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Reference: PCA Case No. 2023-40 – Zeph Investments Pte. Ltd. v. The Commonwealth of Australia

[redacted]

Dear Counsel and Party Representatives,

1. The Tribunal refers to the Parties' submissions and communications of 3 July and 3 and 18 August 2023 regarding the seat of the arbitration. The Claimant argues in favor of Geneva, while the Respondent argues in favor of London, or alternatively The Hague, which the Tribunal had proposed as a compromise solution.

2. Article 25(5) of Chapter 11 of the AANZFTA provides that, unless the parties agree, the Tribunal must set the seat as follows:

> *Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the* ***applicable arbitration rules****, provided that the place shall be in the territory of a* ***State that is a party to the New York Convention****.*[1]

3. The "applicable arbitration rules" referred to in this provision are the 2021 UNCITRAL Arbitration Rules (the "UNCITRAL Rules").[2] Article 18(1) of the UNCITRAL Rules states where relevant:

> *If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal* ***having regard to the circumstances of the case****.*[3]

4. As for the applicability of the New York Convention, which Article 25(5) of Chapter 11 of the AANZFTA sets as a requirement for the choice of the seat, Geneva, London, and The Hague are all in the territory of a State party to the New York Convention.

5. As the Parties have not agreed on a place to serve as the seat of the arbitration, this is a matter for the Tribunal to determine "having regard to the circumstances of the case" under Article 18(1) of the UNCITRAL Rules. To that effect, the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings (the "UNCITRAL Notes") offer some guidance.

6. As a general matter, the selection of the seat triggers the application of the international arbitration law of the seat and the jurisdiction of the local courts in aid and control of the arbitration. It also determines the "nationality" of the award for enforcement purposes. In this vein, the UNCITRAL Notes set out two "prominent legal factors" to determine the seat of the arbitration. First, the "suitability" of the seat's *lex arbitri*.[4] Second, the "law, jurisprudence and practices" at the seat, particularly regarding "court intervention in the course of

[1] Emphasis added.

[2] Terms of Appointment, § 9.1.c.

[3] Emphasis added.

[4] UNCITRAL Notes, ¶ 29(a).

arbitral proceedings", the "scope of judicial review or of grounds for setting aside an award", and "any qualification requirements with respect to arbitrators and counsel representation".[5] In addition, the UNCITRAL Notes provide for the New York Convention requirement already met by the Parties' seat proposals.

7. The UNCITRAL Notes further state that, when it is expected that hearings will be held at the seat, "other factors" may become relevant.[6] For instance, the "convenience of the location",[7] the "availability and cost of support services",[8] and the "location of the subject matter in dispute and proximity of evidence".[9] In practice, these additional factors and other cost-efficiency considerations often play a role in the determination of the seat irrespective of whether it coincides or not with the venue for the hearings. Lastly, while the UNCITRAL Notes do not refer to the neutrality of the seat *vis-à-vis* the parties or the subject matter of the arbitration, this is a well-established factor, which both Parties have addressed in their submissions.

8. Against this background, it is undisputed, and rightly so, that Geneva, London, and The Hague meet the first and second prominent legal factors indicated above. That is, each option has a suitable *lex arbitri* and appropriate law, jurisprudence and practices in terms of court intervention, judicial review, and qualification requirements. Swiss, English and Dutch courts are also highly reputed and have ample experience in dealing with investment arbitrations. Accordingly, the Parties' submissions on the seat focus on other factors: neutrality on the one hand **(I)**, and cost, efficiency, and convenience on the other **(II)**.

1. NEUTRALITY

9. Neither Party disputes the neutrality of Geneva or The Hague as seats. By contrast, the Claimant challenges the neutral character of London as a seat due to alleged links between Australia and the UK. It does so in particular by reference to: the Royal Assent given by the Monarch of the UK to the 2020 Amendment Act passed by Western Australia (the "Amendment Act"), which brought the Amendment Act into Australian Law;[10] the roles and prerogatives of the British Crown under the Australian Constitution and implementing legislation;[11] proclamations of allegiance and obedience to King Charles III made

[5] UNCITRAL Notes, ¶ 29 (b).

