IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 141

Originating Summons No 890 of 2016
(Summons No 4933 of 2017)

Between

(1) Sanum Investments Limited

… *Plaintiff*

And

(1) ST Group Co., Ltd.
(2) Sithat Xaysoulivong
(3) ST Vegas Co., Ltd.
(4) S.T. Vegas Enterprise Ltd.

… *Defendants*

JUDGMENT

[Arbitration] — [Award] — [Refusal of enforcement] — [Jurisdiction of tribunal]

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v
ST Group Co, Ltd and others

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11, 12, 15 January 2018

18 June 2018 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 Sanum Investments Limited ("Sanum") previously obtained leave of court to enforce an arbitral award, dated 22 August 2016 ("the Award"), pursuant to s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and O 69A r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). On 23 November 2016, judgment was entered in terms of the Award. The arbitration in Singapore was administered under the auspices of the Singapore International Arbitration Centre ("SIAC") and the eventual Award was rendered by a three-member tribunal that found in favour of Sanum. The sum is not insignificant; Sanum was entitled to US$200 million in damages alone.

2 Although ST Group Co., Ltd. ("ST Group"), Mr Sithat Xaysoulivong ("Mr Sithat"), ST Vegas Co., Ltd. ("ST Vegas Co"), and S.T. Vegas Enterprise

Ltd. ("ST Vegas Enterprise") (collectively, "the Lao disputants") have commenced four applications concerning various matters relating to the enforcement of the Award, the parties have agreed that this court need only deal with Summons No 4933 of 2017 ("SUM 4933"), filed on 16 June 2017, presently. Consequently, Summons Nos 202, 1331 and 2274, all of 2017, were adjourned pending the determination of SUM 4933.

3 SUM 4933 is an application for the refusal of enforcement of the Award pursuant to Article 36(1) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") contained in the First Schedule of the IAA. In essence, the Lao disputants argue that: (a) the Award was made pursuant to an arbitration agreement (or agreements) to which not all the Lao disputants were a party to; (b) the Award deals with a dispute not contemplated by or falling within the scope of the submission to arbitration; and (c) the composition of the tribunal and the seat of the arbitration were not in accordance with the agreement of the parties. Points (a) and (b) are objections to the tribunal's jurisdiction ("jurisdictional objections"). Point (c) is procedural in nature ("procedural objections"). There were two other objections, that of public policy and language of the arbitration, raised by the Lao disputants in their affidavits but these were not pursued in submissions. This court will treat them as abandoned.

4 Central to the determination of the jurisdictional objections raised in SUM 4933 is the interpretation and relevance of two dispute resolution clauses found in two agreements; namely Clause 2(10) of the Master Agreement, and Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise (see [23]–[24] below). These two clauses are important. They formed the basis upon which the tribunal established its jurisdiction to adjudicate the dispute that was referred to arbitration under the auspices of the SIAC, and

which led to the Award now binding on the Lao disputants. This judgment will also deal with the procedural objections raised in SUM 4933.

5 At the hearing of the present proceedings, Sanum was represented by Mr Alvin Yeo S.C. ("Mr Yeo"). The Lao disputants, on the other hand, were represented by Mr Francis Xavier S.C. ("Mr Xavier").

Factual context of the present case

The parties

6 Sanum is a company incorporated in Macau (Special Administrative Region), People's Republic of China ("Macau"). It has extensive knowledge and experience in the gaming industry and was, at the material time, interested in pursuing business opportunities in the People's Democratic Republic of Lao ("Lao"). Mr John Baldwin, Chairman of Sanum's Board of Directors, testified in the arbitration on behalf of Sanum. He has affirmed affidavits that were used in these proceedings.

7 ST Group is a company incorporated in Lao. It owns diverse business interests across various industries, including the gaming and entertainment industry in Lao. Mr Sithat is the President of ST Group and has affirmed affidavits on behalf of ST Group and himself. His affidavits were used in these proceedings.

8 ST Vegas Co and ST Vegas Enterprise are also companies incorporated in Lao. They own certain gaming licences and operate certain slot clubs in Lao. ST Vegas Co, in particular, holds the gaming licence to operate a slot club located at the Vientiane Friendship Bridge along the Thai-Laos border (the "Thanaleng Slot Club"); the very slot club which the Award was concerned

with. Both ST Vegas Co and ST Vegas Enterprise are managed by Mr Xaysana Xaysoulivong ("Mr Xaysana"), one of Mr Sithat's sons. Mr Xaysana has filed affidavits on behalf of the two entities and they were used in these proceedings.

Contractual framework governing the relationship of the parties

9 Sanum was, back in 2007, looking for business opportunities in Lao. Based on certain recommendations given by other business associates and Lao government officials, Sanum got in touch with the Lao disputants. According to Sanum, the Lao disputants lacked the resources to develop successfully its gaming enterprises and for this reason, needed a joint venture partner. As a result, Sanum and the Lao disputants negotiated and entered into a joint venture arrangement whereby Sanum would eventually come to hold 60% of all present and future gaming businesses of the joint venture. This arrangement was embodied in an agreement dated 30 May 2007 referred to by the parties as the Master Agreement. The Master Agreement has, at times, been indicated to be dated 31 May 2007, nothing turns on this difference. The date used in this judgment is the 30 May 2007 as this appears to be the date commonly adopted by the parties. As an aside, the problem with dates used to mark various documents and to describe different events plague this case. However, given the analysis in this judgment, nothing turns on these differences.

10 The Master Agreement envisioned that there would be three joint ventures created to hold and develop certain properties. Two of the joint ventures concerned the running of casinos whereas the third joint venture concerned the operation of slot clubs: (a) Savannahkhet Casino Joint Venture; (b) Paksong/Champasak Casino Joint Venture; and (c) Slot Club Joint Venture. Separate agreements known as participation agreements may have to be prepared for each of these joint ventures. As regards the Slot Club Joint Venture,

the relevant slot clubs referred to in the Master Agreement are the slot clubs at the "Lao border at Lao Bao" and the "Savannakhet/Daesaven checkpoint" (also referred to by the parties as the Lao Bao Slot Club and Ferry Terminal Slot Club).

11 To execute the joint venture for two slot clubs, Sanum subsequently entered into a participation agreement with ST Vegas Enterprise on 6 August 2007 ("Participation Agreement between Sanum and ST Vegas Enterprise") which indicated that the joint venture was to carry on for a term of 50 years.

12 There is a third slot club named the Thanaleng Slot Club. This slot club was not treated as immediately part of the Slot Club Joint Venture. This is because there were existing third party machine owners already involved in the Thanaleng Slot Club at the time the Master Agreement was concluded. However, the Master Agreement envisaged Sanum taking over the Thanaleng Slot Club upon the termination of the third party machine owners' contracts (referred to by the parties as the "turnover" of the Thanaleng Slot Club). Mr Xaysana's affidavit states the termination dates of these contracts as follows: (a) the contract with RGB Ltd, ending on 10 October 2011; (b) the contract with IndoPacific Gaming Australia Pty Ltd, ending on 31 March 2010; and (c) Thaimac Export-Import Pty Ltd, ending on 26 November 2007. The "turnover" of the Thanaleng Slot Club is given effect to in Clause 1(3)(d) of the Master Agreement. Given the language of Clause 1(3)(d), the "turnover" date would coincide with the expiry of the RGB Ltd contract. There is an inconsistency between the termination date of the RGB Ltd contract as stated by Mr Xaysana and in the Temporary Thanaleng Participation Agreement; the latter indicating that the RGB contract was to terminate on 11 October 2011 (see [14] below). For the purposes of the hearing, Mr Yeo used 11 October 2011 as the "turnover"

date under the Master Agreement. This, to a large extent, was also the position adopted by Mr Xavier.

13 For context, the key portion of the Master Agreement relating to the slot clubs are reproduced as follows:

> **1. <u>Joint Ventures:</u>**
>
> The Joint Ventures shall represent and include all of 2nd Party's present and future gaming businesss in Lao PDR.
>
> The only exceptions are with the Vientiane Friendship Bridge location [also referred to as the Thanaleng Slot Club] where there are three contracts for slot machines with RGB that expires in less than 5 years, Australian Co with approximately 2 years remaining and the Thai Australian Co. with approximately 1 year left. The above mentioned contracts will be allowed to expire with no extensions given by 2nd Party, no expansion is allowed, and no new contracts involving gaming of any type entered into without 1st Party approval. Upon the expiration of the above entities' participation agreements with 2nd Party, each entity may submit a proposal to 1st Party detailing how it may continue a relationship with the Vientiane Friendship bridge location, 2nd Party, 1st Party or the Joint Ventures. 1st Party has the sole discretion to approve or disapprove such proposals. (See also subsection 3d. of this Section).
>
> It is presently contemplated that the Joint Ventures will be compromised of three separate joint venture entities. Some of these contemplated joint venture entities may already exist and 1st Party must be made a legal participant in such entities. As future gaming projects may evolve, additional joint venture entities may be developed between the Parties.
>
> 2nd Party shall not be involved in any present or future gaming activity without the direct participation of 1st Party. 1st Party shall thus have an exclusive gaming relationship with 2nd Party. This exclusive right will be to all gaming and its related gaming concession of 2nd Party.
>
> The Joint Ventures shall include and separately hold and develop the following properties:
>
> …
>
> 3) Slot Club Joint Venture, which shall include, but is not limited to, Slot Club at Lao border at Lao Bao, Slot Club

> Savannakhet/Daensaven checkpoint and 100% of all future slot clubs and gaming of any type that 2nd Party should become involved in. The documenting of the Slot Club Joint Venture, in which slot clubs already exists, may require the use of participation agreements. (See also Section 3(9)).
>
> …
>
> c. Ownership structure of all slot clubs is
>
> i. 60% 1st Party
>
> ii. 40% 2nd Party
>
> d. *Current Vientiane Friendship Bridge location [the Thanaleng Slot Club] will remain as is until the current contract with machine owners expire, whereupon 1st Party will take the place of the current operators under the same conditions and terms as the existing participation agreements. Upon the expiration of the existing entities' participation agreements with 2nd Party, each entity may submit a proposal to 1st Party detailing how it may continue a relationship with the Vientiane Friendship Bridge location, 2nd Party, 1st Party or the Joint Ventures. 1st Party has the sole discretion to approve or disapprove such proposals. Upon the expiration of the existing entities' participation agreements with 2nd Party and turnover of the location to the Slot Club Joint Venture, the 1st Party shall pay to 2nd Party $500,000.*
>
> …
>
> 5) This Agreement shall also be expressed in a number of sub-agreements corresponding to the details of each Joint Venture ("Sub-Agreements"). The Sub-Agreements shall express the exact meaning of all terms of this Agreement. Regardless of semantics and phraseology that is used in the Sub-Agreements, this Agreement rules and is authoritative; any contradiction or vagueness shall be clarified by the plain meaning of the terms of this Agreement.
>
> [emphasis added]

"1st Party" refers to Sanum whereas "2nd Party" collectively refers to the Lao disputants, unless otherwise stated in this judgment.

14 On 4 October 2008, ST Vegas Co and Sanum entered into a temporary revenue-sharing agreement in relation to the Thanaleng Slot Club ("Temporary

Thanaleng Participation Agreement"). According to ST Vegas Co, this was because the expiry of the Thaimac Export-Import Pty Ltd contract led to a shortfall in the slot machines at the Thanaleng Slot Club. Hence, it was agreed that Sanum would provide additional slot machines to the Thanaleng Slot Club, and that the revenue generated from these machines was to be shared in accordance with certain agreed percentages: 40% to ST Vegas Co and 60% to Sanum. The Temporary Thanaleng Participation Agreement contained a clause stating that 11 October 2011 was the termination date of the agreement. As alluded to earlier, the clause also stated that the termination date of the RGB Ltd contract date is 11 October 2011.

