

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

*Raymond Charles Eyre And  
Montrose Developments (Private) Limited*

v.

*Democratic Socialist Republic of Sri Lanka*

ICSID Case No. ARB/16/25

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PROCEDURAL ORDER NO. 6

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*Members of the Tribunal*  
Prof. Lucy Reed, President  
Prof. Julian D.M. Lew, Q.C., Arbitrator  
Prof. Brigitte Stern, Arbitrator

*Secretary of the Tribunal*  
Ms. Geraldine R. Fischer

Date: 6 February 2019

## **I. INTRODUCTION**

1. This Procedural Order addresses the Respondent's Application for the Exclusion of New Issues Raised by the Claimants in its letter dated 11 December 2018 following the Hearing on Jurisdiction (the *Hearing*) and the Parties' Post-Hearing Briefs (the *Application*). As set forth below, the Tribunal grants the Application by majority.

## **II. PROCEDURAL BACKGROUND**

2. The Tribunal conducted the Hearing on 17-19 October 2018. The Parties submitted Post-Hearing Briefs on 7 December 2018.
3. By letter dated 11 December 2018, the Respondent applied to exclude what it alleges are two new substantive issues in the Claimants' Post-Hearing Brief in support of their case on jurisdiction raising new points of Sri Lankan law and factual evidence (the *New Issues*). To quote from the Application, the New Issues – labeled the "Express Trust Argument" and the "Constructive Trust Argument", respectively, are:
  - a. *At paragraphs 16-17, the Claimants assert that no express trust arises from the Memorandum of Understanding (the "MOU") under Sri Lankan law over the profits from the future Hotel Project on the alleged basis that s.5(1) of the Trusts Ordinance, which applies to immoveable property and requires, in the case of immoveable property, that the trust be notarially executed; and*
  - b. *At paragraph 43, the Claimants now seek to advance as an alternative case that Mr Fernando "held the Montrose Share on constructive trust for Mr Eyre under s.83 of the Trusts Ordinance."*<sup>1</sup>
4. Sri Lanka requests the Tribunal to order the New Issues excluded, on grounds that it *"has never had the opportunity to address the New Issues and it is far too late for the Claimants to raise them now, to the fundamental prejudice of the Respondent."*<sup>2</sup>

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<sup>1</sup> Application, para. 2.

<sup>2</sup> Application, paras. 3-4.

According to the Respondent, the New Issues cannot “*be simply remedied and would engender further delay, cost and expense that is inexcusable.*”<sup>3</sup>

5. By letter dated 21 December 2018, the Claimants opposed the Application (the ***Claimants’ Reply***). They reject the basis of the Application on both New Issues and contend that “*Sri Lanka’s proposed course of action is an entirely disproportionate response in any event.*”<sup>4</sup>
6. By letter dated 18 January 2019, Sri Lanka maintained its objections to inclusion of the New Issues (the ***Sri Lanka Response***). The Respondent emphasized that the Claimants did not include either of the New Issues in their graphic decision tree as presented at the hearing and subsequently. Sri Lanka states that there “*has to come a time when there is a guillotine on new points and that time must have passed following the evidentiary hearing.*”<sup>5</sup>

### III. THE EXPRESS TRUST ARGUMENT

#### A. THE RESPONDENT’S POSITION

7. The heart of the Claimants’ Express Trust Argument is that no express trust could arise from the MOU because it was not notarized.
8. It is undisputed that, at paragraphs 16-17 of their Post-Hearing Brief, the Claimants contend that, by virtue of the requirements of s.2 of the Prevention of Frauds Ordinance and s.5(1) of the Trusts Ordinance, an express trust does not arise over the profits from the Hotel Project under the MOU because the MOU was not attested by a notary. According to the Respondent, although the Claimants assert that they made this point at the hearing in closing submissions,<sup>6</sup> these submissions actually were in the context (right or wrong) of the Claimants’ argument that the document of primary relevance to

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<sup>3</sup> Application, para. 14(d).

