

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE
SINGAPORE INTERNATIONAL ARBITRATION CENTRE**

SIAC ARBITRATION NO. 414 OF 2017

Between

(1) SANUM INVESTMENTS LIMITED

(2) LAO HOLDINGS, N.V.

Claimants

And

(1) SAN MARCO CAPITAL PARTNERS, LLC

(2) KELLY GASS

Respondents

RESPONDENTS' RESPONSE TO THE NOTICE OF ARBITRATION

16 January 2018

**EXHIBIT
A-3**

INTRODUCTION

1. San Marco Capital Partners, LLC and Kelly Gass (collectively, the “**Respondents**”) submit this Response to the Notice of Arbitration dated 19 December 2017 submitted by the Claimants, Sanum Investments Limited and Lao Holdings, N.V. (collectively, the “**Claimants**”).
2. This Response is filed in accordance with Rule 4 of the Arbitration Rules of the Singapore International Arbitration Centre (6th Edition, 1 August 2016) (“**SIAC 2016 Rules**”).

PARTIES

3. The Claimants have set out the Parties’ details in paragraphs 12 to 14 of their Notice of Arbitration.
4. The Respondents are represented in this arbitration by Drew & Napier LLC. The Respondents request that all correspondence and communication relating to this arbitration be addressed to:

Mr Cavinder Bull S.C.
Ms Gerui Lim
Mr Darryl Ho
Drew & Napier LLC
10 Collyer Quay #10-01
Ocean Financial Centre
Singapore 049315

Telephone Nos.: +65 6531 4120 / +65 6531 2314
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Email addresses: cavinder.bull@drewnapier.com
gerui.lim@drewnapier.com
darryl.ho@drewnapier.com

PROCEDURAL MATTERS

Arbitration Agreement

5. The Notice of Arbitration asserts jurisdiction in paragraphs 5, 6 and 7. The Respondents accept the jurisdiction of the Tribunal to be appointed by the SIAC to determine the issues set out in the Notice of Arbitration.
6. The Claimants primarily rely on the arbitration agreement in the Deed of Settlement dated 15 June 2014 between the Claimants on the one hand and the Lao People's Democratic Republic ("**GOL**") on the other (the "**Deed**") in commencing the present arbitration. While the Notice of Arbitration emphasises the Deed's arbitration provision in paragraph 35, the full arbitration agreement between the Claimants and GOL is found in paragraphs 35 and 42 of the Deed (the "**Arbitration Agreement**").
7. As stated in paragraph 5 of the Notice of Arbitration, the Respondents consent to SIAC arbitration pursuant to the Arbitration Agreement in the Deed.
8. No other arbitration agreement is applicable.

Rules, Seat, Language and Governing Law

9. With regard to paragraph 9 of the Notice of Arbitration, the seat of the arbitration is Singapore as per the Arbitration Agreement in paragraph 42 of the Deed.

10. The Respondents hereby consent to the Arbitration being conducted in accordance with the SIAC 2016 Rules with three arbitrators and in English.
11. The Respondents agree that the Governing Law of the dispute is the law of the State of New York, United States of America, based upon the express choice of law in paragraph 42 of the Deed.

Nomination of Arbitrator

12. The Respondents nominate Mr Louis Benno Kimmelman as an arbitrator, pursuant to the agreed procedure set out in the Arbitration Agreement. Mr Kimmelman's contact information is as follows:

Email address: bkimmelman@sidley.com
Telephone No.: +1 212 839 7322
Fax No.: +1 212 839 5599
Address: Sidley Austin LLP
787 Seventh Avenue
New York, New York 10019

RESPONDENTS' RESPONSE TO THE NOTICE OF ARBITRATION

Background Facts

13. Since 2012, the Claimants and GOL have been engaged in a multiple proceedings regarding their disputes over gaming properties located in Laos.
14. In 2012, the Claimants commenced two Bilateral Investment Treaty arbitrations against GOL in separate arbitration forums (collectively, the "**BIT Arbitrations**"). The

BIT Arbitrations comprise of PCA Case No. 2013-13 (the “**PCA Arbitration**”) commenced by the 1st Claimant and ICSID Additional Facility Rules Case No. ARB(AF)/12/6 (the “**ICSID Arbitration**”) commenced by the 2nd Claimant. The Claimants sought damages totalling US\$1 billion in the BIT Arbitrations.