15 There are two other agreements in relation to the Thanaleng Slot Club. The first agreement, dated 23 February 2010, was for the expansion of the slot club to an adjacent piece of land which included a building used for the purposes of duty-free sales ("First Expansion Agreement"). This agreement was entered into between Sanum and ST Group, who owned the rights to the land. The second agreement, dated 16 November 2010, was for the construction of an additional facility to further expand the Thanaleng Slot Club ("Second Expansion Agreement"). This agreement was entered into between Sanum, ST Group and ST Vegas Co. The Second Expansion Agreement, notably, included a clause which stated that the Thanaleng Slot Club and the various expansions to the club were to be operated as "one slot club in accordance with the provisions of the [Temporary Thanaleng Participation Agreement] and the Master Agreement", unless provided for otherwise. The Second Expansion Agreement also contained a clause which stated that the participating percentage will change from 40-60 to 60-40, in favour of Sanum on the occurrence of stipulated events. This change in ratio is supposed to be consistent with the eventual ownership ratio in the Master Agreement.

16 The Temporary Thanaleng Agreement, First and Second Expansion Agreements will hereinafter be collectively referred to as the Thanaleng Documents. To sum up, the five agreements mentioned above – namely, the Master Agreement, the Participation Agreement between Sanum and ST Vegas Enterprise, and the Thanaleng Documents – form the contractual backdrop of the underlying dispute ("Five Agreements").

The underlying dispute

17 The underlying dispute between Sanum and the Lao disputants concerned the turnover of the Thanaleng Slot Club. As 11 October 2011 approached, Sanum was informed that the expiration of the RGB Ltd contract was on 12 April 2012 and not 11 October 2011. On 11 April 2012, ST Vegas Co informed Sanum that it considered all the agreements relating to the Thanaleng Slot Club between the parties to be terminated. On 12 April 2012, ST Vegas Co shut down the Thanaleng Slot Club, closed its doors, and refused to allow Sanum access to the club.

18 Sanum soon after commenced arbitral proceedings before the Lao Organisation of Economic Dispute Resolution ("OEDR") (referred in the Master Agreement as the Resolution of Economic Dispute Organization). The initial OEDR petition named ST Group and ST Vegas Co as "petitioned parties". According to the Lao disputants' submissions, the OEDR proceedings thereafter concluded on or around 21 May 2012, with the OEDR dismissing the claim filed by Sanum. Subsequently, on 11 June 2012, ST Vegas Co commenced proceedings against Sanum in the Vientiane People's Commercial Court, seeking *inter alias*, a declaration that the Temporary Thanaleng Participation Agreement had expired and that the parties no longer owed any obligations to each other in relation to the Thanaleng Slot Club. In response,

Sanum filed a defence and counterclaim on 25 June 2012 which named ST Vegas Co, ST Group, Mr Sithat and Xaya Construction Company Ltd (whom the Award was not made against, see [19] below) as defendants in the counterclaim. On 26 July 2012, Sanum's counterclaim was dismissed and ST Vegas Co's claim was affirmed. Dissatisfied, Sanum appealed: first to the Court of Appeal, and then to the People's Supreme Court. On both appeals, Sanum lost. On the 4 April 2014, judgment was handed down by the Supreme Court. It held that the Temporary Thanaleng Participation Agreement had been terminated on 11 October 2011.

The SIAC arbitration

19 Sanum subsequently commenced arbitration seeking damages for breaches of the Master Agreement, and the Participation Agreement between Sanum and ST Vegas Enterprise ("the SIAC Arbitration"). The SIAC Arbitration was initially brought against the Lao disputants and two others, Xaya Construction Co Ltd and Mr Xaysana. Sanum eventually consented to dismissing Xaya Construction Co Ltd and Mr Xaysana from the arbitral proceedings and as a result, the Award was made only against the Lao disputants.

20 The Lao disputants, at all material times, objected to the SIAC Arbitration and did not participate in its proceedings; contending that they did not agree to the SIAC Arbitration. The Lao disputants also questioned Sanum's decision to commence arbitration at the SIAC; highlighting that according to Clause 2(10) of the Master Agreement, "the Parties shall arbitrate their dispute using an internationally recognised mediation arbitration [*sic*] Company in Macau, SAR PRC", among other things.[1] The SIAC noted these objections and

[1] Award, paras 3.3–3.5.

informed the parties on 24 November 2015 that it was *prima facie* satisfied that a valid arbitration under the SIAC Rules existed and requested the Lao disputants to nominate an arbitrator. Having had regard to Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise, the SIAC proceeded on the basis that the parties have agreed to a three-member tribunal. In the absence of the Lao disputants' having nominated of an arbitrator, the SIAC informed the parties that, pursuant to Rule 9.1 of the SIAC Rules 2013, the SIAC would proceed to appoint all the tribunal members. On 20 January 2016, the parties were notified by the SIAC of the appointment of the tribunal, which constituted the following members: Mr Michael Lee as the presiding arbitrator, Mr David Laurence Kreider and Mr Kap-You (Kevin) Kim as co-arbitrators.

21 The Award was rendered on 22 August 2016. The Award found in favour of Sanum and made certain orders against the Lao disputants. The tribunal found that the Five Agreements were to be read together in order to determine the intentions of the parties in relation to the Thanaleng Slot Club and held that the Lao disputants had "breached the [Five Agreements] … insofar as they concerned the Thanaleng Slot Club".[2] The Lao disputants were therefore liable to pay loss of profits as a result of their failure to "turnover" the Thanaleng Slot Club, amongst other things. This loss was calculated on estimated profits over what the tribunal found to be the remaining term of a 50-year joint venture.

22 In ruling on its own jurisdiction, the tribunal accepted that the underlying dispute arose out of the Master Agreement and the Participation Agreement between Sanum and ST Vegas Enterprise. In doing so, the tribunal relied on the two dispute resolution clauses found in the respective agreements

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2 Award, paras 10.14, 11.1.1.

to found jurisdiction. The tribunal took the view that "the Master Agreement and the [Participation Agreement between Sanum and ST Vegas Enterprise] must be construed together in the light of the parties' intention".[3]

23 Clause 2(10) of the Master Agreement states as follows:

> If any dispute shall arise, the Parties agree to conduct an amicable negotiation. If such dispute cannot be settled by mediation, the Parties may submit such disputes to the Resolution of Economic Dispute Organization or Courts of the Lao PDR according to the provision and law of Lao PDR in accordance with this Agreement. All proceedings of the arbitration shall be conducted in the Lao and English languages.
>
> Before settlement by the arbitrator under the rules of the Resolution of Economic Dispute Organization, the Parties shall use all efforts to assist the dispute resolution in accordance with the laws of Lao PDR.
>
> If one of the Parties is unsatisfied with the results of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC.

24 Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise states as follows:

> (a) This Agreement is governed by the laws of Lao PDR.
>
> (b) Any dispute, controversy or claim arising out of or relating to the Agreement, including any question regarding its existence, validity or termination, the parties agree to conduct an amicable negotiation. In the event such dispute cannot be settled by mediation, the unsettled dispute shall be referred to and resolved by, unless the parties otherwise agree, Resolution of Economic Dispute Organization or Courts of the Lao PDR according to the provision and law of Lao PDR.
>
> (c) If one of the parties is unsatisfied with the results of the decision or judgment of the above procedure the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration at the

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[3] Award, para 6.10.

> Singapore International Arbitration Centre (SIAC), Singapore and the rules of SIAC shall be applied.
>
> (d) The tribunal shall consist of three arbitrators. Each of the parties to this Agreement (as a group) shall each be entitled to appoint one arbitrator and the third shall be nominated by the chairman of the arbitration in Singapore, but must be an arbitrator of a different nationality from that of the others. All proceeding of mediation or arbitration shall be conducted in the English language.
>
> (e) The parties shall continue to perform their respective obligations under this Agreement despite the occurrence of a dispute or arbitration to resolve that dispute.

25 The Thanaleng Documents do not contain any dispute resolution clause.

26 In considering whether the Lao disputants agreed to the SIAC Arbitration, the tribunal noted that the named contracting parties of the Master Agreement and the Participation Agreement between Sanum and ST Vegas Enterprise differed:[4]

> The parties to the Agreements vary: the Master Agreement is between Sanum, ST Group and various other companies in the ST Group, including [ST Vegas Co] … The [Participation Agreement between Sanum and ST Vegas Enterprise] is between Sanum and S.T. Vegas Enterprise. There was no evidence of the status of that company within the ST Group. Sanum says that it might be a separate company from [ST Vegas Co], or it may be a division of [ST Vegas Co]. The Tribunal notes that the Master Agreement was signed by Mr Sithat Xaysoulivong "as an individual" and also on behalf of ST Group. It was signed on behalf of S.T. Vegas Co Ltd by Mr Sithat Xaysoulivong and was stated to be (approved by) Mr Sithat Xaysoulivong "for Mr Xaysana Xaysoulivong". The [Participation Agreement between Sanum and ST Vegas Enterprise] was signed by Mr Xaya Xaysoulivong on behalf of S.T. Vegas Enterprise and witnessed by Mr Xaysana Xaysoulivong.

27 In terms of the Master Agreement, the tribunal stated that the agreement was between Sanum, ST Group and ST Vegas Co. Specifically, in respect of Mr

4 Award, para 6.2.

Sithat, the tribunal observed that he signed the Master Agreement "as an individual". In terms of the Participation Agreement between Sanum and ST Vegas Enterprise, the tribunal appeared to accept that ST Vegas Enterprise and Sanum were contracting parties. Despite the differences in the named parties in the various agreements, the tribunal eventually arrived at the conclusion that it had "jurisdiction to determine Sanum's claims against ST Group, ST Vegas, S.T. Vegas Enterprise and [Mr Sithat], all of whom were signatories to the Master Agreement or the [Participation Agreement between Sanum and ST Vegas Enterprise]".[5]

28 While not made apparent under the section on jurisdiction, the tribunal, in a later part of the Award, appeared to take the view that little significance ought to be attached to the different names found in the various agreements:[6]

> A further point on which the Tribunal sought clarification at the hearing was the fact that different parties are named in the various Agreements. S.T. Vegas Enterprise is a signatory to the [Participation Agreement between Sanum and ST Vegas Enterprise] but not the Master Agreement nor the Thanaleng Temporary Participation Agreement (*sic*) nor the First and Second Expansion Agreements. [ST Vegas Co] is a party to the Master Agreement, the Temporary Thanaleng Participation Agreement and the Second Expansion Agreement and [ST Group] is a party to the Master Agreement and the First and Second Expansion Agreements.
>
> In this respect, the Tribunal was assisted by the evidence of Ms Catherine Follet. … Ms Follet was asked by Sanum's counsel about the practice in Lao business of signing documents.
>
> She answered:-
>
> > "… Now in terms of signing contracts, when you get business dealings with families, there will usually be a matriarch or patriarchy. There will be some children of varying levels of aptitude. They may have their own companies. They may have a number of different

5 Award, para 6.23.

6 Award, paras 10.24–10.26.

> companies, but the family will operate as a whole, you know, using one brain.
>
> So the formal name – I have seen this on a number of occasions.
>
> The formal name of a company as a signatory or the person signing a document, they do not look at it in the way that a western lawyers or a western business person would look at it.
>
> What I can tell you, and this is from hearing Dr Ngo's evidence this morning and from my general knowledge of Lao culture and Lao business dealings is that especially in Mr Sithat's family, if somebody who was the wrong person was signing those documents they wouldn't last very long. People signing those documents would have been instructed to sign those documents. No one else outside of that family would ever challenge a person's right to sign those documents.
>
> So every company name listed there, you know, would have been authorised and this backtracks to the concept of – it's an enterprise all by itself. You know, the specific names of the companies were less relevant to them."

> The Tribunal accepts this explanation and does not consider that the use of different companies in the agreement is of any significance.

The tribunal accepted the evidence of Sanum's witness that as part of the business culture in Lao, families frequently use different companies when entering into business dealings. Ultimately, the companies and the family should be viewed as a whole; an enterprise all by itself.