<sup>4</sup> Claimants’ Reply, p. 1.

<sup>5</sup> Sri Lanka Response, para. 11.

<sup>6</sup> Application, para. 7 (citing Hearing Transcript T3/533/24-534/11).



the Land transfer was the notarized Deed rather than the MOU, “*being part of the [...] argument that one cannot look behind the Deed.*”<sup>7</sup> The submissions did not engage the Respondent’s case that the MOU creates an express (or constructive) trust in respect of the profits to be generated from the Hotel Development, and no contention was made that an agreement to share profits had to be notarized under s.5(1) of the Trusts Ordinance.

9. In its Response, Sri Lanka adds that if the Claimants intended to rely on s.2 of the Prevention of Frauds Ordinance and s.5(1) of the Trusts Ordinance in an additional context, “*the onus was on the Claimants to be very specific that they are raising a New Issue.*”<sup>8</sup>
10. Sri Lanka further directs the Tribunal’s attention to Section 143 of the Claimants’ Memorial, where the Claimants assert that s.5(1) of the Trusts Ordinance applies only to trusts over immoveable property and not over shares. The Claimants are now, says the Respondent, “*taking the opposite position, without explanation, and doing so without having given the Respondent opportunity to respond.*”<sup>9</sup>

#### **B. THE CLAIMANTS’ POSITION**

11. The Claimants maintain that they did validly raise the Express Trust Argument before their Post-Hearing Brief and during the Hearing, relying on the transcript (T3/533/24-534/11) where their counsel submitted:

*Now, the purported MOU that is referred to, and what Mr. Diwan mentioned, if I may use his own words, the most important fundamental document in this arbitration, unfortunately is an undated document not attested or not notarized. A notarization is of paramount importance with regard to immobile property in Sri Lanka.*<sup>10</sup>

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<sup>7</sup> Application, para. 7

<sup>8</sup> Sri Lanka Response, para. 7.

<sup>9</sup> Application, para. 9.

<sup>10</sup> Claimants’ Reply, para. 3 (citing Hearing Transcript T3/533/21-534/2 (emphasis from the Claimants)).

12. After this submission, the Claimants' counsel quoted s.5(1) of the Trusts Ordinance and s.2 of the Prevention of Frauds Ordinance, "*thereby drawing the Tribunal's attention to the fact that for any documents 'in relation to immoveable property' or 'affecting land or other immoveable property' to have effect in Sri Lankan law, it must be notarized.*"<sup>11</sup> Accordingly, say the Claimants, it is self-evident that a trust over profits arising directly from land, such as the Hotel Project, is a trust "*in relation to*" or otherwise "*affecting*" land, and consequently "*it is clear that as a matter of Sri Lankan law that the MOU cannot produce an express trust over the profits from the Hotel Project – which is precisely the point being made at paragraphs 16-17 of the [Post-Hearing Brief].*"<sup>12</sup>
13. Further, the Claimants disagree that the Express Trust Argument is inconsistent with their position at paragraph 143 of their Memorial, to the effect that s.5(1) of the Trust Ordinance only applies to trusts over immoveable property and not over shares. Although it is correct that a trust over shares is not a trust "*in relation to*" or otherwise "*affecting*" land even where the relevant company owns land, because of the separate personality of the company in which the shares are owned, the Claimants assert that this "*logic does not apply to a trust over profits over land which ... does directly relate to and otherwise affect land.*"<sup>13</sup>

#### **IV. THE CONSTRUCTIVE TRUST ARGUMENT**

##### **A. THE RESPONDENT'S POSITION**

14. It is undisputed that at paragraph 43 of their Post-Hearing Brief, the Claimants seek to invoke s.83 of the Trust Ordinance to argue the existence of a constructive trust over the Montrose Share.

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<sup>11</sup> Claimants' Reply, para. 4 (citing Hearing Transcript T3/533/4-534/25).

