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THE 13TH LAWASIA INTERNATIONAL MOOT

ASIAN INTERNATIONAL ARBITRATION CENTER

2018

CHUIZI LEISHEN'S LLC

Claimant

v.

ROBUSTESSE ESPACIAL SOLUCION

Respondent

MEMORIAL FOR RESPONDENT

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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 INCAPABLE OF BEING PERFORMED DUE TO IMPECUNIOSITY OF THE RESPONDENT

An arbitration agreement shall declared incapable of being performed provided that the arbitration cannot be effectively set in motion" because of a physical or legal impediment. Such impediment manifests in Respondent's impecuniosity to fund its defense. In any event, Respondent has done everything it could to abolish the state of impecuniosity and fails. Additionally, continuing the arbitration is not permissible because it violates the principle of access to justice.

II. THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION SHOULD NOT BE GRANTED BY THE TRIBUNAL

Rule 9(1) AIAC requires that the additional party - Vader be *prima facie bound* by the arbitration agreement. The most possible grounds for binding Vader to such agreement include (1) implied consent, (2) agency, (3) alter ego, or (4) estoppel. In any case, Vader cannot be bound by any of those bases. Further, the arbitral tribunal shall have regard to any relevant circumstances or any prejudice that may affect the Vader according to Rule 9(1) AIAC and Article 17(5) UNCITRAL Arbitration Rules 2013. Accordingly, joining Vader at this stage violates the principle of parties' equality and the principle of equity.

III. THE INDIAN HEAD NOD WAS NOT A VALID ACCEPTANCE TO 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 INCAPABLE OF BEING PERFORMED DUE TO IMPECUNIOSITY OF THE RESPONDENT

I. Respondent is impecunious

a. Burden of proof

1. In principle, the party that invokes an arbitration agreement carries the initial burden over the basic requirements of formal and substantial validity.[1] Once the court is satisfied that the agreement is valid, the burden shifts to the party asserting the invalidity.[2] In this case, the Respondent will prove that it has done everything in its power to substantiate a fund for arbitration.

2. There is also no legal definition of the concept of "impecuniosity". It is "a generic term that refers to various situations, all based on the lack of money"; and "applied to arbitration, the state of impecuniosity refers to the impossibility of a party to meet the costs of arbitral proceedings."[3] Accordingly, respondent will only have to prove that it is impossible to satisfy such costs. In any case, should Claimant wish to demonstrate that Respondent has sought third-party funding in bad faith, it solely rests on the Claimant to prove this claim.[4]

b. Respondent has done everything it could in good faith

3. First, Respondent had sought third party funding but failed due to its precarious financial position.[5] Booming as the third-party funding business may be, the possibility of getting

[1] See BORN; SCHRAMM.
[2] Stavros, p. 343–344.
[3] Kühner, p. 807.
[4] BDMS Ltd. v. Rafael Advanced Defence Systems [2014] EWHC 68 (Comm), para. 37.
[5] Record, para. 61.

funded is statistically low as demand far exceeds supply. Moreover, funders are only in a position to accept around 10% of cases presented to them.[6]

4. Second, although Respondent was given 6 months to look for third-party sources, it would go too far to argue that the increasing availability of external capital for pursuing international arbitration proceedings prevents otherwise impecunious parties from avoiding arbitration agreements.7 Considering Respondent's financial liabilities, impecuniosity and preparation for the coming arbitration, a period of 6 months proves to be insufficient for successfully finding a third-party source.

5. Third, it is understood that after-the-event sources are also available as a viable option. However, pursuing this option is unlikely to bear fruit, as the lender is to determine whether Respondent's case is worth investing. Due to the current financial state, Respondent is in no position to effectively convince a loan, let alone a third party funding.

6. Fourth, Respondent is willing to bring these claims to local courts but they would not be admitted since the arbitration is already underway.8 Under Article 8 Cambodian Commercial Arbitration Law, Cambodian courts may only assume jurisdiction when the arbitration agreement is either found null, void, inoperative or incapable of being performed. In any case, Respondent will prove that the agreement to arbitrate is incapable of being performed.

[6] Hodges, p. 103; Goldsmith, p. 55.
[7] See GOELER.
[8] Record, para. 60.

7. Finally, Vader would not fund the arbitration because it has severed all ties with Respondent.[9] Additionally, Vader does not have the obligation to be joined into the arbitration just to fund Respondent.