29 As regards the seat of the arbitration, Sanum had in the amended notice of arbitration (dated 22 September 2015) and in the statement of claim (dated 21 April 2016) said that "combining and reconciling" the Master Agreement and the Participation Agreement between Sanum and ST Vegas Enterprise, the seat of arbitration was Macau. Sanum's counsel in her letter dated 23 October 2015 to the SIAC in response to certain objections to the tribunal's jurisdiction

also stated that, "this arbitration has been instituted in an internationally recognized arbitration forum, SIAC, with the designation of the seat in Macau".[7] During the SIAC arbitration hearing, Sanum's counsel changed the position taken on Macau as the seat and told the tribunal that Sanum had no objections to the seat being Singapore and added that the "weight of evidence suggests that [the seat] is indeed Singapore".[8] The tribunal appears to have accepted the lawyer's suggestion on the weight of evidence, and held that Singapore was the seat of the arbitration without actually identifying the evidence in question. The tribunal was in effect relying on Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise. It came to the view that Clause 19 "amplifies and supplements the dispute resolution procedure set out in the Master Agreement":[9]

> …
>
> Finally, the Respondents [,who in the present proceedings are the Lao disputants,] say that under the Master Agreement the parties should arbitrate their dispute "using an internationally recognised mediation arbitration Company in Macau, SAR PRC".
>
> …
>
> The Tribunal has considered all of the points raised by the Respondents in their response to the Amended Notice of Arbitration and their objection to jurisdiction and is satisfied that it has jurisdiction to determine the claims made by Sanum against [ST Group], [Mr Sithat], [ST Vegas Co] and S.T. Vegas Enterprise. The Tribunal considers that, for the reasons given in paragraph 11.14 below [*sic*], the Master Agreement and the [Participation Agreement between Sanum and ST Vegas Enterprise] must be construed together in the light of the parties' intentions.
>
> Mr Baldwin's evidence as to what the parties intended to provide for resolution of their disputes is that Sanum

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7 PBOD Vol I, Tab 12, p 165.

8 PBOD Vol IV, Tab 37, p 579.

9 Award, paras 6.8–6.15.

specifically bargained in its contracts for the right to have its disputes heard and determined in an SIAC arbitration.

When finalising the Master Agreement with [ST Group], Mr Baldwin asked that there be a dispute resolution clause providing for international arbitration. The first draft of the Master Agreement sent to [ST Group] contained a dispute resolution provision providing only that:-

> "[I]f a dispute arises from this Agreement, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC".

The Tribunal notes that this makes no reference to the Lao courts.

Mr Baldwin says that [ST Group] countered with a provision that the parties should first negotiate and mediate and, if unsuccessful, would then be allowed to pursue local arbitration or litigation. The Parties agreed, however, that if one of the parties were dissatisfied with the result of the local proceedings they would mediate, and if necessary, arbitrate using an international mediation/arbitration company in Macau SAR PRC, such as SIAC. This intention was clarified when the parties entered into the [Participation Agreement between Sanum and ST Vegas Enterprise], which specifically identified SIAC as the provider of the mediation/arbitration services.

The Tribunal is satisfied that, construing the dispute resolution provisions together in the Master Agreement and the [Participation Agreement between Sanum and ST Vegas Enterprise], the clear intention of the Parties was that if and when the third and fourth limbs of the dispute resolution clause was invoked by either Party, mediation and arbitration would take place under SIAC Rules in Singapore.

Reading the dispute resolution provision in the Master Agreement alone, it could be argued that the parties intended that the seat of the arbitration should be Macau. However, Sanum's counsel submitted in her opening statement that the greater weight of the evidence was that Singapore was the seat of the arbitration. The Tribunal agrees with this submission. In the Tribunal's view, the [Participation Agreement between Sanum and ST Vegas Enterprise] amplifies and supplements the dispute resolution procedure set out in the Master Agreement providing specifically for arbitration at SIAC in Singapore and that the rules of the SIAC should be applied. This, the Tribunal considers, makes it clear that Singapore should be the seat of the arbitration and the Tribunal so finds.
…

30 The tribunal also addressed the multi-tiered nature of the clauses and whether the necessary steps have been taken prior to the commencement of the SIAC Arbitration (see [86] below).

Lao law as the governing law of the arbitration agreements

31 Both sides agree that the governing law of Clause 2(10) of the Master Agreement, and Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise, is Lao law. Experts have therefore been called upon to provide their opinions on questions of Lao law in the present case: Professor Viengvilay Thienchanhxay ("Professor Viengvilay") for the Lao disputants; Mr Jorge Menezes ("Mr Menezes") and Mr Khamsouk Phommarath ("Mr Phommarath") for Sanum. There were two other "experts" referred to in the Award. These experts have not filed affidavits in the present application.

32 This court agrees with the Lao disputants that Mr Menezes, with respect, does not qualify as an expert under s 47(2) of the Evidence Act (Cap 97, 1997 Rev Ed). Mr Menezes did not formally practise as a lawyer in Lao but practised as a party representative. As party representative, Mr Menezes has had to file petitions, submit evidence, lodge appeals and argue cases before the Lao Courts. But the area of law he practises as party representative is unclear. In addition, Mr Menezes' involvement with the Lao legal system has been fairly recent, beginning only in 2012. This puts Mr Menezes' experience with Lao law at five years as of the time he filed his expert report. While not determinative of the issue, Mr Menezes' relatively short and limited experience with Lao law must be viewed against the backdrop of the focus of his overall practice. Mr Menezes started his practice as a Portuguese lawyer in 1992 and since 1998, have been practicing in Macau (taking a short break from practice to pursue academia). In 2008, Mr Menezes was made partner at Legal Macau law firm before joining

ARB law firm as a partner in 2014. Both firms are situated in Macau and Mr Menezes appears to be based in Macau. His experience in Lao as a party representative is not only recent but does not appear to be the primary focus of his overall practice. Further, there was no specific evidence adduced as to the nature and extent of Mr Menezes' experience in Lao law. It is not known, for instance, how many cases he handled as a party representative and what those cases involved. He, therefore, does not qualify as an expert under s 47(2) of the Evidence Act.

33 While the Lao disputants take issue with Mr Phommarath's credentials as an expert on Lao law and his independence, the objections are untenable. Criticism of his lack of independence is a non-starter. As regards Mr Phommarath's credentials, he is called upon to comment on Lao contract law and to some extent, Lao arbitration law. These are matters within his competence as a qualified Lao legal practitioner since 1998. Further, Mr Phommarath graduated from the Faculty of Law and Political Science at the National University of Laos in 1998 with a Higher Diploma in Law (equivalent to a post-graduate law education programme in Lao today). His experience in providing legal advice on commercial transactions to companies and banks coupled with his legal training as a Lao legal practitioner is sufficient to meet the requirements of s 47(2) of the Evidence Act. As for Professor Viengvilay, there were no apparent criticisms levied against his qualification and standing as an expert.

34 For purposes of this section, the expert opinions referred to are those of Professor Viengvilay and Mr Phommarath. While the experts disagree on various matters, they generally accept the following propositions.

(a) As regards Lao arbitration law:

(i) arbitrations are consensual in nature, there must be an agreement to arbitrate; and

(ii) Lao principles of contractual interpretation apply to the interpretation an arbitration agreement.

(b) As regards, Lao principles of contractual interpretation:

(i) A contract must be interpreted in accordance with its expressed terms and wording. Where the text of a contract is clear and unambiguous, the contract will generally be interpreted on the basis of its text alone. However, the court may have recourse to the intentions of the parties to resolve ambiguity. The court may also consider the context of the provision and purpose of the contract.

(ii) Recourse may be had to the principle of effective interpretation, which provides that the meaning of a provision is to be considered in the context of the whole contractual relationship between the parties. A provision ought to be interpreted in a manner that gives effect of the parties' intention. It should be noted, however, that Professor Viengvilay cautions that this principle has to be used sparingly.

35 These propositions are generally in line with what the Court of Appeal in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [30]–[34] espoused:

> Our first observation is that an arbitration agreement … should be construed like any other form of commercial agreement … The fundamental principle of documentary interpretation is to give effect to the intention of the parties as expressed in the document.

> Our second observation is that, where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars … so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. This approach is similar to the 'principle of effective interpretation' in international arbitration law…
>
> A subsidiary principle to the principle of effective interpretation is the principle that an arbitration agreement should not be interpreted restrictively or strictly. An arbitration agreement is not a statute. …
>
> …
>
> Another subsidiary principle is that, as far as possible, a commercially logical and sensible construction is to be preferred over another that is commercially illogical …
>
> This approach to the interpretation of an arbitration agreement is necessary to uphold the underlying and fundamental principle of party autonomy as far as possible in the selection in the kind of arbitration and terms of the arbitration.

In short, the court would strive to uphold an arbitration agreement where the parties have evinced a clear intention to arbitrate disputes (see for example, *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd and another suit* [2017] 4 SLR 182).

36 The experts' opinions have, at times, been inadequate for several reasons. First, the experts had simply stated the legal principles and asserted conclusions without providing detailed explanations as to how those conclusions were reached (see *Pacific Recreation Pte Ltd v SY Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [85]–[86]). Secondly, as the issues put by the parties to the experts were framed in broad terms, the experts did not explain how a Lao court, applying the general principles outlined above, would construe the specific words in Clause 2(10) of the Master Agreement, and Clause 19 of the Participation Agreement between

Sanum and ST Vegas Enterprise. Thirdly, the experts' opinions waned in relevance as the present proceedings progressed. To elaborate, the experts were asked to address the following questions:

> (a) What are the legal principles which would govern how an individual or entity is made party to an agreement, and relatedly, what is the legal effect of Mr Sithat's signature of the Master Agreement "as an individual"?
>
> (b) What are the legal principles which would govern the construction and interpretation of the agreements which have been said to be related to the underlying dispute?
>
> (c) What are the legal principles relevant to determining whether the Lao disputants are parties to the arbitration agreements found in the Master Agreement, and the Participation Agreement between Sanum and ST Vegas Enterprise?
>
> (d) Based on a construction of the agreements under Lao law, whether the Lao disputants have agreed to refer the underlying dispute to arbitration in Singapore.

These questions were framed in the light of the tribunal's reasoning in the Award. However, during the course of the hearing, the shape of the parties' arguments changed. On question (c), in particular, Mr Yeo said that he would not be relying on the concept of "single enterprise" and was content to rest his case on the signatures that appear on the face of the agreements to identify the contracting parties. As a result, significant portions of the experts' opinions have become academic.

37 That said, the shortcomings of the experts' opinions did not pose a significant hurdle in the present case as the issues before the court ultimately centre on the construction of a contractual document (or documents). This is a matter the court can come to its own conclusions on; applying the relevant principles of law presented by the experts. This approach was explained clearly in *Pacific Recreation* at [81]:

> Moving on, it should be noted that the expert's role differs slightly when the issue is the construction of a foreign *document*, as opposed to a foreign *statutory provision*. In *King v Brandywine Reinsurance Co* [2005]1 Lloyd's Rep 655, the court had to consider the meaning of the phrase "removal of debris" contained in an insurance policy document which was governed by New York law. Waller LJ incisively stated at [68] that:
>
> > It is perhaps also important to remember that the role of an expert, unless the court is concerned with special meaning, is to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules. In other words, the view of the expert as to the meaning which would be given to the word "debris" is not admissible evidence unless he is saying that it has a special meaning under New York law …
> >
> > [emphasis in the original]

With the quoted passage in mind, this court would have regard to the principles of Lao law as stated at [34] above when construing the Five Agreements and the arbitration agreements.

Lao disputants' challenge to the enforcement of the Award

38 The Lao disputants rely on Articles 36(1)(*a*)(i), 36(1)(*a*)(iii) and 36(1)(*a*)(iv) of the Model Law in its application to resist enforcement of the Award. For convenience, the relevant provisions are as follows:

> **Article 36. Grounds for refusing recognition or enforcement**
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> (*a*) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
>
> (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> …
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

39 Insofar as the objections are jurisdictional in nature, the review is *de novo*.

Jurisdictional objections

40 The tribunal relied on the Master Agreement and the Participation Agreement between Sanum and ST Vegas Enterprise to found jurisdiction. The Lao disputants disagreed with the tribunal, contending that these agreements have nothing to do with the Thanaleng Slot Club. Notably, the Lao disputants'

primary position essentially relates to the question of which agreement or agreements the underlying dispute arose out of. The Lao disputants took the position that the dispute related to the Thanaleng Documents which contain no arbitration agreement, and their primary position questions the existence of an agreement to arbitrate. To the Lao disputants, the Award was made pursuant to an arbitration agreement which not all the Lao disputants were a party to (*ie*, Article 36(1)(*a*)(i)), and that the Award deals with a dispute not contemplated by or falling within the scope of the submission to arbitration (*ie*, Article 36(1)(*a*)(iii)).