15. Prior to the final hearing in the BIT Arbitrations, in or around June 2014, GOL and the Claimants agreed to resolve their pending disputes under the Deed. Under the Deed, the Claimants agreed to dismiss their claims in the BIT Arbitrations for no monetary compensation, but instead would sell their remaining gaming assets in Laos (the “**Gaming Assets**”), which included the Savan Vegas Hotel and Casino (the “**Casino**”) and two slot clubs (the “**Slot Clubs**”), and leave the country.
16. Under paragraph 10 of the Deed, it was envisaged that the Claimants would, amongst other things, sell the Gaming Assets. Paragraph 11 of the Deed provided that there would be a 10 month period after 15 June 2014 for the Claimants to effect the sale of the Gaming Assets. The deadline could be extended by a maximum of 90 days if the Claimants signed an MOU with a proposed buyer during the 10 month period (the “**Sale Deadline**”). Under paragraph 48 of the Deed, the parties agreed that time was of the essence.
17. If the Claimants failed to sell the Gaming Assets within the allotted time, the parties agreed that GOL would take control and complete a sale.
18. Under paragraphs 9 to 12 and Annex E of the Deed, GOL was to appoint a consultant, RMC Gaming Management LLC (“**RMC**”) to “provide the financial and operational expertise to [GOL] necessary to assist [GOL] in the sale of the Savan

Vegas and Casino Company Ltd” and “provide consulting services to [GOL] related to the sale of the [Gaming Assets]”. As it was envisaged in the Deed that the Claimants would operate the Gaming Assets during the 10 month interim period before the sale of the Gaming Assets took place, RMC’s role was also to serve as GOL’s agent to monitor and oversee the Claimants’ management due to alleged (and now substantiated) financial irregularities under the Claimants’ control. Under Annex E of the Deed, RMC was to receive a monthly retainer of US\$150,000 to be paid by Savan Vegas and Casino Company Ltd (“**SVCC**”) which was 80% owned by the 1st Claimant and 20% owned by GOL.

19. Paragraph 12 of the Deed provided that in the event that the Sale Deadline lapsed without a sale being completed, the Claimants and GOL were entitled to appoint RMC or any other qualified gaming operator to (i) step in to manage and operate the Gaming Assets in place of the Claimants until the sale was completed, and (ii) complete the sale; provided that such gaming operator would have a fiduciary duty to each of the Claimants and GOL as interested parties in the Gaming Assets.
20. After the execution of the Deed, the Claimants and GOL each asserted that the other had breached the Deed. In or around July 2014, the Claimants filed a Material Breach Application in the respective BIT Arbitrations to revive the BIT Arbitrations.
21. The Claimants also stopped performing their obligations under the Deed and procured SVCC to suspend its monthly payments of RMC’s retainer, amongst other things. As its retainer was not paid, RMC ceased to provide the services envisaged in the Deed.

