, the Contract was not validly formed due to lacking of mutual assent between the Parties.**(ii)**

> ***(i) Mr.Deewavala's sideway nod was not a valid acceptance.To determine whether the Parties had reached agreement, thus forming a valid contract, the concepts of offer and acceptance are essential tools of analysis.[28] Both Parties must expressly indicate its intention to be bound by the contract through offer and acceptance at the time of conclusion and establish common intention, or mutual assent.[29]***

30. The intention to be bound by the contract may either be made by an express statement or action or inferred from the conduct of the Parties.[30] In the case of

[27] Gregorio v. Intrans-Corp. (1994), 18 O.R. (3d) 527 (Ont. C.A.)
[28] Art 2.1.1 UNIDROIT Principles 2016

[29] ibid

[30] Art 2.1.6 UNIDROIT Principles 2016

inferred intention, the conduct has to be interpreted in accordance with the criteria set forth in Article 4.1 and 4.2[31]

The statement and other conduct of a party shall be interpreted according to

(1) That party's intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.[32]

31. Mr.Deewavala's sideway nod cannot be interpreted as an acceptance because Mr. Parades did not know or could have been aware of that intention (a) and a reasonable person of the same kind as the Respondent would interpret the nod as a rejection under the same circumstances. (b)

(a.) Mr.Parades did not know or could not have been aware of Mr.Deewavala's intention

32. In order to determine whether Mr.Parades knew or could have been unaware of Mr.Dewarvala's intention, Objective Theory must be taken into consideration. In Objective Theory, it is not Mr.Dewarvala's real intention that must be taken as a decisive factor but rather Mr.Parades' understanding.

[31] Art 2.1.1 UNIDROIT Principles 2016

[32] Art 4.2 UNIDROIT Principles 2016

34. Although the Claimant claimed to have an intention to be bound by the Contract, the conduct he performed cannot be interpreted according to his claimed intention because it can only be done so if the Respondent knew or could not have been unaware of that intention which is not possible in this case.

35. The Respondent, Mr. Amando Parades, is a Mexican-born managing director who completed his education in Mexico and France.[33] In Mexican and French cultures, people interpret a sideway nod as a rejection[34], not an acceptance. Moreover, Cambodian culture where he is currently living in also interprets a so-called nod the same way as Mexico and France.[35]Given the cultural background of the Respondent, Mr.Parades did not know or could have been aware of Mr.Deewavala's intention. Therefore the Claimant's sideway nod shall not be interpreted according to the Claimant's claimed intention under UNIDROIT Principle Art 4.2

> *(b.)* reasonable person of the same kind as the Respondent would interpret the nod as a rejection under the same circumstances.

36. Due to the preceding paragraphs, the Claimant's sideway nod cannot be interpreted in accordance with the Claimant's claimed intention. Hence, it shall accordingly be interpreted by understanding of a reasonable person of the same kind of the Respondent, or objective test.[36]

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[33] Clarifications, Question 5

[34] Autumn,'The Importance of Interpreting Body Language' < https://www.alsintl.com/blog/interpreting-body-language/> accessed 18 September 2018

[35] Ibid

[36] Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256

37. In applying the objective test, no matter what the party's real intention is, if it conducts itself in a manner that a reasonable person would believe that it was assenting or rejecting to the terms proposed by the other party, that party would be equally bound as if it had intended to agree or reject to the other party's terms.[37]

38. Indeed, even if the party does not subjectively intend to be bound, if its actions support the conclusion that it has accepted the offer, it is bound to honor the contract[38] Analogically, even if the party does intend to be bound, if its actions support the conclusion that it has rejected the offer, the contract is deemed to not be formed.

39. To sum up, the terms of a contract are determined by objective rather than subjective criteria[39]

40. In this case, the Respondent is a MBA graduate from France [40] who is not currently working in South Asian countries and has not experienced a culture where a sideway nod is interpreted as an acceptance[41]. Given these backgrounds, reasonable persons of the same kind as Mr.Parades would interpret sideway nod as a rejection, not an acceptance. Thereby, the Claimant's sideway nod shall be interpreted as a rejection.

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[37] smith v Hughes [1871] LR6 QB 597, *see also* Lucy v. Zehmer 196 Va. 493, 84 S.E.2d 516 (1954)

[38] Dodge Street, LLC. v. Livecchi, 32 Fed. Appx. 607, 611 (2d Cir.2002) (summary order).

[39] Winograd v. Am. Broad. Co., 68 Cal. App. 4th 624, 632 (1998)

[40] Clarification, Question 5

[41] Clarification, Question 6

41. Accordingly, there was no valid acceptance because the Claimant's sideway nod did not indicate an intention to be bound. The UNIDROIT Principles establishes that in order to form a valid contract, there must be both valid offer and acceptance. If there was no valid acceptance, the Contract could not be validly formed[42]

(ii) ***Even if the sideway nod was a valid acceptance, the Contract was not validly formed due to lack of mutual assent between the Parties***

42. A manifestation of mutual assent by the parties to an informal contract is essential to its formation.[43] In order for an acceptance to stimulate a valid contract, it ought to notify intention to the person who makes the offer so that both party can have the same understanding.[44] If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all.[45]

43. Here, it is obvious that the Parties attached different meaning to the same contract and no one is at fault, meaning it knew or had a reason to know the meaning attached by the other party. Both the Claimant and the Respondent had justified reasons to believe in their own way of interpretations. Therefore, there is no basis for holding one of the parties responsible for knowing the correct term, then there is no contract.[46]

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[42] Art 2.1.1 UNIDROIT Principle Art 2.1.1

[43] Restatement (First) of Contract Art 20

[44] *See* case cited supra noted 36

[45] Mayawanti v. Kaushalya Devi

[46] Raffles v. Wichelhaus

PRAYER FOR RELIEF

According to foregoing reasons, the Respondent respectfully requests the Tribunal to declare that

1. The agreement to arbitrate is incapable of being perform and shall be settled by Cambodian court

2. The request of the claimant to join Vader as a party to the arbitration should not be granted by the tribunal

3. The Contract was not validly formed between the Parties.