<sup>12</sup> Claimants' Reply, para. 4.

<sup>13</sup> Claimants' Reply, para. 5 (emphasis in original).



15. The Respondent contends that, until the Post-Hearing Brief, the Claimants had always advanced their claim of trust with regard to the shares on grounds that Mr Fernando held the Montrose Share subject to an express trust in favor of Mr Eyre rather than on a constructive trust.<sup>14</sup> In s. 248 of the Rejoinder, the Claimants asserted that there was no need to document the creation of a trust, as the relevant question is whether there was an intention to create a trust. The argument, says the Respondent, was premised on an express trust without any invocation of s.83 of the Trust Ordinance relating to constructive trusts. Further, the Claimants in their Rejoinder did not engage with the legal principles for the creation of an express trust in the shares set out in the Respondent's Reply.<sup>15</sup>
16. The Respondent objects that the Claimants are now "*opportunisticly seeking to try and construct a new case*" of constructive trust under s.83, calling the attempt "*unfair and prejudicial*."<sup>16</sup> In specific, Sri Lanka alleges that, if the Claimants had been timely in advancing this case, which raises attendant circumstances to the MOU, "*it would have been entitled to cross-examine Mr Eyre on the basis of this allegation and it [was] deprived of that opportunity*."<sup>17</sup>

#### **B. THE CLAIMANTS' POSITION**

17. The Claimants explain that they raised the Constructive Trust Argument in their Post-Hearing Brief because of "*Sri Lanka's continued emphasis on s 83 of the Trusts Ordinance at the Hearing and consideration of Mr Eyre and Mr Wijeratne's evidence thereafter,*" which reflected Mr Eyre's intention not to part with his beneficial interest in the Montrose Share when it was transferred to Mr Fernando.<sup>18</sup> Notwithstanding this, the Claimants disagree that Sri Lanka needs any further cross-examination of Mr Eyre or Mr Wijeratne to deal with the Constructive Trust Argument stating that both

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<sup>14</sup> Application, para. 11 (citing Claimants' Memorial paras. 29, 99; Claimants' Counter-Memorial on Jurisdiction, para. 14; and Claimants' Rejoinder on Jurisdiction, para. 248).

<sup>15</sup> Application, para. 12 (citing Respondent's Reply on Jurisdiction, paras. 214-238).

<sup>16</sup> Application, para. 13.

<sup>17</sup> Application, para. 13.

<sup>18</sup> Claimants' Reply, para.7.

witnesses testified several times about Mr Eyre's intention to retain control of the Montrose Share. If there were further cross-examination, say the Claimants, "*the only thing that would emerge is further evidence consistent with the Claimants' case.*"<sup>19</sup>

18. The Claimants submit that Sri Lanka can vitiate any disadvantage caused by the late raising of the Constructive Trust Argument by making a brief supplementary submission. This would not be difficult for the Respondent while "*the prejudice caused to the Claimants by excluding such an obviously meritorious point would be considerable and entirely unjustified ... [and] could lead the Tribunal into making determinations on a false basis, which is obviously undesirable.*"<sup>20</sup>

## **V. THE TRIBUNAL'S ANALYSIS**

### **A. THE EXPRESS TRUST ARGUMENT**

19. The Tribunal turns first to the New Issue of the Express Trust Argument.
20. Having reviewed the relevant section of the hearing transcript, the Majority of the Tribunal considers that the quoted submissions (T3/533/4-534/25) were made in the context of the Claimants' argument concerning the alleged primacy of the notarized Deed over the unnotarized MOU. There was no express or implied discussion of the distinction between a trust over shares in a company that owns land (as immoveable property) and a trust over the profits from shares related to land. Insofar as the MOU was discussed, the context was the Respondent's argument that the MOU was an attendant circumstance to the Deed. The Majority cannot find that the Claimants explicitly or implicitly flagged at this point of the Hearing (or at any other point) the connection it made in its Post-Hearing Brief between the Express Trust Argument and the submissions on s.5(1) of the Trusts Ordinance and s.2 of the Prevention of Frauds Ordinance.