II. Impecuniosity is a legitimate basis for the "incapable of being performed" standards

8. 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, which was signed and performed in Cambodia. However, Cambodian legislation does not shed further light on the term "incapable of being performed", thus we are led to examine international practice instead.

9. Cambodia Law on Commercial Arbitration is largely based on the UNCITRAL Model Law.12 In turn, the Commentary on UNCITRAL Model Law sets out the grounds upon which the agreement to arbitrate may be deemed "incapable of being performed". Parties' impecuniosity therefrom could serve as such a ground.13

10. Moreover, various national courts have also taken the position that impecuniosity automatically renders the agreement incapable of being performed.14 The German Federal Supreme Court's judgment of 14 September 2000 has become in many ways a prime

[9] Record, para. 19, 27.
[10] Mertcan İPEK, p. 712; See ERK; KRÖLL.
[11] Moyano, p. 642 – 43; Choi, p. 110–111; Bulgarian; 28 BERG; See BORN, p.506.
[12] RESPONDEK/FAN, p. 43.
[13] UNCITRAL 2012 DIGEST, p.43
[14] KKO 2003 (lack of resources is sufficient to set aside an arbitration agreement under s. 46 of Finish Arbitration Act which orders that both parties must cover the costs of the arbitration); Kammergericht; Cologne.

example of this approach.[15] The principle of *access to justice* must be taken into consideration vis-à-vis the principle of *pacta sunt servanda*.[16] In this case, continuing the arbitration violates the principle of *access to justice*.

III. Continuing the arbitration constitutes denial of justice

a. Respondent's procedural rights if it is not in a financial position to submit counterclaim

11. The submission of counterclaims in AIAC leads to the payment of separate advances.[17] Since a respondent is impecunious, this is followed by payment made only on by claimant for its own claims,[18] while respondent's counterclaims are considered withdrawn. In this case, the respondent, or counterclaimant, is not prevented from defending itself against the claims submitted by claimant, but it is prevented from raising new claims.[19]

12. In the case *Société*, Respondent was deprived of the ability to submit its counterclaims, which were sufficiently connected with the claims, hence being deprived of a possibility to offset claimant's successful claims. The Paris Court of Appeal the parties were not on equal footing and the principle of equality was violated.[20] Further, regarding the violation of the right of access to courts, the Court of Appeal stated that if there are restrictions imposed on this right, they must be proportionate to the proper administration of justice, and the tribunals are also due to apply this principle.[21]

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[15] Bundesgerichtshof. Although it does not appear to have been a critical element in the decision, the court did find that the respondent was not in a position to cover the costs of the arbitration either due to its own insolvency.
[16] KRÖLL, p. 344; Mertcan İPEK, *Interpretation of Article II(3) of the New York Convention* 715.
[17] Rule 14(4), AIAC.
[18] Record, para. 48.
[19] Zivkovic, p. 200.
[20] *Id*., p.204.
[21] Société.

13. Although the decision of the Court of Appeal was annulled, it was on the grounds that the Court failed to examine whether the counter-claim are inseparable from the main claims. To this ends, scholars rightly pointed out that it is up to the arbitral tribunal to decide on this issue on a case-by-case basis.[22]

14. Here, each segment of the counter-claim runs congruence to the Claimant's claim value at USD456,262,500. The lost profits is intrinsically linked to claimant's relief to order respondent's performance regarding the deliveries. Thus, continuing the arbitration is not justifiable with regards to Respondent's procedural rights.

b. Respondent's procedural rights when it cannot pay the costs for effective defence (notwithstanding the submission of counterclaims)

15. The costs which are necessary for respondent's defense include, but are not limited to, attorney's fees, other expenses, and the readjustment of the advance on costs. More specifically, without expenses such as travel costs, technical advisers, interpreters costs, etc. the respondent will not have an opportunity to present evidence supporting its arguments, or its defense will at least not be as effective as it could be.[23] Following the reasoning behind the French *Pirelli case*, any impairment of a respondent to answer to a claim caused by financial distress would lead to the violation of due process which results in the setting aside the award.

[22] *Supra* note 3, p. 810-12.
[23] Zivkovic, p. 206.

ISSUE 2: THE REQUEST OF THE CLAIMANT TO JOIN VADER AS A PARTY TO THE ARBITRATION SHOULD NOT BE GRANTED BY THE TRIBUNAL

16. Pursuant to Rule 9(1) AIAC, 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(5) AIAC and Article 17(5) UNCITRAL Arbitration Rules 2013.