41 As the Lao law experts have posited at [34(a)(i)] above, arbitrations are consensual in nature; there must be an agreement to arbitrate on the dispute referred to arbitration. The relationship between the dispute referred to arbitration and the arbitration agreement is significant for this case. The inquiry into the Lao disputants' jurisdictional objections would involve: (a) the identification of the underlying agreement or agreements in respect of the dispute referred to arbitration; and (b) the interpretation of the arbitration agreement contained in the identified underlying agreement or agreements.

42 In my view, it is inappropriate to cast the Lao disputants' jurisdictional objections under both Articles 36(1)(*a*)(i) and 36(1)(*a*)(iii) of the Model Law. The former deals with the *existence of an agreement to arbitrate* whereas the latter deals with whether the tribunal acted *in excess of the scope of the submission to arbitration*. Put another way, Article 36(1)(*a*)(iii) presupposes the existence of an agreement to arbitrate and the inquiry is as to the scope of the arbitration (see *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*PT First Media*") at [152]–[158]; see also *CRW*

Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] 4 SLR 305 ("*CRW Joint Operation*") at [31]).

43 Needless to say, the arguments were refined in the course of the hearing and as such the following matters emerged. Whilst not resiling from the primary position, Mr Xavier agreed with Mr Yeo that the real question is whether or not the Master Agreement was breached when the Thanaleng Slot Club was not "turned over" to Sanum on or after 11 October 2011. Furthermore, Mr Xavier was prepared to concede that if the court holds that the Master Agreement is relevant for the purposes of jurisdiction, the Master Agreement would have to be read with the Thanaleng Documents and in this scenario, the Lao disputants' challenge to enforcement of the Award would no longer be premised on Articles 36(1)(*a*)(i) and 36(1)(*a*)(iii) but on Article 36(1)(*a*)(iv) of the Model Law instead.

What contracts were breached?

44 On the question of whether the Lao disputants had failed to "turnover" the Thanaleng Slot Club on or after 11 October 2011 to Sanum, it is necessary to examine the obligations contained within each of the Five Agreements and to identify the obligation(s) that was breached.

45 According to Mr Xavier, the underlying dispute concerned the Thanaleng Slot Club and must therefore have arisen out of the Thanaleng Documents, which do not contain or any arbitration agreement. The tribunal was wrong to have relied on the Master Agreement and the Participation Agreement between Sanum and ST Vegas Enterprise to found jurisdiction as these agreements have nothing to do with the Thanaleng Slot Club. Conversely, in seeking to uphold the tribunal's decision, Sanum points out that the

underlying dispute concerns the failure to "turnover" the Thanaleng Slot Club on 11 October 2011, when the RGB Ltd contract would have terminated. This dispute arose out of the Master Agreement and the Participation Agreement between Sanum and ST Vegas Enterprise.

46 Having examined the evidence and arguments of the parties, this court is satisfied that the underlying dispute arose out of the Master Agreement alone. There is an agreement to arbitrate and this is to be found in Clause 2(10) of the Master Agreement. The other four agreements may be relevant only insofar as they are used to show the context of the dispute and to support the interpretation given to Clause 2(10) of the Master Agreement.

47 At the hearing, Mr Yeo argued that the obligation to "turnover" the Thanaleng Slot Club is to be found in Clause 1(3)(d) of the Master Agreement:[10]

> Mr Yeo: … In fact, your Honour had asked me *what is the clause that we rely on to say there was an obligation in the master agreement to turn over the Thanaleng Slot Club* into the joint venture upon the expiration of the third party machine owners agreements. So your Honour will have seen from the first sentence of 3(d) on page 83, the words:
>
> > "… whereupon the 1st Party [Sanum] will take the place of the current operators under the same conditions and terms as the existing participation agreements."
>
> *So that's the obligation to turn it over.*
>
> …
>
> Mr Yeo: … Mr Xavier and myself may differ on which are the participation agreements to be referred to, but there's indisputably, a statement in mandatory terms that Sanum will take the place of those operators. And then, your Honour, also, I pass over the middle lines which talk about how the third party machine owners can make proposals, but Sanum can decide whether they want to take them up. And then the last three lines of 3(d) which is:

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10 Transcript Day 2, p 104, lines 12–25; p 105, lines 1–25.

> "Upon the expiration of the existing entities' participation agreements …"
>
> That's the third party machine owners.
>
> …
>
> Mr Yeo: "… and turnover the location to the Slot Club Joint Venture, the 1st Party shall pay to 2nd Party $500,000."
>
> Your Honour, I referred to the obligation to make payment as consistent with there being a binding obligation to turn the Thanaleng Slot Club into the slot club joint venture.
>
> [emphasis added]

48 I accept Mr Yeo's submission that the obligation to "turnover" the Thanaleng Slot Club is contained within Clause 1(3)(d) of the Master Agreement. Indeed, the clause specifically states that Sanum would take the place of the existing machine owners of the club upon the termination of the existing machine owners' contracts. The obligation to then pay the Lao counterparty in the Master Agreement $500,000 (which by agreement was changed to $600,000) is consistent with there being an obligation to "turnover" the Thanaleng Slot Club in the first place. Now, the parties had some dispute over the words "existing participation agreements". However, as Mr Yeo points out, regardless of the interpretation to be given to the words "existing participation agreements", the more pertinent point is that Sanum would take the place of the existing machine owners; in other words, that the Thanaleng Slot Club would be "turned over" to Sanum. Factually, no "turnover" occurred on or after 11 October 2011 or at all.

49 It is worth mentioning here the Lao disputants' position that the underlying dispute relate *solely* to the Thanaleng Documents which do not contain any agreement to arbitrate. This position is clearly assailable.

50 While the Temporary Thanaleng Participation Agreement certainly concerns the Thanaleng Slot Club, it does not contain an obligation to "turnover" the club. As Mr Xaysana himself explained, the Temporary Thanaleng Participation Agreement was concluded to meet the shortfall in slot machines at the Thanaleng Slot Club after the termination of the first existing machine owners' contract in 2007. In exchange for Sanum supplying machines to the club, the Temporary Thanaleng Participation Agreement sought to establish an interim profit-sharing regime pending the termination of the remaining existing machine owners' contracts. The obligations in the Temporary Thanaleng Participation Agreement were directed towards achieving this purpose. It is therefore unsurprising that the Temporary Thanaleng Participation Agreement had obligations that pertained to the interim operation of the Thanaleng Slot Club but it did not contain an express obligation to "turnover" the club. Instead, it provides for a termination date and hence an end date to the 60-40 revenue split in favour of ST Vegas Co.

51 The Lao disputants next suggested that the Master Agreement specifically excluded the Thanaleng Slot Club, and referred to Clause 1(3)(d) in support:[11]

> In particular, the second paragraph of Clause 1 read with Clause 1(3)(d) make it clear that the parties had intended for the Thanaleng Slot Club to be ***excluded*** from and / or to be dealt with differently from ST Group's present and future gaming businesses (defined as the "*Joint Ventures*") as encompassed in the Master Agreement. This is further supported by the entry into the [Participation Agreement between Sanum and ST Vegas Enterprise] (which did not include the Thanaleng Slot Club) and the three other Thanaleng agreements, which provide for short-term arrangements.
>
> [emphasis added]

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11 Defendants' Submissions for SUM 4933, para 141.

To bolster this position, the Lao disputants also stated that the Master Agreement was merely a "general agreement for cooperation between Sanum and ST Group in relation to various gaming interests in Laos". A "further formal participation agreement" was needed in respect of the Thanaleng Slot Club.[12]

52 The Lao disputants' position that the Thanaleng Slot Club was to be excluded from the Master Agreement is inaccurate. While Clause 1(3)(d) of the Master Agreement states that the Thanaleng Slot Club is not to be immediately included into the Slot Club Joint Venture described at Clause 1(3), it is an entirely different assertion to say that the Thanaleng Slot Club was to be excluded from the terms of the Master Agreement completely. At the very least, it cannot seriously be disputed that the last line of Clause 1(3)(d) provides that Sanum had to pay $500,000 upon the Thanaleng Slot Club being "turned over".

53 While the preamble of the Master Agreement may, at first blush, be read to suggest that the Master Agreement was no more than a non-binding memorandum of understanding, this is not the case on a close reading of the entire document. The preamble states that "[t]his Agreement is not intended to be a definitive agreement but only provides the Parties' general understanding of their relationship". The phrase "not intended to be a definitive agreement" does not mean that the document is non-binding, it simply means that the agreement is not exhaustive of the relationship of the parties. The reason for stating that the Master Agreement was not exhaustive is because subsequent agreements would be concluded pursuant to the Master Agreement to detail the relationship of the parties in respect of a particular aspect of the Lao disputants' gaming business. That the Master Agreement has a binding character is fortified

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12 Defendants' Submissions for SUM 4933, paras 140–141.

not only by the other terms of the agreement that carry with it a binding force, such as the "Duties and Obligations" of the parties "upon signing of [the] Agreement", but the existence of a dispute resolution clause, *ie* Clause 2(10) itself. Indeed, it would be incongruous for a dispute resolution clause to have been concluded if two parties with no previous dealings had not intended for the document to be binding. It follows from this analysis that Clause 1(3)(d) is capable of giving rise to a binding obligation to "turnover" the Thanaleng Slot Club on or after 11 October 2011.

54 Moving on to the First Expansion Agreement between Sanum and ST Group, this was an agreement concerning the expansion of the Thanaleng Slot Club to a piece of land and a building used for duty-free sales located adjacent to the Thanaleng Slot Club. The rights to use this land were and are owned by ST Group. In the agreement, Sanum agreed to pay $300,000 to ST Group to gain a 40% interest in the expansion. While there is mention of a "turnover" year in 2011, the First Expansion Agreement merely records the expected change in the participating percentages in 2011 and does not provide for any obligation to "turnover" the slot club:

> When the investments are repaid in full, the generated revenues shall then be paid 60% to ST and 40% to Sanum until the turnover date in 2011, when the terms of the Master Agreement shall prevail.

55 The Second Expansion Agreement is an agreement to acquire land in the vicinity of the Thanaleng Slot Club and for the construction of an additional facility on the land as part of the club, it does not expressly provide for any "turnover". The Second Expansion Agreement also alluded to the change in the participating percentages as between Sanum, and ST Group and ST Vegas Co, the latter two collectively defined as "ST":

> The Slot Club and, when completed, the Additional Facility, shall be operated by the parties as one slot club in accordance with the provisions of the Participation Agreement and the Master Agreement except as herein expressly provided to the contrary and shall be owned … by ST and Sanum in accordance with their respective Participating Percentages. The Participating Percentage of Sanum in the Slot Club and the Additional Facility shall be 40% from the date of this Agreement and 60% from October 11, 2011; and the Participating Percentage of ST in the Slot Club and the Additional Facility shall be 60% from the date of this Agreement and 40% from October 11, 2011.

Again, there is no express obligation to "turnover" the Thanaleng Slot Club in this agreement.

