

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. 7

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

Secretary of the Tribunal
Mercedes Cordido-Freytes de Kurowski

Date: 5 April 2015

INTRODUCTION

1. The Tribunal is in receipt of the Respondent Government's application of 27 March 2015 "for documents and information that Claimant has refused to produce" in advance of the hearing on the merits to take place in Singapore on April 13 and 14, 2015, together with the Claimant's response of 31 March 2015, the Government's Reply of 2 April 2015, a letter from counsel for the Claimant dated 3 April 2015, and an additional submission of the Government also dated 3 April 2015 to supplement its 2 April 2015 submission.

2. In light of these exchanges, the Government has withdrawn its request for documents but still seeks the identity of (1) the "credible buyer, interested in purchasing Savan Vegas for US\$275 Million" referred to by Mr John Baldwin, a principal of the Claimant, in his affidavits sworn 1 August 2014 and 27 March 2015 and, by way of an additional request in the Government's 2 April 2015 submission, (2) the two Lao Government officials [who are said to have stated] that they had seen written approval for a casino at Site A."

3. The Claimant has offered to share with Government counsel the name of the "credible buyer" on terms of confidentiality which Government counsel has rejected as unsatisfactory. The Claimant declines to identify the "two Lao Government Officials".

4. The Government asserts that this information is essential for it to have in advance of the merits hearing if it is to be in a position to test the credibility of Mr Baldwin in an effective way. Government counsel says he intends to retain Macau counsel to seek an

interview with the “credible buyer”, and presumably to make similar inquiries of “the two Lao Government officials”, if they are identified. If the names are not provided in advance, he says, he will have no way of discovering evidence that may contradict Mr Baldwin’s assertions at the hearing. Mr Baldwin's evidence would stand challenged by Government counsel but not capable of being contradicted at short notice with contrary evidence.

5. The Claimant, for its part, argues that disclosure of the identity of the “credible buyer” to Government Ministers or officials will prejudice the sale at fair market value of its gambling assets in Laos and that disclosure of the names of the “two Lao Government officials” will likely lead to retaliation against them.

THE TRIBUNAL’S DECISION

6. The Tribunal notes that no issue of privilege arises with respect to this information. Secondly, the Claimant clearly intends to rely on the statements by these undisclosed persons for the truth of their contents. The Claimant has not undertaken to call any of these undisclosed persons as witnesses available for cross-examination at the merits hearing. Their “evidence”, now offered through Mr Baldwin's affidavits, is hearsay. Yet the Claimant clearly regards the truthfulness of this evidence as an important element in support of its case. Otherwise it would not have included these assertions in Mr Baldwin’s affidavit.

7. The Tribunal also notes that it is being asked by the Claimant to make an order for Provisional Measures at the conclusion of the merits hearing on 14 April 2015. The

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request is to stop the Government from introducing, as of 15 April 2015, a change in the management and control of the Savan Vegas Hotel and Casino pursuant to the Deed of Settlement (which the Claimant's Material Breach Application seeks to set aside in its entirety) and further, effectively to order the status quo at Savan Vegas to continue until the Tribunal hands down its decision in due course on the merits of the Material Breach Application. Such an order also requires a sound evidentiary basis, especially at this late stage in the proceeding.

8. The Tribunal has no way of testing the legitimacy of the Claimant's concerns about disclosure. It will therefore not order the Claimant to identify the "credible buyer" or the "two Lao Government officials" at this time. Equally, however, the Tribunal wishes to make it clear that hearsay evidence attributed by Mr Baldwin to unidentified sources will be considered of no probative value. These "sources" cannot be cross-examined. Their credibility will remain unknown and unknowable to the Tribunal. The onus is on the Claimant to make its case for a Material Breach and an interim order for Provisional Measures. If for whatever reason it chooses not to name its sources it does so in the knowledge that those parts of Mr Baldwin's affidavit that relate to those unidentified sources will be disregarded.

9. Further, if the identity of the "credible buyer" is not disclosed to the Respondent in time for verification checks to be made prior to the Singapore hearing, the Tribunal will be attentive to whether the narrative of the "credible buyer at US\$ 275 million" is or is not corroborated by independent evidence.

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10. The Tribunal has encouraged the parties to come to an agreement on the scheduling of witnesses and looks forward to being informed of the progress of discussions and of any issues that remain to be resolved by the Tribunal itself prior to Monday April 13, 2015.

11. The cooperation of counsel is appreciated.

Place of arbitration: Singapore

[Signed]

The Honourable Ian Binnie, C.C., Q.C., President
For the Arbitral Tribunal
Date: 5 April 2015