I. Vader is not bound by the arbitration agreement

17. The most relevant bases upon which a joinder of an additional party into arbitral proceedings shall justify itself include: (1) implied consent, (2) agency, (3) alter ego, and (4) estoppel and can be sought by either signatories or non-signatories.[24]

a. Through implied consent.

18. 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[25]. However, the theory of implied consent should only extend the right to join to those third parties whom the "original parties" to the arbitration presumably intended to be able to participate.[26]

19. Here, the contract, as well as the arbitration agreement was officially concluded by Claimant and Respondent in detailed terms and negotiations. Vader's prior negotiations

[24] Park, pp. 1.11, 1.48, 1.56; Hosking, p. 482.
[25] Pociute, p. 15; Park, p.4.
[26] Strong, p. 993.

might have been a starting point but it is by no means within the intentions of the signatories to bind Vader to the arbitration agreement.

20. In any case, Chap only negotiated for the contract rather than the arbitration agreement. According to the principle of separability, the contract and the agreement to arbitrate are not presumably intertwined.[27] At the time, Vader did not intend to be bound by the arbitration and he was also not aware of such agreement except for the fact that the contract between Claimant and Respondent was formed.

21. Furthermore, Mr. Chap is not familiar with trade practices in Asia as opposed to Mr. Armando. This means that the later contract, which was drafted by Claimant and Respondent would prove to be drastically different from the initial negotiation between Mr. Chap and Claimant. In other words, the only influence Mr. Chap had on the contract was mere guidelines. Therefore, the implied consent doctrine is not justifiable to bind Vader to the arbitration agreement.

b. Under the agency doctrine

22. 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.[28] 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

[27] 28 BERG; BORN p.155-296; 1958 BERG; See ICCA.
[28] Srivastava; Bridas.

third party (apparent authority)".[29] In other words, when the case lacks an express agreement, the tribunals must look at the conduct of the party.[30]

23. In Feubrary 2013, it was Respondent and Claimant who contacted a business agent to set up the negotiation for the venture. Mr. Chap's presence in this case was rather symbolic. In the end Respondent, by its own rights, initiated the business with Claimant and not Vader.

24. Additionally, the fact that Respondent is being controlled by Vader does not automatically render Respondent representative of Vader. The contract was tailored specifically for Respondent and Claimant considering the unique Asian environment. Respondent represented no one but itself when signing the contract.

c. Under the alter ego doctrine.

25. The doctrine requires three elements in order to join a non-signatory to arbitration proceedings, which are the following: a) close relationship between two companies; b) control exercised by one company over another; and c) the use of control over another company to commit fraud or misconduct.

26. The corporate relationship between the parent and its subsidiary must be sufficiently close so as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other. A corporate relationship alone is not sufficient to bind a non-signatory to an arbitration agreement.[31]

[29] Hester; Arriba.
[30] Pociute, p. 18.
[31] Pociute, p. 13; Hosking, p. 482.

27. In this case, Vader had twice expressed that it had severed all relations with Respondent.[32] Vader no longer controls or requires anything from Respondent thus becoming independent. Additionally, during the first 3 deliveries, Respondent's business remained largely detached from Vader's control despite being under Vader's parental authority. No commercial activity was in any way affected by Vader. Therefore, the relationship between Vader and Respondent is not sufficiently close to justify piercing the corporate veil.

28. Assuming *arguendo* that dominance persists, in the case of *Freeman* the court reiterated that a mere finding of dominance or control, without more, does not satisfy all three elements of the traditional test. Here, Vader's control was not used to perpetrate fraud or misconduct of any kind. In fact, everything Respondent and Vader did was in good faith.

29. Firstly, Vader had no choice but to withdraw from the Asian market due to Brexit. It would risk profit rather than insolvency on the part of Respondent, thus honoring the initial negotiation with Claimant. Further, Respondent has always upheld the commercial bond with Claimant, making each delivery satisfactorily.

30. Secondly, Respondent was by no means undercapitalized. Here, the heavy establishment and operational costs of Respondent meant that its income barely allowed it to break even against its immediate expenses and overheads.[33] This proves that the initial capital injection was already quite large notwithstanding the capital for starting commercial operations.[34] The test fails in the present case. Therefore, Vader shall not be bound by the arbitration agreement.