22. On or around 11 August 2014, GOL commenced SIAC Arbitration No. 143 of 2014 against the Claimants in respect of the Claimants' breaches of the Deed. GOL also sought to enforce the terms of the Deed, including GOL's right to have a third party take over the management and operation of the Gaming Assets.
23. In or around December 2014, GOL gave notice to the Claimants that it intended to transition control of the Casino once the 10 month deadline for the sale lapsed on 14 April 2015 and invited the Claimants to participate in the orderly transition of control pursuant to the Deed. The Slot Clubs were excluded from the Gaming Assets to be sold because the Slot Clubs were owned by the 1st Claimant's former Laotian partner, ST Vegas Enterprise Ltd, which did not agree to the sale of the Slot Clubs.¹
24. In or around January 2015, the Claimants made an application in the ICSID Arbitration to enjoin GOL from taking over the Casino. On 14 April 2015, after hearing the parties, the Tribunal in the ICSID Arbitration rejected the Claimants' application to enjoin GOL from taking over the Casino. GOL subsequently assumed control of the Casino.
25. On or around 16 April 2015, GOL entered into a Management and Sales and Marketing Contract (the "**Marketing Contract**") with the 1st Respondent. The 1st Respondent had been recommended to GOL by RMC.

¹ On 3 separate occasions (15 July 2015, 2 August 2015 and 5 October 2015), GOL wrote to the 1st Claimant explaining that GOL had no objection to selling the Slot Clubs but could not do so unless ST Vegas Enterprise Ltd agreed to the sale. GOL requested the 1st Claimant to provide a solution to this issue but the 1st Claimant never provided such a solution. The Slot Clubs were accordingly excluded from the sale.

26. Under the Marketing Contract, the 1st Respondent was to perform the same interim management, marketing and sale assistance that RMC would have performed in exchange for the same remuneration that RMC would have received.

27. At paragraph 18 of the Notice of Arbitration, the Claimants have alleged that the “excessive compensation” paid to the Respondents makes it “obvious that the GOL bought Respondents to act solely in its interest” and that such payment was a “bribe”. However, there is no merit to this allegation. Amongst other things, the remuneration which the 1st Respondent was entitled to receive under the Marketing Contract was the same as the amount which the parties agreed the Claimants would pay RMC under the Deed.

28. The Claimants’ attempt to question the expertise and competence of the Respondents in respect of the management, sale and marketing of the Gaming Assets at paragraph 17 of the Notice of Arbitration is also without basis. Amongst other things, at the time that the 1st Respondent was engaged by GOL to manage the operation and sale of the Gaming Assets, the 2nd Respondent as the President and sole owner of the 1st Respondent had extensive experience in providing services to clients in the gaming industry. The 1st Respondent also had extensive expertise in operational, transaction and financial matters in relation to both established and emerging gaming markets, having performed consulting services to clients in regions such as Cambodia and Vietnam.

29. On 10 June 2015, the ICSID Tribunal denied the Claimants’ First Material Breach Application in the ICSID Arbitration. The proceedings in the PCA Arbitration had been suspended at that time pending the Singapore Courts’ determination of GOL’s

challenge in respect of the PCA Tribunal's jurisdiction to hear an expropriation claim under the Bilateral Investment Treaty Concerning the Encouragement and Reciprocal Protection of Investments dated 31 January 1993 between the Government of the People's Republic of China and GOL.

30. On 16 April 2015, having failed in its request to the ICSID Tribunal to enjoin GOL from taking control of the Casino after the Sale Deadline had lapsed, the Claimants made an application to the Tribunal in SIAC Arbitration No. 143 of 2014 to revert the control of the Casino back to the Claimants. On 30 June 2015, the Tribunal in SIAC Arbitration No. 143 of 2014 issued an order denying the Claimants' request for the return of the Casino under the terms of the Deed. The Tribunal in SIAC Arbitration No. 143 of 2014 directed GOL to provide regular financial information and marketing information to the Claimants. This direction by the Tribunal, which GOL was responsible for complying with, did not impose any duties or obligations on the Respondents who were not party to SIAC Arbitration No. 143 of 2014. Further, GOL complied with the Tribunal's directions in full.
31. In or around May 2016, GOL completed the sale of the Casino for a total consideration of US\$42 million. The sale closing took place on 31 August 2016.
32. On 29 June 2017, the Tribunal in SIAC Arbitration No. 143 of 2014 issued a Final Award. By majority, the Tribunal found, amongst other things, that the Claimants were in material breach of the Deed. Specifically, the Tribunal found, by majority, that the Claimants breached (i) their obligations to participate in a Flat Tax Committee "and in so doing, forwent [their] opportunity to influence the tax rate"; (ii) their

obligations under the Deed to take the required steps to sell the Casino; and (iii) their obligations under the Deed concerning their cooperation with and payment to RMC.