[6] UNCITRAL Notes, ¶ 30.

[7] UNCITRAL Notes, ¶ 30(a).

[8] UNCITRAL Notes, ¶ 30(b).

[9] UNCITRAL Notes, ¶ 30(c).

[10] Claimant's submission of 3 July 2023, ¶ 14.

[11] Claimant's submission of 3 July 2023, ¶¶ 19-39.

by Australia's Commonwealth and State Governments;[12] how Australian nationals may vote in the UK and vice versa;[13] the images of the Monarch of the UK borne by Australian currency;[14] the close relationship between the legal systems of Australia and the UK and the fact that Australian and English lawyers can practice in both Australia and the UK,[15] that the former can be recognized as King's Counsel ("KC"),[16] and that Australian lawyers now employed by the Respondent have previously worked for the UK;[17] the Respondent's likelihood to take extraordinary measures to hinder these proceedings as the Chairman of Australia's Joint Standing Committee on Treaties, Mr. Josh Wilson MP, has demonstrated contempt for ISDS;[18] and the British Government's likelihood to use its intelligence services to undermine the integrity of the arbitral process on Australia's behalf given Australia's previous deployment of its own intelligence services to thwart international arbitration.[19]

10. The Tribunal does not consider it necessary or useful to delve into the historical, constitutional, political, or protocolary ties between Australia and the UK for present purposes, except to note (i) the Respondent's submission, which the Claimant did not dispute, that "the power to assent to the Amendment Act was exercisable solely by the Governor of Western Australia, and not by the British Monarch", [20] and (ii) the fact that the Claimant's allegations on the potential use of intelligence services by the British or Australian Governments are either unsubstantiated or irrelevant to assess London's neutrality as the seat of arbitration.[21]

11. More importantly for the issue currently before the Tribunal, Australia and the UK are both sovereign States under international law, with independent legislative, governmental, and judicial institutions.[22] It is similarly relevant that the Claimant does not question the independence, impartiality, and neutrality of the English courts despite the Respondent's repeated statements to this effect,

[12] Claimant's submission of 3 July 2023, ¶¶ 40-43.

[13] Claimant's submission of 3 July 2023, ¶¶ 53-57.

[14] Claimant's submission of 3 July 2023, ¶¶ 58-61.

[15] Claimant's submission of 3 July 2023, ¶¶ 45-52.

[16] Claimant's submission of 3 July 2023, ¶ 44.

[17] Claimant's submission of 3 July 2023, ¶ 17.

[18] Claimant's submission of 3 July 2023, ¶¶ 80-95.

[19] Claimant's submission of 3 July 2023, ¶¶ 62-79.

[20] Respondent's submission of 3 August 2023, ¶ 20.b.

[21] Respondent's submission of 3 August 2023, ¶¶ 17.c, 21.

[22] Respondent's submission of 3 August 2023, ¶ 20.a.

especially on investment arbitration matters.[23] As noted previously,[24] one of the main effects of determining the seat is the identification of the courts with jurisdiction over applications to set aside an arbitral award.

12. That being said, the Tribunal appreciates that the Claimant's concerns about London as seat reflect a strong subjective perception of close proximity to the instant case and a thus of lack of neutrality and risk of bias. While these concerns are objectively unfounded, it would not be satisfactory for the Tribunal to dismiss the Claimant's apprehension outright. The arbitration is more likely to unfold in an orderly manner and the final outcome may be more likely to be acceptable if both Parties trust the courts that may eventually scrutinize the Tribunal's awards.

2. COST, EFFICIENCY AND CONVENIENCE

13. According to the Respondent, the following reasons of cost, efficiency and convenience militate in favor of London as the seat, as opposed to Geneva:

i. Any court proceedings that may arise out of the arbitration would be conducted and decided in English (that is, the language of the arbitration, of the Respondent, and one of the official languages of Singapore), which would eliminate the need for the Parties to incur unnecessary translation costs.[25]

ii. The Parties' current counsel could appear before the English Courts in any prospective proceedings. This would facilitate continuity of representation in a familiar common law jurisdiction, while preventing the costs and inefficiencies associated with the need to secure new foreign counsel from a civil law jurisdiction.[26]

iii. In England, any set aside application would be made to the High Court, with the possibility of appeals to the Court of Appeal and then to the Supreme Court.[27]

[23] Respondent's submission of 3 August 2023, ¶¶ 11, 20.e, Respondent's Communication of 18 August 2023, ¶ 2.a.