[32] Record, para. 19, 27.
[33] Record, para 26.
[34] Clarification 1, note 3.

d. By estoppel.

31. 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 the contract containing the arbitration clause.[35] 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.[36]

32. Although the first 3 deliveries had been made before Vader cut ties with Respondent. There is no evidence that any profit made were transferred to Vader. Respondent has been operating with no profit since its incorporation,[37] where it is barely breaking even. In light of this, it is unreasonable to claim that Vader had been benefiting from Respondent business.

II. Assuming *arguendo*, granting the request for joinder is impermissible under public policy

a. The joinder violates the principle of parties' equality

33. Article 17(5) UNCITRAL Arbitration Rules finds that joinder should not be permitted because of prejudice to any of those parties. A prejudice may be said to arise by depriving the person to be joined of the right to participate in the constitution of the arbitral tribunal.[38]

34. Further, pursuant to Art. 17(1) UNCITRAL Arbitration Rules, parties must be 'treated with equality'. The principle of *equal treatment* herein is not a mechanistic concept, but rather

[35] Park, p.13.
[36] Pavic.
[37] Record, para. 26.
[38] PAULSSON/PETROCHILOS.

imports the requirement of treating the parties fairly in the light of all the circumstances.[39] Thus, the additional party can only be in a position of perfect equality with the existing parties in the constitution of the tribunal if the tribunal has been totally empaneled by the appointing authority.[40]

35. In the case at hand, the arbitrators were appointed by Claimant and Respondent notwithstanding the input of Vader. Joining Vader at this stage is therefore inconsistent with the principle of parties' equality.

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

36. Under the principle of equity, the arbitral tribunal should only consider letting the third party into the action 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 is *high*,.[41]

37. According to Rule 9(5) AIAC and Article 17(5) UNCITRAL Arbitration Rules 2013, relevant circumstances must be taken into account including equitable factors such as: (1) increased cost;[42] (2) increased delay;[43] (3) disclosure of confidential matters.[44]

[39] REVISION, p. 116.
[40] *Supra* note 38.
[41] *Supra* note 26, p. 981.
[42] A tribunal's exercise of its power to request the parties to deposit an equal amount as an advance for costs may effectively deprive an impecunious party from affording participation in the proceedings. *See* PCA Case No. 2000-04.
[43] Ad Hoc Award of 3 March 1999, excerpted in de Boisséson, Joinder of Parties to Arbitral Proceedings, Two Contrasting Decisions, in ICC, Complex Arbitrations 19, 22-23 (ICC Ct. Bull. Spec. Supp. 2003) (distinguishing Award in ICC Case No. 5625 and holding "[t]here is, therefore, no rule here requiring the identification of all the defendants in the request for arbitration, or preventing the naming of additional defendants at a subsequent stage of the proceedings, subject of course to the parties' right to due process of law") (emphasis added).
[44] *Supra* note 26, p. 986.

38. In this case, joining Vader would elevate the costs not only with respect to introducing the counterclaims but also for joining Vader. Respondent is in no position to fund the current arbitration, let alone the burden of joining a third-party. Furthermore, the joinder would elongate the arbitration on the part of Vader exercising its procedural rights, which would possibly lead to the reconstitution of the arbitral panel. Hence, the arbitration will lose its advantage as an Alternative Dispute Resolution (ADR), rendering it meaningless.[45] Moreover, the joinder would also risk disclosing confidential matters from the third-party which is unequitable for Vader. With all due regards, the joinder should not be granted at this stage.

[45] Yifei, p. 97.

ISSUE 3: THE INDIAN HEAD NOD WAS NOT A VALID ACCEPTANCE TO RESPONDENT'S OFFER.

39. Article 2.1.6 of the UNDROIT Principles provides 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 on 23 November 2016, Mr. Deewarvala responded to Mr. Paredes's offer by doing an Indian head nod.[46] The Indian head nod failed to objectively indicate Mr. Deewarvala's assent to the offer.

I. The reasonableness test is solely applicable to the interpretation of the Claimant's conduct.

40. Art. 4.2 UNIDROIT lays out two tests of interpretation of which the reasonableness test (or "objective test") should be applied in this case. The objective test is based on reasonable expectations and external signs of the act.[47] In line with this, Art. 4.2(2) suggests that if the other party could not have been unaware of the intent then the actual intention of the party concerned is not relevant.