33. In contrast, the Tribunal by majority found that GOL complied with all of its obligations under the Deed. Specifically, the Tribunal accepted GOL's assertion that it took all steps to sell the Casino in good faith. The Tribunal also rejected the Claimants' allegation that the Respondents failed to conduct the sale of the Casino in good faith. A copy of the Final Award in SIAC Arbitration No. 143 of 2014 is annexed as Exhibit 1.

There is no merit to the Claimants' allegations

34. The Claimants' allegations are nothing more than a blatant and bad faith attempt to re-litigate issues and seek damages arising out of the sale of the Casino.
35. In SIAC Arbitration No. 143 of 2014, the Claimants prosecuted counterclaims under the Deed and have disingenuously placed at issue in this proceeding claims that arose out of the same facts, circumstances, and conduct of GOL and its agents (including the Respondents) relating to the operation and sale of the Casino. These claims are particularly vexatious in light of the findings in SIAC Arbitration No. 143 of 2014 which not only determined that the Claimants' rights were respected and complied with under the Deed, but that the Claimants violated and breached nearly all of their own obligations under the Deed. In particular, the Tribunal by majority concluded that the Claimants failed to demonstrate that GOL had failed to maximize the sale proceeds of the Casino — the primary purpose of the Deed and singular source of potential damage to the Claimants.

36. Thus, the Claimants' claims here are barred by the doctrine of collateral estoppel. In addition, the Claimants' claims must be dismissed as an abuse of process. It is an abuse of process and/or vexatious for the Claimants to seek to re-litigate the same issue against the Respondents in these proceedings and the Claimants should not be permitted to do so.

The Respondents did not owe fiduciary duties to the Claimants

37. The Respondents deny the Claimants' allegations at paragraph 26 of the Notice of Arbitration that the Respondents owed fiduciary duties to the Claimants. At all material times, the Claimants (i) were not party to the Marketing Contract; (ii) never accepted the Respondents as their principals; and (iii) never accepted that they were the Respondents' fiduciaries. To the contrary, the Claimants opposed the appointment of the Respondents to assist parties in the marketing and sale of the Casino and did not depose any trust and confidence in the Respondents. In the premises, a fiduciary relationship did not arise between the Claimants and the Respondents.

The Respondents did not breach their duties to the Claimants.

38. The Respondents deny the Claimants' allegations at paragraphs 27 to 30 of the Notice of Arbitration that the Respondents had breached their fiduciary duties to the Claimants. At all material times, after the expiry of the 10 month Sale Deadline, GOL took control of the Casino from the Claimants and management level decisions regarding the Casino were made by GOL to ensure that GOL complied with its obligations under the Deed. GOL also had control of all casino bank accounts and

made decisions regarding the finances of the Casino.

39. The 1st Respondent's role was to handle the day to day operation of the Casino and the marketing of the Casino.

40. Further, prior to the Deed, the Claimants' ownership interest in gaming properties in Laos pursuant to a Project Development Agreement between GOL and the 1st Claimant, among others, had been terminated by GOL. GOL had terminated the Project Development Agreement on the basis of the Claimants' (i) failure to pay taxes; (ii) criminal conduct; and (iii) unfitness to operate gaming businesses in Laos. Accordingly, the Claimants' only remaining interest in Laos (ie. the Casino) was recorded in the Deed, which the Tribunal in SIAC Arbitration No. 143 of 2014 has now determined to have been complied with by GOL in every aspect.