[24] *Supra*, ¶ 5.

[25] Respondent's submission of 3 August 2023, ¶¶ 14, 24.b; Respondent's communication of 18 August 2023, ¶ 2.b, ¶ 5

[26] Respondent's submission of 3 August 2023, ¶¶ 15-16, 24.c-d; Respondent's communication of 18 August 2023, ¶ 2.b, ¶ 4.

[27] Respondent's submission of 3 August 2023, ¶ 24.a; Respondent's communication of 18 August 2023, ¶ 2.c.

14. Alternatively, the Respondent argues that The Hague shares some of London's advantages and as such is preferable as a seat over Geneva. In particular, the Respondent submits that:

    i. The Hague also prevents the Parties from incurring unnecessary translation costs. Notably, in the event of a set aside application before the Dutch Courts it would be possible for the Parties to submit the Tribunal's award and the documentary record of the arbitration where relevant in English.[28] Similarly, the Dutch courts have developed the practice of producing judgments concerning international arbitration cases in English as well as in Dutch if requested by the Parties.[29]

    ii. Any set aside application would be made to the Court of Appeal, with a possible appeal to the Supreme Court.[30]

15. In turn, the Claimant submits that Geneva overall entails greater cost and efficiency savings over both London and The Hague mainly because set aside proceedings would be decided by the Swiss Federal Tribunal ("SFT") in a single instance.[31]

16. The Tribunal notes that, measured against London and The Hague, annulment proceedings in Switzerland indeed would be comparatively faster and more efficient:

    i. In Switzerland, set-aside requests are brought before the SFT as a single instance. These proceedings involve only two rounds of submissions, with the second round having short time limits, and typically conclude within a year or less, rarely more. This single-instance and streamlined procedure represents considerable cost-efficiency savings compared to the potential two or three-instance annulment proceedings in The Netherlands and the UK. Importantly, it spares the Parties from incurring legal fees in relation to proceedings that could extend over several years if the seat were London or The Hague. This would not only counterbalance (if necessary) the translation and new counsel retention costs addressed below, but is also likely to establish a firm positive balance in this respect. Furthermore, it advances the goal of international arbitration to resolve disputes promptly.

    ii. The arbitration record and the Parties' annulment memorials can be filed in English before the SFT and the latter rules based on the record, meaning that there are no oral hearings. It is true that the SFT would hand down its (generally brief) decision in one of Switzerland's official languages. It is also true that the Parties would have to retain local counsel to make their case

[28] Respondent's communication of 18 August 2023, ¶ 5.

[29] Respondent's communication of 18 August 2023, ¶ 5.

[30] Respondent's communication of 18 August 2023, ¶ 5.

[31] *See generally* Claimant's communication of 18 August 2023.

before the SFT, as opposed to relying on their current counsel. As the Respondent acknowledges, this would equally be the case if the arbitration were seated in The Hague, which the Respondent favors over Geneva as a seat.[32] In any event, local counsel usually need not be briefed on the entirety of the underlying arbitration and Swiss practitioners have ample experience in representing foreign parties in annulment proceedings. Further, the grounds for annulment in Switzerland are narrow and the case law is generally clear. Hence, submissions before the SFT are usually tailored accordingly.

17. Therefore, the inefficiencies or inconveniences, if any, associated with potential set aside proceedings in Switzerland, appear immaterial all things considered.

18. For the above reasons, the Tribunal determines that the seat of the arbitration shall be Geneva, Switzerland.

On behalf of the Tribunal,

Gabrielle Kaufmann-Kohler
President of the Tribunal

[32] Respondent's communication of 18 August 2023, ¶ 4.