41. In this case, there is no evidence that the Respondent knew or should have known of Claimant's actual intention. The lack of acknowledgment of the actual intent of Mr. Deewarvla behind the act of doing an Indian nod shall not be attributed to Mr. Paredes but rather the ambiguous nature of the gesture and the fact that it failed to be communicated to Mr. Paredes.

42. First, the Indian nod manifests itself as an act of turning the head side-way. It resembles a headshake in such a way that, without speech to convey more clues of Mr. Deewarvala's

[46] Record, para. 30, 35.
[47] Pavlína, p. 222.

actual intention, can be easily assumed as a headshake, which is universally recognized as a gesture of rejection. Unlike the Indian head nod, the headshake is commonly used and recognized in the context of international business.

43. Second, Mr. Paredes was not in the position to acknowledge the message behind the Indian head nod. Mr. Paredes was employed to execute Respondent's commercial activities in Cambodia and ASEAN[48] on a professional level. Therefore, it would be unreasonable to ask of Mr. Paredes the knowledge of business rituals or the Indian style of communication. Besides professionalism, the representatives were not personally intimate. They had only met each other once in Paris to discuss business regarding the First Incentives on November 2014.[49] Nevertheless, there is no evidence indicating that Mr. Paredes have acquainted himself with Mr. Deewarvala's Indian – Malaysian heritage or his ways of communication.

44. In conclusion, Mr. Paredes did not and could not have been aware of Mr. Deewarvala's intention. The intention of Claimant was one-sided and does not coincide with the views of Respondent. According to Art. 4.2(2), the Indian head nod should be interpreted according to a reasonable person's understanding.

II. Under reasonable person's perspective, the Indian nod failed to indicate assent to the offer.

45. Based on objective standards, in doing an Indian head nod, Claimant turned down the offer, thereby terminating the Contract. This position was made judging from the context of the expression and taking into consideration all relevant circumstances especially (a) the

[48] Record, para. 12.
[49] Record, para. 20.

meaning commonly given to terms and expressions in the trade concerned,[50] and (b) the context of negotiation.[51]

a. The meaning commonly given to terms and expressions in the trade concerned

46. Pursuant to Article 4.3(e), without speech to convey further clues of the gesture, an Indian head nod is easily mistaken for the headshake - a head motion indicating rejection. Unlike the Indian head nod, the headshake is commonly used in the international trade sector. Therefore, preference should be given to such meaning rather than that of the Indian head nod when interpreting Mr. Deewarvala's head motion during the negotiation.

b. The context of negotiation

47. While it is apparent that Claimant would like to maintain their business relation before entering the negotiation, it is possible for Mr. Paredes to change his mind due to the upsurge of the price incentive's rate.

48. Before the negotiation, both parties had consistently agreed to maintain their partnership with a promised incentive rate at 15% of the contract price within 2 years' time.[52] Since the price incentive rate was raised to 35% during the negotiation that took place on 23 November 2016, it can be inferred that Claimant found the proposal to be neither reasonable nor affordable, thus rejecting it.

[50] Article 4.3(a) UNIDROIT.
[51] Article 4.4 UNIDROIT.
[52] Record para. 23, 24.

ISSUE 4: RELIEF THAT THE TRIBUNAL SHOULD GRANT

49. 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.[53] These claims have no substantial grounds.

I. The contract was non-existent and unenforceable

50. According to Article 2.1.1, a contract may be concluded either by the acceptance of an offer or by conduct of the parties which sufficiently shows agreement. As has been established, there was no valid acceptance. In the absence of a consensus between the parties, no contract was formed in this case.

51. One may argue that an implied duty to negotiate in good faith which is underlined in Article 2.1.15 shall give rise to the formation of a contract in the context of a negotiation, and the exact moment of contract formation is the time at which the parties reach a *point of no return* in the negotiation process.[54] However, such pre-contractual obligation shall be imposed on the Respondent because parties did not reach "the point of no return" in the process so as to bind themselves upon the agreement.

52. Furthermore, Respondent could not have been induced reasonable reliance by the Claimant due to a lack of commitment. 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.[55] To this end, one may consider the

[53] Record, para. 45.
[54] Pannebakker, 139.
[55] COMMENTARY, Comment 4 to Article 2.1.15.

circumstances surrounding the negotiations of the agreement and the conduct of the parties.[56]

53. In the negotiation, Mr. Paredes made it clear that his proposal regarding the value of the contract was a mere restatement of his client's intent. He later repeated the proposed terms, only to ensure that Mr. Deewarvala had a clear understanding.[57] While he was willing to exchange ideas, he did not intend to be bound by those terms. Therefore, one may not deduce an obligation from such circumstances. There was no conduct or statement from the Respondent that could have led to Claimant's reasonable reliance.

