

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Lao Holdings N.V.
v.
The Lao People's Democratic Republic
(ICSID Case No. ARB(AF)/12/6)

PROCEDURAL ORDER NO. 8

The Honourable Ian Binnie, C.C., Q.C., President
Professor Brigitte Stern, Arbitrator
Professor Bernard Hanotiau, Arbitrator

Secretary of the Tribunal
Anneliese Fleckenstein

Date: 20 October 2016

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The Tribunal convened at the Warwick Hotel, Brussels, on Tuesday October 18, 2016, for a procedural hearing to consider applications by the Respondent government covering its jurisdictional objections to the Claimant's Second Material Breach Application dated 26 April 2016, as well as its motion to stay the Second Material Breach Application on grounds related to what it considers to be parallel proceedings before the Singapore International Arbitration Centre (SIAC), and its application for security for costs against Lao Holdings NV, which the Respondent considers to be a "shell" company.

In its Second Material Breach Application the Claimant contends that the Respondent government is in violation of various sections of the Deed of Settlement reached between the parties in Singapore on June 15, 2014, together with clarifications set out in a side-letter executed by the parties and dated June 18, 2014 [the "Settlement"].

However at the outset of the present hearing counsel for the Respondent indicated that its jurisdictional objections had become moot. The original concern had been that the Settlement provided the Claimant with a choice of remedies when faced with what it considered to be a material breach: either revival of the prior ICSID investment arbitration pursuant to Article 32 of the Settlement; or specific performance by way of arbitration at SIAC under article 42. In the Respondent's original view, "by electing to pursue specific performance and to recover damages ... LHNV has now waived all rights to elect to rescind the [Settlement] under Article 32". However, it had now become apparent to the Respondent that in a subsequent pleading the Claimant is no longer seeking specific performance. In the circumstances, the Respondent acknowledged that the basis for its jurisdictional objection has now disappeared and the objection is accordingly withdrawn.

With respect to the stay of proceedings, the Tribunal's attention was drawn to an order of the SIAC Tribunal dated September 28, 2016 wherein the granting of an adjournment was made conditional "on both Parties' Agreement that they will respectively postpone scheduling a merits hearing or taking any action in any other arbitration or lawsuit involving matters relating to the case before us [the SIAC Tribunal] and jointly request any other Tribunal or Court to defer taking any action until the January [SIAC] hearing has been concluded." Elsewhere, it was noted, there is an expectation that the SIAC Tribunal will likely be able to hand down an Award within two months of the conclusion of the hearing on January 27, 2016.

This Tribunal interprets the undertaking of the parties "to defer taking any action" as limited to proceeding to a hearing on the merits. As the SIAC Tribunal undoubtedly recognized, the Claimant in this case has a right to have its claim resolved expeditiously.

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If this Tribunal were simply to down tools and pick them up again after the SIAC Tribunal delivers its award sometime in the spring of 2017, we will have lost about 6 months. In the view of this Tribunal, it is perfectly possible to put in place a timetable that accommodates both the wish of the Claimant to get on with its ICSID claim while respecting the desire of the Respondent (and indeed the Claimant) to have the SIAC judgment in hand before proceeding to a hearing on the merits of the Second Material Breach Application. The Respondent is content to agree to a reasonable timetable arrangement provided that every reasonable effort is made not to require it to deliver a pleading before the release of the SIAC award on the merits.

The Claimant objected that the SIAC Tribunal might well take longer to deliver reasons than it now anticipates, and that the parties should get on with the ICSID proceeding where the Tribunal will have to wrestle with a number of issues not present in the SIAC arbitration. The Tribunal agrees with the Claimant that it is entitled to have its Second Material Breach Application heard and disposed of expeditiously, but will set out a schedule which can be expected to accommodate the time required by the SIAC Tribunal to complete its deliberations, provided post-hearing briefs are not required. The schedule is as follows:

- January 23 to 27, 2017 -- hearing on the merits at SIAC
- March 14, 2017 -- the Claimant is to deliver its Memorial in the ICSID proceeding
- April 28, 2017 -- the Respondent is to deliver its Counter-Memorial in the ICSID proceeding
- May 23, 2017 -- the Claimant is to deliver its Reply, if any
- June 19, 2017 -- the Respondent is to deliver its response, if any
- July 3 to 7, 2017 -- ICSID hearing on the merits in Singapore.

In the event of an unexpectedly delayed delivery by the SIAC Tribunal of its Award each party to the ICSID hearing reserves the right to apply to this Tribunal for some variation of the schedule, although the Tribunal is determined to proceed to the merits in the week of July 3 to 7, 2017 as aforesaid.

Finally, the Respondent government applied for an order requiring the Claimant to provide security for costs that the Respondent anticipates it will expend in the course of (it thinks successfully) defending the Second Material Breach Application. It points out that a previous costs order made by the Tribunal on November 5, 2015, against the

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Claimant (described as a shell company incorporated in Aruba whose only assets are the gaming facilities said to be expropriated without compensation by the government of Laos) remains outstanding. However, as it happens, the Claimant had other funds in Laos out of which the Respondent, without recourse to the courts, was able to pay itself the amount of the costs award. Nevertheless, as the Claimant points out, it has largely funded the current arbitration because of the Respondent government's refusal to pay its share of the ICSID levy and there is no evidence at all that the Claimant, funded by its principal, Mr John Baldwin, would be unable to pay any costs award made against Laos Holdings NV. While this may leave the Respondent government with some exposure to the risk of unpaid costs, the risk is not greater than is forced on many litigants, and does not rise to the level of extraordinary circumstances required by the ICSID jurisprudence,¹ in order to pronounce provisional measures related to costs. As a consequence, this request is not granted.

The Tribunal will order accordingly.

Place of arbitration: Singapore

[Signed]

The Honourable Ian Binnie, C.C., Q.C., President
For the Arbitral Tribunal
Date: October 20, 2016

¹ *RSM Production Corporation and others v. Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent's Application for Security for Costs of October 14, 2010, para. 5.17; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Decision on El Salvador's Application for Security for Costs of September 20, 2012, para. 44; *Burimi SRL and Eagle Games S.H.A v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2 of May 12, 2012, para. 34; *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs of August 13, 2014, para. 75.