56 There remains the view that the underlying dispute arose out of *both* the Participation Agreement between Sanum and ST Vegas Enterprise, and the Master Agreement. This was the position Sanum presented to the tribunal; which was eventually accepted:[13]

> The Tribunal is satisfied that, *construing the dispute resolution provisions together in the Master Agreement and the [Participation Agreement between Sanum and ST Vegas Co]*, the clear intention of the Parties was that if and when the third and fourth limbs of the dispute resolution clause was invoked by either Party, mediation and arbitration would take place under SIAC Rules in Singapore.
>
> [emphasis added]

57 As earlier concluded at [46] above, the underlying dispute (*ie*, failure to "turnover" the Thanaleng Slot Club) falls under the Master Agreement. The Participation Agreement between Sanum and ST Vegas Enterprise concerned the Lao Bao Slot Club and Ferry Terminal Slot Club (see [10]–[11] above). These slot clubs are not, and have nothing to do with, the Thanaleng Slot Club. Indeed, the Thanaleng Slot Club was not part of the joint venture arrangement

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[13] Award, para 6.14.

then as there were existing third party machine owners at the Thanaleng Slot Club. Recital (A) of the Participation Agreement between Sanum and ST Vegas Enterprise reinforces the point that the agreement only covered the Lao Bao Slot Club and Ferry Terminal Slot Club:

> [ST Vegas Enterprise] carries out the entertainment and gaming business at Suvannakhet-Mukdahan Ferry Terminal border checkpoint ("*Savannakhet*") and Daensavan-Labao border checkpoint in Ban Daensavan (Laos-Vietnam border checkpoint) ("*Daensavan-Laobao*"), Savannakhet Province, Lao PDR ("*Business Operations*"). [ST Vegas Enterprise] desires to find a partner to participate in its Business Operations and to supply certain slot machines and other electronic gaming ("*Machines*") on a generated revenue participation basis (sharing revenue).

More critically, the Participation Agreement between Sanum and ST Vegas Enterprise does not contain any obligation to "turnover" the Thanaleng Slot Club (or any slot club for that matter). Hence, the only agreement from which the underlying dispute arose out of is the Master Agreement.

58 All in all, as Mr Xavier said,

> the breach that is being relied [by Sanum] and I think [Mr Yeo has] clarified rightly that the breach is a breach of the master agreement. But [Sanum] rely on the fact that the master agreement is related to the slot club joint venture so, therefore one can have recourse to the dispute resolution provision in the [Participation Agreement between Sanum and ST Vegas Enterprise].[14]

59 There is force in Mr Xavier's submission above. The underlying dispute arose out of the Master Agreement and thus the relevant arbitration agreement is Clause 2(10) of the Master Agreement. Yet, the tribunal ended up relying on Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise as well. This requires an examination of the Award to understand

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[14] Transcript Day 3, p 72, lines 21–25; p 73, lines 1–3.

how the tribunal viewed the relationship between the Master Agreement and Participation Agreement between Sanum and ST Vegas Enterprise (see paras 10.14–10.21 of the Award):

> The Tribunal is satisfied, in the light of Dr Ngo's evidence, that the five agreements must all be read together in order to determine the intentions and agreements of the parties in relation to the Thanaleng Slot Club.
>
> The Tribunal concludes that the agreement reached between the parties was that they would enter into separate participation arrangements for each Joint Venture, with the intention of ultimately transferring each separate Joint Venture into a Foreign Investment Venture in which Sanum would own 60% and ST 40%. The [Participation Agreement between Sanum and ST Vegas Enterprise] related to two of the three slot clubs, but similar arrangements could not be entered into immediately for Thanaleng Slot Club because of the existing third party contracts. The Master Agreement therefore provided that separate arrangements were necessary for that Club until the third party contracts expired. Whilst none of the agreements provides in specific terms for what was to happen after the Turnover Date in respect of the Thanaleng Slot Club, the Tribunal is satisfied that the parties agreed that the profit sharing ratios would revert to those provided for in the Master Agreement and the Participation Agreement between Sanum and ST Vegas Enterprise, and that the term of the Thanaleng Joint Venture would be the same as provided for in relation to the other two Slot Clubs, namely 50 years.
>
> …
>
> The Tribunal finds that the contractual arrangements between Sanum and [ST Vegas Co] and ST Group did not come to an end on 11 October 2011, as alleged by [ST Vegas Co] in its letter of 4 November 2011, but that they continued to operate beyond that date. Specifically, following that date, their contractual relationship was governed by the Master Agreement and the [Participation Agreement between Sanum and ST Vegas Enterprise].
>
> The Tribunal finds that the Master Agreement set out the framework for the various Joint Ventures agreed between the parties. The [Participation Agreement between Sanum and ST Vegas Enterprise], whilst specifically referring only to the Lao Bao and Savannakhet Slot Clubs, was intended to also govern the Parties' relationship in respect of Thanaleng Slot Club after 11 October 2011 when the RGB contract expired. The Master Agreement expressly refers to Thanaleng Slot Club and provides

> that this should 'remain as is until the current contract with machine owners expire, whereupon [Sanum] will take the place of the current operators under the same conditions and terms as the existing participation agreements'. Whilst the reference to existing Participation Agreements could be said to be ambiguous, the Tribunal is satisfied that what that meant, and the parties intended, was that when the third party contracts expired, Sanum and ST would enter into Participation Agreement for Thanaleng's Slot Club on the same terms as they had entered into for the other two Slot Clubs, as provided for in the [Participation Agreement between Sanum and ST Vegas Enterprise].

60 From the above passages in the Award, the tribunal appears to be taking inconsistent positions and analyses. On one reading of the Award, the tribunal seems to accept that upon the "turnover" of the Thanaleng Slot Club, the club would come under the Slot Club Joint Venture but pursuant to a separately negotiated participation agreement. This reading is consistent with Clause 1(3)(d) of the Master Agreement, which states that Sanum may consider proposals from the existing third party machine owners for a continued relationship with Sanum, the Lao disputants and/or the Slot Club Joint Venture after the "turnover". This line of reasoning must necessarily accept that the Participation Agreement between Sanum and ST Vegas Enterprise does not concern the Thanaleng Slot Club. At best, reliance on the Participation Agreement between Sanum and ST Vegas Enterprise can only go so far as to suggest that the separate participation agreement involving the Thanaleng Slot Club would contain a dispute resolution clause similar to Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise. From this perspective, the relevance of Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise lies in assisting with the interpretation of Clause 2(10) of the Master Agreement. But this is not what the tribunal said in the Award. In any event, it cannot be said for certain that the intended Thanaleng Slot Club participation agreement would contain a dispute resolution clause worded in the same manner as Clause 19 of the Participation Agreement

between Sanum and ST Vegas Enterprise in the light of Clause 1(3)(d) of the Master Agreement.

61 On another reading of the passage quoted above, the tribunal stated that:

> the contractual arrangements between Sanum and [ST Vegas Co] and ST Group did not come to an end on 11 October 2011 … but that they continued to operate beyond that date. Specifically, following that date, their *contractual relationship was governed by* the Master Agreement and the [Participation Agreement between Sanum and ST Vegas Enterprise].

These statements suggest that the tribunal viewed the underlying dispute to have arisen from *both* the Master Agreement and the Participation Agreement between Sanum and ST Vegas Enterprise. Thus, when the tribunal, in determining its own jurisdiction said that "the [Participation Agreement between Sanum and ST Vegas Enterprise amplifies and supplements the dispute resolution procedure set out in the Master Agreement",[15] the tribunal must have combined and reconciled the inconsistencies between Clause 2(10) of the Master Agreement and Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise.

62 Having considered the Award as a whole, the tribunal's understanding of the dispute and findings on its own jurisdiction were premised on accepting that the failure to "turnover" the Thanaleng Slot Club engages both the Master Agreement and the Participation Agreement between Sanum and ST Vegas Enterprise. For the reasons stated above, this is incorrect. The Participation Agreement between Sanum and ST Vegas Enterprise is confined to the two other slot clubs and thus would only be relevant as a contextual backdrop for the Thanaleng dispute. While the Participation Agreement between Sanum and

15 Award, para 6.15.

ST Vegas Enterprise makes reference to the Master Agreement, the reference serves only to incorporate the terms of the Master Agreement into the Participation Agreement between Sanum and ST Vegas Enterprise but the converse situation is not true (see [81] below). Accordingly, any suggestion that Clause 2(10) of the Master Agreement and Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise should be combined and reconciled must be rejected.

Parties to the agreement to arbitrate in Clause 2(10) of the Master Agreement

63 Both sides have proceeded on the basis that the court's determination of the identity of the contracting parties to the Master Agreement would likewise determine whether the tribunal had jurisdiction over the Lao disputants. While this is sufficient for most cases, Clause 2(10) of the Master Agreement requires the further consideration of whether the Lao disputants were proper parties to the arbitration itself. This is because Clause 2(10) is a multi-tiered clause which not only sets out pre-requisites to the commencement of arbitration but, more importantly by its language, defines and limits the parties who may proceed to the stage of international arbitration. Thus, the parties to the SIAC arbitration may not necessarily be congruous with the parties named or covered by the Master Agreement. With this in mind, I will first discuss the identity of the contracting parties to the Master Agreement, and by extension Clause 2(10), before considering if the Lao disputants were proper parties to the SIAC Arbitration.

64 It is apposite to set out the key portions of the Master Agreement at this juncture:

> [m]ade and entered into by and between
>
> **"1st Party":**

> **SANUM INVESTMENTS, LTD**
>
> A Macau SAR, PRC Company,
>
> Represented by Mr. John K. Baldwin
>
> And its affiliates, subsidiaries, principles [*sic*] or assigns
>
> …
>
> (Hereinafter referred to as the said 1st Party) of the one part
>
> And
>
> **"2nd Party":**
>
> **ST GROUP CO., LTD**
>
> Represented by Mr. Sithat Xaysoulivong
>
> And its affiliates, subsidiaries, principles [*sic*] or assigns
>
> …
>
> **Slot Clubs Vientiane Capital**
>
> S.T. Vegas Co. LTD.
>
> **Slot Clubs Savannakhet Province**
>
> S.T. Vegas Co. LTD.
>
> …
>
> (All of the above hereinafter referred to as the said 2nd Party)

65 The Lao disputants do not appear to challenge ST Group's status as party to the Master Agreement; ST Group is expressly named as "2nd Party" to the Master Agreement. Instead, the Lao disputants' principal argument is that, apart from ST Group, the other entities and individuals under the definition of 2nd Party merely represented ST Group in the Master Agreement.

66 As regards Mr Sithat's status as a contracting party, Mr Yeo drew my attention to several portions of the Master Agreement to demonstrate that Mr Sithat is a party to the agreement. First, Mr Sithat is named under the definition of 2nd Party. While the Master Agreement may appear to suggest that he was merely named as a representative, the concluding line under the definition of

2nd Party provides that "all of the above" are to be "referred to as the said 2nd Party". Secondly, regard must be had to Mr Sithat's signature in the signature block of the Master Agreement. In affixing his signature "as an individual" under the broader heading of "AS WITNESS the signature of the said **2nd PARTY**", Mr Sithat was undertaking obligations outside his representative capacity. Thirdly, Sanum was directed to make payments to Mr Sithat's personal bank in Singapore for sums due under the Master Agreement. Against this factual backdrop, Mr Phommarath opined that under Lao law, Mr Sithat is a party to the Master Agreement.

67 The Lao disputants contend otherwise. They urge this court to prefer Professor Viengvilay's opinion over that of Mr Phommarath as the legal basis of the latter's opinion is questionable. According to Professor Viengvilay, the Master Agreement should be interpreted in accordance with the Lao Law of Contract and Tort and not, as Mr Phommarath suggests, general civil law principles. Under Professor Viengvilay's analysis, Mr Sithat would only be a party to the Master Agreement if the agreement identifies "rights, duties and / or obligations" personal to Mr Sithat. In this regard, Mr Sithat explained that his signature was merely to "give comfort and assurance" to Sanum and not to "undertake any rights, duties and / or obligations under the Master Agreement *in* [his] *personal capacity*" [emphasis in the original].[16] In relation to the payments under the Master Agreement, Mr Sithat further explained that he received the payments on behalf of the ST Group.

68 There appears to be a suggestion that Mr Sithat would have to be named as a "3rd Party" to the Master Agreement for him to be a party to the agreement. There is nothing to this passing suggestion. Returning to the question whether

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16 PBOD Vol 5, Tab 43, para 47(d).

2nd Party, as interpreted under Lao law, would include Mr Sithat, I accept Mr Yeo's submission that Mr Sithat is a party to the Master Agreement.

