

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. 4

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

Secretary of the Tribunal
Anneliese Fleckenstein

Date: 21 August 2104

INTRODUCTION

1. On 19 June 2014, and upon the Parties' joint request, the Tribunal issued an Order on Consent suspending this arbitration pursuant to the Deed of Settlement dated and effective as of 15 June 2014, and the Side Letter executed by the Parties on 18 June 2014.

2. On 4 July 2014, the Claimant submitted an Application for a Finding of Material Breach and for Reinstatement of the Arbitration pursuant to Section 32 of the Deed accompanied by annexed documents purporting to show that the Government had licensed a rival casino contrary to the Claimant's interpretation of the terms of the Settlement. In its Reply of 11 August 2004, the Respondent denied the allegations. Additional pleadings and counter pleadings followed. The Tribunal took time to deliberate.

THE TRIBUNAL'S DECISION

3. The jurisdiction of the Tribunal is based on Section 32 of the Deed which provides that the Arbitration may be revived in the event that Laos is found by the Tribunal to be in material breach of sections 5-8, 15, 21-23, 25, 27 or 28 of the Deed. Accordingly, the Tribunal rules that the Claimant's allegations and claims under Articles 13, 16 and 30 are not within its jurisdiction. Equally, the Tribunal does not consider that the Provisional Measures Order has any application so long as the arbitral proceedings that gave rise to it are suspended. The Parties' rights and obligations are now found in the Deed of Settlement and accompanying Side Letter.

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

Procedural Order No. 4

4. The Tribunal notes that under Section 42 of the Deed "(a)ny dispute arising out of or in connection with this Deed, including any question regarding its existence, validity or termination, shall be referred to and resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre [SIAC] for the time being in force, including its emergency arbitration rules." At the same time, this Tribunal is bound to exercise its own exclusive jurisdiction under Section 32 "to determine whether or not there has been such a material breach". A question has arisen as to how this Tribunal can determine a material breach without interpreting the scope of the obligation said to be breached. In other words, when an issue of interpretation is coupled with an allegation of a material breach, does the task of interpretation fall to this Tribunal or to SIAC? The written submissions of the Parties on the relationship between Section 32 and Section 42 do not permit a determination of this threshold issue.

5. The Respondent, while denying any material breach, contends that the Claimant has in any event denied it the benefit of the grace period of 45 days provided under Section 32 to remedy any alleged material breach. The Claimant simply responds that the breaches are incurable and that any remedial effort by the Respondent would be futile. The evidence presented by the Claimant in support of "futility", and the written submissions of the Parties on the legal effect of provision for a 45 day cure period, do not permit the Tribunal to determine the legal effect of this provision (on which the Respondent places great emphasis) in the unusual circumstances posed by this Application.

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

Procedural Order No. 4

6. The evidentiary record with respect to the Respondent's grant or no grant (or no promise to grant) a rival casino licence in Savannakhet is unsworn and succinct. The Respondent denies the Claimant's allegations (which are supported by affidavits) but has been reluctant to produce documents other than those it has itself relied on and the documents therein referred to. The Claimant says that without access to additional documents the Tribunal cannot test the validity of the Respondent's denial. The Tribunal does not consider the present factual record to provide a sufficient level of comfort to make findings of the material facts one way or the other.

7. The Tribunal does not wish to be interpreted as having made a finding that the Claimant has made out a *prima facie* case. The Tribunal has not done so. The conclusion reached by the Tribunal, rather, is that the Application cannot be disposed of in a satisfactory way without a hearing limited to issues (2) (3) and (4) above. The members of the Tribunal wish to have the opportunity to put questions directly to counsel and to engage with them on the relevant points of fact and law.

8. The hearing is to be of no more than one day's duration and convened as soon as is reasonably practicable. It is likely that an earlier date can be found in London or Paris than Singapore. The Parties are invited to communicate their views and preferences to the Tribunal by 27 August 2014. When arrangements for a hearing have been made the Tribunal will provide the Parties with more detailed guidance on the three issues listed above that it wishes to be addressed.

Lao Holdings N.V.

v.

The Lao People's Democratic Republic

(ICSID Case No. ARB(AF)/12/6)

Procedural Order No. 4

9. By way of postscript, the Tribunal recalls that on other occasions when a hearing has been convened, including the proceedings in Singapore, the Parties when face to face have taken the opportunity to work out their differences to their mutual satisfaction without the need for the Tribunal's intervention.

Place of arbitration: Singapore

[Signed]

The Honourable Ian Binnie, C.C., Q.C., President

For the Arbitral Tribunal

Date: