

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. 15

Judge Ian Binnie, C.C., Q.C., President of the Tribunal
Professor Brigitte Stern, Arbitrator
Professor Bernard Hanotiau, Arbitrator

Secretary of the Tribunal
Catherine Kettlewell

Date: August 29, 2018

The Tribunal acknowledges receipt of the following requests from the Parties: (a) Respondent's request to strike from the record Mr. William Greenlee's witness statements; (b) Respondent's request to introduce to the record exhibits LHRE-164 and LHRE-165, (c) Claimants' request to extend its time in the distribution of time for the hearing, (d) Claimants' request to remove the 291 pages attached to Exhibit LHRE-161 (the "BDO Report") from the record, and (e) Claimants' request for advance notice of witness examination.

The Tribunal has considered all of the Parties' arguments. The Parties' arguments are summarized in the subsequent paragraphs followed by the Tribunal's ruling.

1. Respondent's Request to Strike from the Record Mr. William Greenlee's Witness Statements

The record in this case has two witness statements of Mr. William Greenlee: (i) the first is dated May 9, 2014 and was filed in this proceeding, and (ii) the second filed in the SIAC proceedings is dated 8 June 2015 and was introduced into the record in this case as Exhibit C-1242.

The Government has requested to strike from the record Mr. Greenlee's statements because he is not available to be cross examined at the hearing.

The Claimants allege that the Government waived its right to request Mr. Greenlee's presence at the hearing when he was not included in the final list of witnesses. Moreover, the Claimants state that the Government did not cross examine Mr. Greenlee in the SIAC proceeding. The waiver to examine Mr. Greenlee extends, Claimants add, to both witness statements.

The Government indicated that it did not waive the right to cross examine Mr. Greenlee. The Government noted that it was unclear from the Claimants' position whether they would choose to submit a second witness statement in the record and continues to claim that it had notified on July 20, 2018 of its intent to cross examine Mr. Greenlee. The Government also states that, pursuant to IBA Rule 4.7, the Claimants have failed to present a valid reason why Mr. Greenlee would not be able to attend the hearing in Singapore.

Tribunal's Ruling

The Tribunal is of the view that the application is premature. The two statements of Mr. Greenlee are denials of his involvement. While it is clear that Mr. Greenlee has no intention of attending the hearing to be examined, the Tribunal cannot know at this stage whether exceptional circumstances exist that would justify the reception of these two statements despite his absence, with the issue becoming weight rather than admissibility, or whether the eventual solution is to strike both statements altogether.

2. Respondents Request to Introduce Exhibits LHRE-164 and LHRE-165

The Government has requested to introduce two new exhibits in the record. The first, Exhibit LHRE-164 is the full witness statement of Mr. Gus Noble, dated June 8, 2015, and related to the June 2015 Noble MOU [i.e. purchase of Savan Vegas]. The second, Exhibit LHRE-165, dated June 8, 2015, is a selection of paragraphs from Mr. Baldwin's witness statement also related to the Noble MOU and submitted in the SIAC proceeding.

The Claimants do not object to the introduction of Exhibit LHRE-165 but continue to object to the introduction of Exhibit LHRE-164 related to the Noble MOU, alleging this is irrelevant for this case.

Tribunal's Ruling

The Tribunals have already admitted extensive "fresh" evidence regarding the allegedly fraudulent MOU signed by Mr. Noble to delay the Government takeover of the casino. Therefore, the Tribunal grants Respondent's request to introduce Exhibit LHRE-164.

The Tribunal takes note that Claimants did not object to the introduction of Exhibit LHRE-165.

3. Claimants' Request to Extend the Time Assigned at the Hearing

Claimants requested to extend the time assigned to each of the parties as they expect to cross-examine double the number of witnesses [8 to 4] than the Government. Claimants requested to be provided with 2/3 of the examination time (two days) to Respondent's 1/3 (1 day) of examination.

The Government responded that "the raw number of witnesses is less important than the scope of their exam" and states that there is no reason to disturb the usual rule of equal time. The Government also alleges that its witnesses, for the most part, deal with very specific points whereas the Government's cross-examination of Claimants' witnesses and expert covers a broader array of subjects.

Tribunal's Ruling

The Tribunal notes that the Parties have both received extra time because of the bifurcation of the damage and quantum issues. The Tribunal decides to grant each party equal time. Furthermore, each side is to determine the order in which its own cross examinations proceed as well as time allocation.

4. Claimants' Request to Exclude the BDO Report

The Claimants have raised before the Tribunal that Exhibit LHRE-161 contains the 39-page BDO Report and 291 additional pages with a new coversheet which were not

originally submitted in the SIAC case. Respondent indicated that the BDO Report and supporting exhibits were admitted in the SIAC arbitration and allege that these documents are evidence of corruption and criminality.

Tribunal's Ruling

In the Procedural Order No. 11, the Tribunal granted the Government's request to introduce to the record solely those "portions of the BDO forensic audit relating to the allegation of bribery and corruption."¹ The Tribunal considers that the 291 additional pages introduced by the Government in Exhibit LHRE-161 are not part of the 39-page BDO Report that the Tribunal originally granted the Government to introduce in the record in Procedural Order No. 11. Therefore, the BDO Report extracts are admitted while the appendix (*i.e.* the additional 291 pages) is excluded from the record.

5. Claimants' Request for Advance Notice for Witness Examination

Claimants requested a clarification of Section 3.ii of Procedural Order No. 10 and Section 2.ii of Procedural Order No. 2, which provide for a seven-day advance notice for direct and re-direct examination of witnesses.

The point on which Claimants requested a clarification was whether 24 hours before examination was sufficient time to alert the other side about cross-examination outside of the scope of the witness statement and credibility. To further exemplify this clarification request, the Claimants indicated that in the 2014 pre-hearing conference the parties agreed to provide a 24 hours' notice by topic of the cross-examination issues beyond the scope of a witness's statement.

Tribunal's Ruling

With respect to the basis for direct and cross-examinations, the provisions of the procedural orders are not ambiguous. Each party was required to seek leave to expand the scope of the direct examination of its own witnesses and if leave were granted then "the additional material" on which a party wished to examine its own witnesses was to be provided to the other party at least one day in advance of the hearing. The Claimants' request refers to the intended scope of its cross-examination of the Government's witnesses, an entirely different matter. The Claimants are not seeking leave to expand the examinations in chief of their own witnesses.

In respect of cross-examination, the procedural orders do not require advance notice of the topics to be covered. Each party is free to cross-examine the other party's witnesses on any relevant matter, provided the documentary basis of the questioning is already in the record. If a party wishes to cross-examine on documentary material not in the record, the additional material must be the subject of a fresh evidence application.

¹ Procedural Order No. 11 dated June 25, 2018 (as amended on June 28, 2018), p. 5.

The Tribunal notes that the Claimants' latest e-mail dated August 25, 2018 is not a further fresh evidence application. Accordingly, no further order is required in this respect.

THE TRIBUNAL THEREFORE ORDERS

1. The Respondent's request to strike from the record Mr. William Greenlee's witness statements is premature.
2. Exhibits LHRE-164 and LHRE-165 are to be admitted into evidence.
3. Each party shall have equal time and is to determine the order in which its own cross-examinations proceed as well as time allocation.
4. The Claimants' request to exclude from the record the 291 additional pages attached to the BDO Report contained in Exhibit LHRE-161 is granted.
5. The Parties are not required to provide advance notice of topics to be covered in cross-examination.

[Signed]

The Honourable Ian Binnie, C.C., Q.C., President
For the Arbitral Tribunal
Date: August 29, 2018