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<sup>19</sup> Claimants' Reply, para. 9.

<sup>20</sup> Claimants' Reply, para.10.



21. The Tribunal by majority further agrees with Sri Lanka that, if the Claimants had contemporaneously considered that this discussion of notarization was relevant to the Express Trust Argument, they were obliged to make that clear during the Hearing. It is not enough that certain Sri Lankan laws were cited in connection with one argument to allow them to be used to support a new and different argument in a post-hearing submission.

**B. THE CONSTRUCTIVE TRUST ARGUMENT**

22. The Tribunal turns next to the Constructive Trust Argument, which the Majority finds to be an unallowable new argument. The Majority considers it compelling that the Claimants accept this to be a new argument in the Claimants' Reply to the Application.
23. The Tribunal (by majority) cannot agree with the Claimants that this new argument is justified by the fact that Sri Lanka emphasized its own constructive trust argument under s.83 of Trusts Ordinance at the Hearing. The record reflects that Sri Lanka had presented this argument fully in its Reply, to which the Claimants responded in their Rejoinder. This was not new at the Hearing.

**C. GENERAL CONSIDERATIONS**

24. In connection with both of the New Issues, the Tribunal notes the absence of either the Express Trust Argument or the Constructive Trust Argument on the Claimants' "decision tree" demonstrative. This is not a decisive point, as the decision tree demonstrative is neither evidence nor formal submission. However, the Claimants' choice not to include the New Issues in what is a complex and seemingly inclusive case map does support the contention that they are new arguments in the Claimants' Post-Hearing Brief.
25. The Tribunal next examines the Claimants' argument that exclusion of the New Issues would be disproportionate to any prejudice caused to Sri Lanka by allowing the Claimants to pursue them.



26. It is true that the Tribunal could, if sought by Respondent, allow Sri Lanka to file further written submissions on one or both of the New Issues, and schedule a further hearing for cross-examination of Mr Eyre and Mr Wijeratne on the Constructive Trust Argument. It is also true that it is not unusual for one or both parties in any arbitration to identify new potential arguments after the written submission stage and even after a hearing. Yet, tribunals are responsible to manage proceedings both fairly and efficiently, and are trusted to impose discipline.
27. The Tribunal recognizes that it was possible to show flexibility during the Hearing by allowing the Claimants, over Sri Lanka's objections, to introduce one new argument in oral closing, namely that it is not permissible to look behind the terms of the Deed to assert the absence of consideration. This was at a stage when the Tribunal, the parties and their representatives, and the witnesses were in attendance and hence the Respondent had a timely opportunity to address the argument orally and/or by a post-hearing submission. In comparison, the Claimants have raised the New Issues only in their Post-Hearing Submission. For the Tribunal to schedule further written submissions and schedule a further hearing for cross-examination, to which Sri Lanka would be entitled as a matter of due process, would entail additional time leading to what the Majority of the Tribunal considers to be an unacceptable delay.
28. To borrow Sri Lanka's language, there does have to "*come a time when there is a guillotine on new points,*" and here that time must be the close of the Hearing on Jurisdiction in October 2018. It was the Claimants who chose to raise the New Issues only after the Hearing, without a satisfactory justification. The prejudice to Sri Lanka of requiring it to deal with either New Issue outweighs any prejudice suffered by the Claimants in excluding the New Issues from these proceedings.

**VI. ORDER**

For the reasons set forth above, the Tribunal by majority ORDERS as follows:

1. The Respondent's Application of 11 December 2018 for the Exclusion of New Issues Raised by the Claimants following the Hearing on Jurisdiction is GRANTED.
2. The issue of costs is reserved.

[signed]

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Lucy Reed  
President of the Tribunal

Date: 6 February 2019