69 In respect of the legal bases of the experts' opinions, I have found the general principles of contract law as provided by the experts to be, in substance, largely the same (see above at [34]). The Lao disputants' objection to the legal basis of Mr Phommarath's opinion does not take their case very far.

70 It must be remembered that the Master Agreement is about creating joint ventures that would involve Sanum's counterparty in Lao giving up a stake in the *entire* gaming business to Sanum:

> [t]he Parties hereby agree to negotiate and work towards entering into certain joint ventures, represented by necessary agreements, which shall convey 60% of *all 2nd Party's gaming business* located in the country of Lao PDR.
>
> [emphasis added]

To be able to "convey … *all* 2nd Party's gaming business" [emphasis added], *all* relevant entities and individuals to be involved in this transaction has to be party to the Master Agreement. This is made clear in the "Duties and Obligations of 2nd Party" found in Clause 4 of the Master Agreement:

> **4. DUTIES AND OBLIGATIONS OF 2ND PARTY**
>
> 3) Agrees to commit all of its current gaming rights and locations into the Joint Ventures within the frame work of Lao PDR law.
>
> 4) Agrees that all current and future gaming rights of every kind will be exclusively those of the Joint Ventures.
>
> …
>
> 6) Agrees fully and completely assist the Joint Ventures and 1st Party in every possible way to make the Joint Ventures a success. This full assistance shall continue indefinitely and not be limited to the Management Transfer. 2nd Party agrees that this full assistance shall be comprehensive. …

Mr Sithat's explanation that his signature was merely to "give comfort and assurance" to Sanum and not to "undertake any rights, duties and / or obligations under the Master Agreement *in* [his] *personal capacity*" [emphasis in the original] must be viewed in the light of the purpose of his involvement.

71 While the definition of 2nd Party states that ST Group was "[r]epresented by Mr Sithat", this should not be read strictly. Mr Sithat signed the Master Agreement as a "representative" and "as an individual". Adopting the principle effective interpretation under Lao law, the differentiation would be superfluous if the Master Agreement were not intended to bind him as a party. Indeed, there are rights and obligations specific to "individuals" under the Master Agreement. For instance, in Clauses 5(g) and (h) of the Master Agreement, the "2nd Party represents and warrants" that "[a]ll entities and individuals included in the above definition of '2nd Party' are all entities and individuals that hold any interest in the Joint Ventures", and that "[a]ll entities and individuals included in the above definition of '2nd Party' is duly authorized and has the power to execute this Agreement". The only "individual" under the definition of 2nd Party is Mr Sithat. Clause 5 makes clear that Mr Sithat is making certain *legal representations* in his personal capacity.

72 Mr Sithat's unsubstantiated explanation that he received the payments on behalf of the ST Group, seems a rather convenient explanation to proffer in the present application. Mr Baldwin's evidence is that several payments to Mr Sithat were made pursuant to the Master Agreement and he exhibited payment invoices in his affidavit where Sanum transferred sums into an account whose stated beneficiary is Mr Sithat. In contrast, Mr Sithat has not provided any evidence of ST Group specifically authorising him to receive monies on its behalf. Sanum would not have made payment to Mr Sithat if he were not a party to the Master Agreement.

73 Turning to consider ST Vegas Co's status as a party to the Master Agreement, Mr Yeo similarly relies on the broad definition of 2nd Party and the existence of ST Vegas Co's name in the signature block to argue that ST Vegas is a party to the Master Agreement. The Lao disputants likewise maintain that ST Vegas Co is not a party adopting similar arguments as the ones in relation to Mr Sithat.

74 As stated, for the negotiated business arrangement under the Master Agreement to be effected, *all necessary entities and individuals* must be a party to the Master Agreement. Hence the entity that own rights to the Thanaleng Slot Club has to be a party to the Master Agreement; otherwise the obligation to "turnover" the Thanaleng Slot Club would be denuded of effect. In this regard, Mr Xaysana in his affidavit attests to the fact that ST Vegas Co and ST Group are the entities that own various rights and permits pertaining to the Thanaleng Slot Club. It follows that when ST Vegas Co was named in the Master Agreement, it was also undertaking obligations under the same. It is a party to the Master Agreement.

75 Finally, on ST Vegas Enterprise, Mr Yeo's position is that ST Vegas Enterprise is bound by the Master Agreement even though it is not an expressly named party of the Master Agreement. Mr Yeo, amongst other things, points to Recital (B) of the Participation Agreement between Sanum and ST Vegas Enterprise in support. Mr Yeo suggests that there is acknowledgement in Recital (B) to ST Vegas Enterprise being a party to the Master Agreement.

76 Recital (B) states as follows:

> [Sanum] is an entertainment and gaming operator and desires to participate in [ST Vegas Enterprise's] aforementioned business in order to supply Machines to the Business Operations, provided that [Sanum] and [ST Vegas Enterprise]

> together with other partied [*sic*] has initially entered into the Principle Agreement on 30 May 2006 ("*the Agreement dated 30 May 2006*") [which is the Master Agreement] in represent of their intention to joint venture the casino and gaming business in Lao PDR pursuant to the terms and conditions therein.

77 Mr Xavier attempts to explain away the apparently adverse statement in Recital (B). His point is simply that Recital (B)'s reference to the Master Agreement was a mistake and that the other parts of the Participation Agreement between Sanum and ST Vegas Enterprise referencing the Master Agreement is neutral and does not assist Mr Yeo.

78 The reference to the "Principle Agreement on 30 May 2006" is obviously a typographical error. It is clear from the overall evidence that there is no such document. Hence, the parties can only be referring to the Master Agreement. Furthermore, the rest of the sentences in Recital (B) about the joint venture concerning the gaming business in Lao is consistent with the subject-matter and intent of the Master Agreement.

79 Recital (B) captures certain background information. First, Sanum's willingness to partner ST Vegas Enterprise, as so desired by the latter in Recital (A), is on account of the Master Agreement. Secondly, Recital (B) also states that the parties to the Master Agreement as "[Sanum] and [ST Vegas Enterprise] together with other partied [*sic*] has initially entered into the Principle Agreement on 30 May 2006 ("the Agreement dated 30 May 2006")".

80 Whether a recital in a contract is intended to be binding on either or both parties involves a question of construction. I make two point. First, the statement in Recital B – that "[Sanum] and [ST Vegas Enterprise] together with other partied [*sic*] has initially entered into the [Master Agreement] – is unclear. Was it intended to be a statement which all parties to the Participation Agreement

between Sanum and ST Vegas Enterprise have mutually agreed to admit as true so that it is an estoppel upon all? Secondly, the subject statement found in Recital (B) relates to Sanum as a counterparty. Therefore, it is not unreasonable to treat it as a statement of one party only, namely Sanum. Notably, Mr Yeo's argument did not take the shape of any of the two points made here. There was no suggestion that he was relying on estoppel. In the premises, the subject statement at best is from one side, Sanum. There is no mutual agreement to admit as true that ST Vegas Enterprise was a contracting party to the Master Agreement.

81 Mr Yeo also attempts to bring in what he purports to be a concession in Mr Xaysana's affidavit. In response, Mr Xavier pointed out that Mr Yeo has misread the evidence. I agree with Mr Xavier as the sentence Mr Yeo relied on takes the text out of its context. Mr Yeo focused on the first sentence (in italics) of the paragraph quoted below to say that there was at least tacit acceptance that ST Vegas Enterprise was a party to the Master Agreement:[17]

> *While ST Vegas Enterprise was not named in the Master Agreement, it had agreed to adhere to the general framework of cooperation entered into between Sanum and ST Group in respect of the Savannakeht and Lao Bao Slot Clubs via the [Participation Agreement between Sanum and ST Vegas Enterprise].* I also expressly disagree with paragraph 42(b) of JB's 9th Affidavit which suggests that ST Vegas Enterprise accepted all the obligations under the Master Agreement and that it accepted 'its own interchangeability with the other ST entities'. That is incorrect, and was not the intention of both parties as expressed in the [*Participation Agreement between Sanum and ST Vegas Enterprise*].
>
> [emphasis added]

As Mr Xavier emphasised, the rest of the paragraph goes on to clarify that the first sentence is not to be read as a concession.

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17 PBOD Vol V, Tab 44, para 13(b).

82 Finally, while the text of the Participation Agreement between Sanum and ST Vegas Enterprise references the Master Agreement or the terms and conditions of the Master Agreement, these references do not assist Mr Yeo. It is clear that ST Vegas Enterprise is not a named party in the Master Agreement. This distinguishes ST Vegas Enterprise from the other Lao disputants named in the Master Agreement. In my view, properly construed, ST Vegas Enterprise does not feature in the Master Agreement through the definition of 2nd Party, namely the reference to "affiliates, subsidiaries, principles [*sic*] or assigns". The references, at best, seek to incorporate the terms and conditions of the Master Agreement as terms and conditions of the Participation Agreement between Sanum and ST Vegas Enterprise; ST Vegas Enterprise cannot be made a contracting party by the backdoor.

83 In conclusion, only ST Group, Mr Sithat and ST Vegas Co are parties to the Master Agreement.

Clause 2(10) of the Master Agreement

84 Having concluded that the underlying dispute arose out of the Master Agreement, the relevant arbitration agreement to be construed is Clause 2(10) of the Master Agreement. Clause 2(10) is reproduced at [23] above. The issues of jurisdiction in this regard are whether the SIAC Arbitration was commenced against the correct parties, and whether the institution and procedures chosen was in keeping with strictures of Clause 2(10).

(1) Proper parties to an international arbitration under Clause 2(10)

85 It is not disputed that Clause 2(10) is a multi-tiered clause. It requires the parties to exhaust the various stated pre-requisite steps in Lao before commencing arbitration. It bears reiterating the earlier observation the parties

to the arbitration may not necessarily be congruous with the parties named or covered by the Master Agreement. This is because Clause 2(10) of the Master Agreement not only sets out pre-requisites to the commencement of arbitration, but more importantly, by its language, defines and limits the parties who may proceed to the stage of international arbitration (see [63] above).

86 It is useful to refer to Mr Baldwin's explanation for the genesis of Clause 2(10) and, in particular, the option to proceed to international arbitration:[18]

> A: … [The Lao disputants] wanted a tiered approach, friendly, amicable negotiation. If that didn't work, a choice of either [OEDR] or Lao court.
>
> Q: What was Lao [OEDR]?
>
> A: [The OEDR] is run by the Department of Justice of the country of Lao and it is an arbitration service offered to both Laos and international people to resolve disputes.
>
> But we just didn't understand Laos. … [W]e just weren't comfortable with sticking just to Lao, so we kept going back to international. So we finally settle on a process.
>
> You talk friendly. If that doesn't work you go to Lao court or [OEDR]. Full stop. If you're not happy with that, you go to international mediation. Full stop. If either party is not happy with that you go to international arbitration, so that's what we negotiated for.
>
> This was actually more difficult than negotiating the financial terms because they weren't comfortable with international. We weren't comfortable with Lao. So it took a long time for us to come to this compromise but we did.

87 The tribunal accepted Mr Baldwin's evidence that Clause 2(10) is a multi-tiered dispute resolution provision with pre-requisite steps before the commencement of arbitration. Indeed, the tribunal identified four possible pre-requisite steps in the clause and discussed the steps taken:[19]

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18 PBOD Vol IV, Tab 37, pp 626–627.