54. In conclusion, the parties' conduct during the negotiation did not result in the imposition of a duty to negotiate in good faith. The Respondent has the right to withdraw from the negotiation that is recognized under Article 2.1.15(1) without infringing on the principle of good faith and fair dealing. Therefore, no Contract was formed or binding upon the parties according to Article 1.3.

II. Relief for specific performance cannot be granted

55. Firstly, the Respondent was not bound to perform any delivery in 2017 and 2018 since the so-called agreement that incorporated the parties' contractual obligations did not exist.

56. Alternatively, Claimant has no right to order the Respondent's performance because non-performance was excused and Claimant failed to request performance within reasonable time.

[56] ICC No. 8540; COMMENTARY, Comment 2 to Article 2.1.2.
[57] Record, para. 34.

a. Respondent's failure to perform was excused

57. According to the Official Comment of the UNIDROIT, a party is not entitled to claim specific performance for an excused non-performance of the other party.[58] In this case, Respondent's failure to perform the first two deliveries in 2017 shall be excused because it was caused by the Claimant in accordance with Article 7.1.2.[59]

58. The wording of Art. 7.1.2 merely affirms the need for a causal link between the act or omission of the promisee and the failure of the promisor to perform any of its obligation without specifying this causal connection.[60] This is also not limited to direct causation and indirect causation is generally sufficient.[61] Causation of the Respondent's failure to perform can be attributed to the confusing Indian nod that Claimant's representative – Mr. Deewarvala made during the negotiation, which led to the assumption that the Contract was terminated. Performance of the Respondent was made impossible in whole due to the interference of the other party.

59. As the result, Claimant is barred from relying on the non-performance to order specific performance.

b. Claimant failed to request performance within reasonable time

60. Under Article 7.2.2, there are several exceptions to the general rule for orders to perform non-monetary obligations. In particular, Article 7.2.2(e) provides that the right to performance is excluded if the party entitled to performance does not require performance

[58] COMMENTARY, Article 7.1.1.
[59] COMMENTARY, Article 7.1.1.
[60] Friederike.
[61] *Ibid.*

within a reasonable time after it has, or ought to have, become aware of the non-performance.

61. Claimant became aware of the non-performance after it contacted the Defendant to confirm the date of the next delivery which was supposed to be scheduled at the end of March 2017.[62] After realizing the misunderstanding in mid-March 2017, Claimant had failed to reach out to the Respondent to request performance or at least to remedy the situation.[63] Such delay deprives Claimant of the right to require performance under Article 7.2.2(e).

III. To set the terms of the Contract in writing

a. There is no basis for the employment of reformation of contract

62. It is undisputed that equitable remedy, in particular, the reformation of contract can be employed to ensure parties' true intentions are reflected in case of mistake.[64] However, there have been many instances in which unilateral mistake cannot be considered a valid ground for reformation of contract.[65]

63. Alternatively, one seeking reformation based on unilateral mistake must prove the mistake is fundamental and the other party had actual, constructive knowledge of his mistake.[66]

b. Claimant is not entitled to reformation of contract

64. 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*

[62] Record, para. 43.
[63] Clarification, note 10.
[64] Sabbath, p. 829.
[65] Jones; Manley: mistake as to assumption of mortgage debt. Hearne. Fullerton.
[66] Keong, p. 75-76, 80.

assumption, by virtue of Article 3.2.3 UNIDROIT, is explicitly broadened to include "an error occurring in the expression of a declaration."

65. There was a mistake in expression as Mr. Deewarvala did an Indian head nod in response to Mr. Paredes's proposal. However, the mistake was not of fundamental nature. Further, as has been established, the Defendant couldn't have been aware of the mistake under the perspective of a reasonable person.

66. The circumstances in this case therefore did not warrant equitable intervention.

PRAYER FOR RELIEF

In light of the foregoing considerations, the Respondent respectfully request the Tribunal to declare that:

I. The Agreement to arbitrate is 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 not be granted by the Tribunal

III. The Indian head nod was not a valid acceptance to Respondent's offer

IV. None of the following reliefs should be granted:

i. To declare 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,

Robustesse Espacial Solucion Corp, THE RESPONDENT