41. Insofar as the Claimants assert that the Respondents failed to communicate, advise or cooperate with the Claimants regarding the management and sale of the Casino, the Claimants had specifically agreed under paragraphs 9 to 12 and Annex E of the Deed that any consultant appointed would be assisting GOL in the sale of, *inter alia*, the Casino and providing consulting services to GOL relating to the sale. To that end, all communications with the Claimants were taken at the direction of GOL and under the explicit supervision of the Tribunal in SIAC Arbitration No. 143 of 2014. Further, insofar as the Respondents owed any fiduciary duties to the Claimants, this did not entitle the Claimants to participate and/or be involved in the Respondents' management, marketing and sale of the Casino.

42. The Respondents deny the allegations at paragraphs 21 to 23 of the Notice of Arbitration.

43. With regard to the Claimants' allegations at paragraph 27(j) of the Notice of Arbitration that the Respondents failed to conduct the sale of the Casino in a manner that would maximize the sale price, these allegations are denied. At all material times, policy level decisions regarding the sale process were made by GOL to ensure GOL's compliance with its obligations under the Deed. This issue, like all other issues, was previously litigated and decided against the Claimants in SIAC Arbitration No. 143 of 2014. As stated in paragraph 36 above, the Respondents rely on the doctrines of collateral estoppel and abuse of process.

No breach of contract

44. At paragraphs 31 to 35 of the Notice of Arbitration, the Claimants allege that the 1st Respondent breached its contractual obligations to the Claimants under the Marketing Contract by failing to act to the Claimants' benefit or in the Claimants' best interests. This allegation is baseless and denied. The Respondents also rely on the matters stated at paragraphs 34 to 43 above.

The Respondents did not exercise unlawful dominion over the Claimants' funds

45. At paragraphs 36 to 40 of the Notice of Arbitration, the Claimants assert that the Respondents had wrongfully seized funds which the Claimants allegedly had a right to; refused to pay the Claimants these funds; and collected US\$150,000 per month from these funds. These allegations are misplaced and denied. The Respondents

also refer to paragraph 38 above.

46. Further and in any event, without prejudice to the Respondents' position that the Claimants are not entitled to enforce the Marketing Agreement and that no fiduciary relationship existed between the Claimants and the Respondents, the 1st Respondent was entitled to use revenues of the Gaming Assets (which included the Casino) to pay its monthly invoices of US\$150,000. Clause 6.a.2 of the Marketing Agreement provided *inter alia*:

“On or before the 15th day of each month after the Effective Date, ***San Marco will submit an invoice for \$150,000 USD*** for the Management Fee to the GOL's designated appointee under Section 5. The takeover has been notified to Sanum/LHNV and the Government has today taken control of the Sa van Vegas and Casino Co. San Marco shall enter the premises within 7 days and will submit an appropriate invoice pursuant to the terms of this agreement which the Government will approve on sight. ***San Marco is then authorized to pay the invoices and all its future invoices from the revenues of the Gaming Assets.*** If the funds are not available from the Gaming Assets for any reason to allow San Marco to make the payment, the GOL guarantees the payment and will pay the invoice within ten (10) days of notice from San Marco in accordance with the terms of this Section.” [Emphasis added.]

47. In the premises, the Claimants are not entitled to any of the reliefs claimed at paragraph 41 of its Notice of Arbitration.
48. The Respondents will respond to the Claimants' allegations in greater detail when it receives the Statement of Claim in this Arbitration.

RESERVATIONS

49. All of the Respondents' rights are reserved, including their right to amend, supplement, abandon and/or add to the matters, claims, and reliefs stated and made

herein and their right to file and serve their detailed Statement of Defence in due course as envisaged in Rule 20.3 of the SIAC 2016 Rules.

Counsel for the Respondents

A handwritten signature in black ink, appearing to read "Drew Napier", with a horizontal line extending to the right from the end of the signature.

Drew & Napier LLC