19 Award, paras 6.16.1–6.16.5.

> The first step is negotiation between the parties. There is evidence before the Tribunal that the parties did attempt to settle their differences but these negotiations did not result in a settlement.
>
> The second step was, therefore, initiated by Sanum, which was to refer the dispute to OEDR. Under the dispute resolution provision in the Master Agreement and the [Participation Agreement between Sanum and ST Vegas Enterprise], either party had the right to refer the dispute to the OEDR or the Courts of Lao PDR.
>
> ST then initiated proceedings in the Lao courts. Arguably this was a breach of the agreed dispute resolution provisions as Sanum had already commenced proceedings before the OEDR, but it is not necessary for the Tribunal to make any finding in this respect.
>
> …
>
> … Secondly, *the dispute resolution is clear; it gives <u>either</u> Party the right to proceed to the next step in the process if it is 'unsatisfied with the results of the above procedure' i.e. the proceedings before the OEDR or the Lao courts. This, in the Tribunal view, entitles either party to proceed to the next step if it is dissatisfied with the result of the OEDR procedure or Lao court proceedings, however those proceedings may have been conducted. …*
>
> The final step is for the parties to mediate and, 'if necessary arbitrate' the dispute. On reading Clause 10 [*sic*] of the Master Agreement with Clause 19 of the [Participation Agreement between Sanum and ST Vegas Enterprise], the Tribunal considers that this requires the dissatisfied party first to attempt to mediate, and then, if mediation is unsuccessful, arbitrate the dispute at SIAC.
>
> [emphasis added]

88 Critically, the tribunal recognised that the right to proceed to international arbitration is conditional upon either party being "dissatisfied with the result of the OEDR procedure or Lao court proceedings, however those proceedings may have been conducted". I agree with the tribunal on the low threshold to commencing international arbitration and that the right to commence arbitration accrues to the dissatisfied party. However, what the tribunal did not consider in its analysis is how the language of Clause 2(10) has

the effect of defining and limiting who the relevant parties to the arbitration are (*ie*, who may commence arbitration and whom the arbitration may be commenced against). In other words, the tribunal did not consider the relevant parties to an arbitration under Clause 2(10) as those who were parties in the OEDR procedure or Lao court proceedings. It is critical that the stipulated pre-requisite steps of the multi-tiered clause have been fulfilled as this bears upon the reference of the dispute to arbitration and consequently, the jurisdiction of the tribunal. The substantive dispute referred to arbitration must be the same as the one that was before the OEDR or Lao courts.

89 For present discussion on parties, the critical portion of Clause 2(10) is italicised in bold below:

> ***If one of the Parties is unsatisfied with the results of the above procedure***, ***the Parties shall*** mediate and, if necessary, ***arbitrate such dispute*** using an internationally recognized mediation/arbitration company in Macau, SAR PRC.
>
> [emphasis added]

90 The phrase "[i]f one of the Parties", read with the words "such disputes" and "results of the above procedure", lead to the conclusion that the relevant parties of the arbitration are those who have fulfilled the "above procedure" (*ie*, the OEDR procedure or Lao court proceedings). The party who is dissatisfied with the results of the OEDR or Lao court proceedings is entitled to call for international arbitration and the counterparty agrees to abide by this choice and to "arbitrate such dispute".

91 The OEDR was commenced by Sanum against ST Group and ST Vegas Co. The Lao court proceedings were commenced by ST Vegas Co against Sanum and in its counterclaim, Sanum named ST Vegas Co, ST Group, Mr Sithat and Xaya Construction Company Ltd as parties. In both sets of

proceedings, the substantive dispute involved the failure to "turnover" the Thanaleng Slot Club. Sanum lost both proceedings and thus would naturally be a dissatisfied party within the meaning of Clause 2(10) to commence international arbitration. Save for ST Vegas Enterprise, Mr Sithat, ST Group and ST Vegas Co were involved in the pre-requisite steps necessary to commence international arbitration under Clause 2(10). As such, in the context of this dispute, Sanum is only entitled to call for international arbitration against Mr Sithat, ST Group and ST Vegas Co. Having interpreted the first half of Clause 2(10), I now turn to the other portion of Clause 2(10).

(2) The meaning of "an internationally recognized … arbitration company in Macau"

92 The relevant portion of Clause 2(10) for this discussion is italicised in bold below:

> If one of the Parties is unsatisfied with the results of the above procedure, the Parties shall mediate and, if necessary, ***arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau***, SAR PRC.
>
> [emphasis added]

93 Apart from taking issue with the seat and composition of the tribunal, the Lao disputants, in their written submissions, question Sanum's position that arbitration in Singapore, adopting the SIAC Rules is consistent with Clause 2(10). For present purposes, the question for consideration is whether Clause 2(10) is capable of accommodating the commencement of the arbitration under the auspices of SIAC, adopting SIAC Rules. Whilst there may be reference to the seat in the analysis here the consequence of an incorrect seat will be discussed in another section of the judgment.

94 Many versions have been presented to this court as to how the words "an internationally recognized mediation/arbitration company in Macau" in Clause 2(10) is to be construed:

(a) Parties shall arbitrate such dispute using an internationally-recognised arbitration company in Macau ("Interpretation (a)").

(i) This construction of Clause 2(10) is premised on a literal reading of the clause. So read, the institution of choice must be geographically located in Macau and that particular institution must be one that is internationally recognised. The reference to Macau is not intended to stipulate the seat nor venue of the arbitration; it assists in the identification of the institution.

(b) Parties shall arbitrate such dispute using an international arbitration company recognised in Macau ("Interpretation (b)").

(i) This construction of Clause 2(10) requires the court to change the word "internationally" to "international" and move the word "recognized". So read, the chosen institution is an open category; as long as an institution is an arbitration company offering international arbitration and meets the criterion of being regarded as "internationally recognized" in Macau, the institution would qualify as the chosen institution under Clause 2(10). Examples of such institutions, as given by Mr Xavier, would be the "SIAC", "LCIA" and "ICC". Like the previous construction, this reading of Clause 2(10) only expressly stipulates the parties chosen institution but does not stipulate the seat.

(c) Parties shall arbitrate such dispute, using an internationally recognised arbitration company, in Macau ("Interpretation (c)").

(i) This construction of Clause 2(10) inserts two grammatical commas, one after the word dispute and the other after the word company (alternatively, parenthesis could be used in place of the commas). So read, Clause 2(10) identifies the seat of the arbitration to be in Macau and that the parties agreed to *use* an internationally recognised arbitration company chosen by the party who is dissatisfied with the result of the stated Lao procedure. This right to choose an institution flows from the first portion of Clause 2(10) as explained above at [89].

95 Now there are obvious many other permutations one can give to the interpretation of Clause 2(10). However, it is important to bear in mind that the court has to eventually come to an interpretation that is premised on the principles stated above at [34]–[35]. In this regard, two principles of interpretation stand out. First, where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars, so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. This is the principle of effective interpretation. Second, where the text of an agreement is clear and unambiguous, the agreement will generally be interpreted on the basis of its text alone. The corollary to both these principles is that a harmonious reading of an arbitration agreement should be adopted. While the court should strive to uphold the

parties' intention to arbitrate, the court should, as far as possible, avoid an interpretation that does violence to express words of the arbitration agreement.

96 Turning to the interpretation of Clause 2(10), Mr Yeo, in one way, advocates Interpretation (b). At the outset, Mr Yeo's difficulty in this case is to justify Sanum's commencement of arbitration under the auspices of the SIAC, adopting SIAC Rules, and the tribunal's decision on Singapore as the seat of the arbitration. At the same time, he would have to justify the tribunal's decision to read together Clause 2(10) of the Master Agreement and Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise. In this vein, Clause 19 is to be viewed as an amplification of Clause 2(10).

97 In light of the above difficulties, Mr Yeo had to resort to Interpretation (b) to enable Clause 2(10) of the Master Agreement to be read alongside Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise. According to Mr Yeo's interpretation, the SIAC qualifies as an international arbitration company and would be regarded as "internationally recognized" in Macau. As Interpretation (b) does not expressly provide for a seat, Rule 18.1 of the SIAC Rules 2013 provides that Singapore is to be the seat of the arbitration by default. Mr Yeo can then justify the choice of SIAC as the institution, use of SIAC Rules, and defend the tribunal's decision on Singapore as the seat of the arbitration.

98 Mr Yeo does not attempt to justify why the court should resort to amending the words and sentence structure of Clause 2(10) to arrive at Interpretation (b). As the court sees it, Clause 2(10) is capable of a reasonable construction on its own (*ie*, Interpretations (a) and (c). Further, Interpretation (b), as advocated by Mr Yeo, requires the court to accept that Clause 2(10) of the Master Agreement must be read alongside Clause 19 of the Participation

Agreement between Sanum and ST Vegas Enterprise. Again this presupposes that the "turnover" dispute arose out of the Participation Agreement between Sanum and ST Vegas Enterprise. To repeat, the failure to "turnover" the Thanaleng Slot Club was a breach of the Master Agreement only.

99 I digress to address two further points raised by Mr Yeo. On the first point, Mr Yeo advances an alternative view that Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise amended the parties' intention in Clause 2(10) of the Master Agreement. This argument must necessarily fail as this is premised on combining and reconciling both agreements. Further, there is no clear evidence that Clause 19 was meant to be a variation of Clause 2(10). On the second point, Mr Yeo argues that the parties could not have intended for their arbitrations to be seated in different forums where the contracts are so closely related; adopting any other interpretation aside from the ones he proffers would lead to this absurd result. This argument does not distinguish between the differences in the obligations contained in both agreements. Notably, Sanum's counsel in her letter of 23 October 2015 to the SIAC in reply to the Lao disputants' objection to jurisdiction saw no difficulty in reconciling and SIAC Rules with Macau as the seat of the arbitration (see [102] below).

100 This leaves Interpretations (a) and (c) to be considered. The difference between both interpretations is how the reference to "Macau" is given effect to. In the case of the former, "Macau" features as part of the institution chosen by the parties. In the case of the latter, "Macau" represents the parties chosen seat. In this court's view, the better interpretation of Clause 2(10) is Interpretation (c). Let me elaborate.

101 Interpretation (a), when applied, would give rise to some practical difficulties in that there appears to be no centre that was qualify as an "internationally recognized mediation/arbitration company" located in Macau. There was some debate over the objective standing of the World Trade Center Macau Arbitration Center ("WTC") as an "internationally recognized mediation/arbitration company" in Macau. In addition, the SIAC, LCIA and ICC would not be considered an internationally recognised arbitration company in Macau as they have no presence there.

102 The better construction of Clause 2(10) is Interpretation (c). By this interpretation, the identity of the "internationally recognized" arbitration company is an open category, leaving the selection of the institution to the party dissatisfied with the result of the stated procedure (*ie*, OEDR or Lao court proceedings). The understanding to be given to the chosen institution of the parties is that an institution will qualify as coming under Clause 2(10) as long as the institution is "internationally recognized" (see as illustration, the broad interpretation accepted by the Hong Kong High Court in considering the words "shall be arbitrated in the 3rd Country" in *Lucky-Goldstar International (HK) Limited v Ng Moo Kee Engineering Limited* [1993] 2 HKLR 73).

103 As stated, the choice of selecting the institution is given to the party dissatisfied with the results of the OEDR or Lao court proceedings as this right flows from the dissatisfied party's entitlement to commence arbitration. In the present case, Sanum's choice of the SIAC as the arbitration institution with an international reputation is an acceptable one. In fact, the acceptability of the SIAC as an internationally recognised arbitration company is demonstrated by the reference to the same dispute resolution centre in the other dispute resolution clauses found in various documents presented to the court. Separately, Sanum's

counsel's letter of 23 October 2015 to the SIAC in reply to the Lao disputants' objection to jurisdiction further states:[20]

> Likewise, this arbitration has been instituted in an internationally recognized forum, SIAC, with the designation of the seat in Macau. While the Master Agreement does not specify SIAC, it is surely an "internationally recognized" arbitration company as required by the Master Agreement. In addition, the several later agreements between the parties specifying SIAC and SIAC rules as the forum for dispute resolution confirms the acceptability of SIAC to the parties as an "internationally recognized" arbitration company.

This letter makes two points: (a) the acceptability of the SIAC as an internationally recognised arbitration company; and (b) that Macau is the seat of the arbitration.

104 Under Interpretation (c), the seat of the arbitration is made express; the seat being Macau. This would be consistent of the intention of parties (*ie*, expressly stipulating a seat in Clause 2(10) and that the seat would be Macau). This, at the very least, can be said of Sanum's intention until the arbitration hearing. Macau as the seat of the arbitration was repeated in the amended notice of arbitration dated 22 September 2015, the letter dated 23 October 2015 and the statement of claim dated 21 April 2016. Sanum's counsel in the arbitration initially stated that the Master Agreement was meant to stipulate a seat and that the seat was Macau:[21]

> President: The seat of the arbitration: now, arguably if you look at the first dispute resolution provision it is Macau but if you look at the second, it is Singapore and the SIAC rules provide -- I forgot why one it is -- that in default of the parties choosing a seat then the seat will be Singapore.
>
> Ms Deitsch-Perez: … *Originally the claimant had selected Macau because it was from Macau.* Later agreements the claimant and

[20] PBOD Vol 1, Tab 12, p 164.

[21] PBOD Vol IV, Tab 37, p 579.

> the respondent agreed to Singapore and we expected actually the respondent to come in and say no, it should be Singapore and we were prepared to agree that, so we would have no objection if the panel found that the seat was Singapore.
>
> …
>
> Ms Deitsch-Perez: If it is helpful, the claimants have no objection to the seat being Singapore and think the weight of evidence suggests that it is indeed Singapore.
>
> [emphasis added]

105 However, as can be seen from the quote above, Sanum's counsel then took the position that Sanum had "no objection to the seat being Singapore and think the weight of evidence suggests that it is indeed Singapore". This appears to have eventually found its way into the reasoning of the tribunal's decision on the seat of the arbitration.

106 In addition to the points above, Interpretation (c) is preferable as Interpretation (c) is sufficiently detailed and precise to be enforced as an arbitration agreement without straining the language of the clause. In short, this court adopts Interpretation (c) in construing Clause 2(10) of the Master Agreement. Accordingly, this court finds that while the commencement of the arbitration at the SIAC was proper, the tribunal was wrong to have held that the seat was Singapore. The arbitration ought to have been seated in Macau. Pausing here, Mr Xavier's arguments on the "wrong seat" is not framed as a jurisdictional challenge but a procedural one under Article 36(1)(*a*)(iv). This will be dealt with below. Likewise, the issue of composition of the tribunal is not raised as a jurisdictional issue but a procedural challenge.

Conclusions on jurisdictional objections

107 For the reasons stated above, in respect of the Lao disputants' jurisdictional objections under Article 36(1)(*a*)(i) of the Model Law, the court's rulings are as follows:

(a) The underlying dispute arose out of the Master Agreement which contains an agreement to arbitrate. Accordingly, the Lao disputants' contention that there was no valid arbitration agreement must be rejected.

(b) Only ST Group, Mr Sithat and ST Vegas Co are parties to the Master Agreement and thus have agreed to arbitration pursuant to Clause 2(10) of the Master Agreement. ST Group, Mr Sithat and ST Vegas Co, having been involved in the pre-requisite steps prior to the commencement of arbitration, are proper parties to the Arbitration. Accordingly, the Award binds them.

(c) ST Vegas Enterprise is not a party to the arbitration agreement in Clause 2(10) of the Master Agreement. By the same token, ST Vegas Enterprise is not a party to the SIAC Arbitration and the Award does not bind ST Vegas Enterprise.

108 For the reasons stated at [41] above, the Lao disputants' jurisdictional objections under Article 36(1)(*a*)(iii) of the Model Law is a non-point.

Procedural objections

109 Coming now to the procedural objections on the issue of seat, as alluded to earlier at [29] above, the tribunal was in effect relying on Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise in coming to

its conclusion that the SIAC Arbitration was to be seated in Singapore. This court has stated that the correct understanding of the matter is that the underlying dispute arose out of the Master Agreement. Consequently, it is Clause 2(10) of the Master Agreement that is of relevance to the question of seat. Having accepted Interpretation (c), the correct seat of the arbitration is Macau and not Singapore.

110 As for the issue of composition of the tribunal, there is no express stipulation in 2(10) as to the number of arbitrators. Hence, the default would be prescribed by the institutional rules of the parties chosen institution. Since the SIAC is the chosen institution, the default position under Rule 6.1 of the SIAC Rules 2013 provides for one arbitrator unless it appears to the Registrar, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators. As is clear from the letters between the SIAC and the parties that the decision to appoint a three-member tribunal was made pursuant to Clause 19 of the Participation Agreement between Sanum and ST Vegas Enterprise, as well as another document containing a similar dispute resolution clause. With the finding that the underlying dispute did not arise from the Participation Agreement between Sanum and ST Vegas Enterprise but the Master Agreement instead, the appointment of a three-member tribunal was incorrect.

111 Against the backdrop described above, I now turn to the question of enforcement. The Lao disputants rely on Article 36(1)(*a*)(iv) of the Model Law to seek a refusal of enforcement of the Award. However, the Lao disputants have done little to demonstrate the manner in which these procedural irregularities have affected the arbitral procedure adopted. This will have a bearing on the question of prejudice and the exercise of the court's residual

power on the enforcement of an award. As Mr Yeo points out, where prejudice has not been shown, the court ought to exercise its residual discretion to enforce the Award. This discretion is found in the words "may be refused" in Article 36(1) of the Model Law.

112 In discussing the equivalent of Article 36(1)(*a*)(iv) in the New York Convention (*ie*, Article V(1)(*d*)) the learned author of Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) ("*International Commercial Arbitration*") indicated that material prejudice is ordinarily required for non-recognition (which by implication, goes towards non-enforcement). I gratefully adopt the following paragraphs (at pp 3560–3565):

> [i] Article V(1)(d)'s First Prong: General Principles
>
> The question of whether the arbitral tribunal … conducted the arbitration in a manner that did not comply with the parties' arbitration agreement is largely one of interpretation of that agreement. Where procedures were used that were not in compliance with the parties' agreement, then Article V(1)(d) is potentially applicable. The parties' agreement, in these as in other circumstances, includes both their express agreement and the terms of any implied agreement (such as … implied agreement on the arbitral seat, implied agreement on institutional rules …)
>
> …
>
> [iv] Serious Violation of Parties Agreed Procedures Required for Non-Recognition Under Article V(1)(d)
>
> Article V(1)(d) also requires a serious violation of a significant procedural term of the parties' arbitration agreement in order to justify non-recognition of an award. It is not a basis for denying recognition of an award that there was a minor or incidental violation of the parties' agreement or the breach of an incidental or unimportant term of that agreement. As one authority put it, with some understatement, Article V(1)(d) is not a "hair trigger" for non-recognition.
>
> …

> [v] Material Prejudice Ordinarily Required for Non-Recognition Under Article V(1)(d)
>
> As with Article V(1)(b), it is generally necessary for an award-debtor seeking non-recognition under Article V(1)(d)'s first prong to show that the violation of the parties' agreed arbitral procedures materially affected the party's rights. It is not enough merely to demonstrate that the arbitral procedures failed to comply with the provisions of the parties' agreement, including material provisions of that agreement; in addition, the noncompliance must have had a meaningful effect on the arbitration process that produced the award in question. For example, in one U.S. decision, the court held that the tribunal's failure to comply with the applicable AAA rules did not warrant non-recognition because the award-debtor "was not 'substantially prejudiced' by respondents' failure to comply with the AAA's procedural rules." …

113 In considering the specific issue of an incorrect number of arbitrators, the court in *AQZ v ARA* [2015] 2 SLR 972 at [136] stated:

> Even if the Supplier is correct in its submission that the arbitration should not have been conducted before a sole arbitrator, the Supplier has not discharged its burden of explaining materiality or the seriousness of the breach. Nor has it demonstrated that it suffered *any prejudice as a result of the arbitral procedure adopted. While prejudice is not a legal requirement for an award to be set aside pursuant to Art 34(2)*(a)*(iv), it is a relevant factor that the supervisory court considers in deciding whether the breach in question is serious and thus whether to exercise its discretionary power to set aside the award for the breach …*
>
> [emphasis added]

Although the above paragraph was stated in the context of a setting aside application, the court's clear statements are nonetheless instructive.

114 As Sanum points out, the Lao disputants have not produced any evidence of prejudice arising out of the procedural irregularities in the Award. Absent such evidence, the Lao disputants have not discharged their burden of demonstrating the seriousness of the breach (*ie*, the consequences of having an incorrectly seated arbitration or incorrect number of arbitrators on the arbitral

procedure). The Lao disputants' arguments to resist enforcement on the for reasons for incorrect seat of the arbitration and composition of the tribunal are insufficient for the court to refuse enforcement under Article 36(1)(*a*)(iv) of the Model Law.

115 For completeness, I note Mr Xavier's contention that in respect of the issue of seat, there is no need to show prejudice. Mr Xavier argues the seat is the "very fount of arbitration" and cites certain authorities to suggest that a refusal of enforcement of an award is immediate if an arbitration were incorrectly seated. While I agree that the parties chosen seat is an important aspect of an arbitration, as the seat indicates the curial court to supervise the conduct of the arbitration, choice of a seat for arbitration is less critical here since the application is not to set aside the award but to refuse enforcement. This is because enforcement can be brought in any jurisdiction whereas only the seat court can set aside an award. Hence, the mere assertion of an incorrectly seated arbitration is not enough. There must be evidence of how the law of the incorrect seat would impact the arbitral procedure that was adopted by the tribunal. Further, the authorities cited by Mr Xavier do not assist. The fact of the matter is that the discretion of the court is found in the words "may be refused" in Article 36(1) of the Model Law.

116 I note that the learned author in *International Commercial Arbitration* stated the following (at p 3567):

> A representative example of a failure to comply with the parties' agreed arbitral procedures under Article V(1)(d) involves the parties' choice of the arbitral seat. If the arbitral tribunal (or arbitral institution) does not seat the arbitration in the parties' agreed arbitral seat, then the resulting award will be subject to non-recognition.

This paragraph has to be read with caution. The author derived the proposition above from the case of *Polimaster Ltd v RAE Systems Inc* 623 F 3d 832 (9th Cir, 2010) ("*Polimaster*"), amongst others. Mr Xavier, at the hearing, placed heavy reliance on that decision. That case is distinguishable from the present.

117 The court in *Polimaster* was concerned a clause which stated that, "[i]n case of failure to settle the mentioned disputes by means of negotiations [the disputes] should be settled by means of arbitration at the defendant's [site]". The reference to the defendant's site was understood to refer to the geographical location of the defendant's principal place of business. As it turned out, Polimaster commenced arbitration in RAE System's principal place of business in California under the reservation that "no counterclaims will be filed in this matter based on the requirement in the agreement that all such claims be filed in the location of the party against whom such claims are brought". In responding with its defence, RAE Systems included several counterclaims. These counterclaims were accepted by the arbitrator and an award was eventually rendered including the counterclaims. The issue for the court was whether enforcement of the award should be refused on the account of a departure from the parties agreed arbitral procedure. The majority eventually held that enforcement ought to be refused as the counterclaim should have been commenced at Polimaster's place of business in Belarus; Polimaster being the defendant for the purposes of the counterclaim. The majority came to this conclusion by construing the word "disputes" in the relevant clause as encompassing both claims and counterclaims, and took a literal reading of the clause (at 837–838). The relevant clause in *Polimaster* is distinguishable from Clause 2(10) of the Master Agreement, which does not require commencement of proceedings at the adversary's place of business. The contractual requirement to commence proceedings at the adversary's place of business is doctrinally

different from the seat of an arbitration. By Clause 2(10), the parties agree to adopt the rules of an international arbitration institution that need not be the same country as the seat of the arbitration.

118 In conclusion, while there is force in the Lao disputants' procedural objections, this court is not minded to refuse enforcement of the Award pursuant to Article 36(1)(*a*)(iv) of the Model Law.

Conclusion

119 For the reasons stated, save for ST Vegas Enterprise, SUM 4933 is dismissed against ST Group, Mr Sithat and ST Vegas Co. Overall, I award costs of the SUM 4933 to Sanum. If parties are unable to agree on costs, they are to submit on the quantum of costs, in writing, no later than 2 July 2018.

Belinda Ang Saw Ean
Judge

Alvin Yeo SC, Wendy Lin, Monica Chong & Sean Poh (Wong Partnership LLP) for the plaintiff;
Francis Xavier SC, Alina Chia, Tee Su Mien & Edwin Tan (Rajah & Tann Singapore LLP) (instructed); Thomas Tan & Benjamin Tan (Haridass Ho & Partners) for the 1st, 2nd, 3rd and 4th defendants.