IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 9

Originating Application No 18 of 2023 (Summons No 2721 of 2023)

Between

Government of the Lao
People's Democratic Republic

… *Claimant*

And

Lao Holdings NV

… *Respondent*

JUDGMENT

[Arbitration — Award — Setting aside]

TABLE OF CONTENTS

Government of the Lao People's Democratic Republic
v
Lao Holdings NV

[2024] SGHC(I) 9

Singapore International Commercial Court — Originating Application No 18 of 2023 (Summons No 2721 of 2023)
Andre Maniam J, Vivian Ramsey IJ and Douglas Jones IJ
16 January 2024

18 April 2024 Judgment reserved.

Vivian Ramsey IJ (delivering the judgment of the court):

Introduction

1 The respondent ("LHNV") applied by HC/SUM 2721/2023 ("Summons 2721") to set aside an order of court granting the claimant ("GOL") leave to enforce an award (the "ICSID Award") made in ICSID Arbitration Case No ARB(AF)/12/6 (the "ICSID Arbitration"). LHNV contended that the ICSID Tribunal was misled into granting an excessive costs order against it, as GOL had intentionally withheld disclosure of a fee cap agreement between itself and its solicitors.[1]

2 We dismiss LHNV's application for the reasons set out below.

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[1] Respondent's Written Submissions dated 4 January 2024 at para 4.

Facts

Background

3 LHNV's application arises out of an enduring, protracted dispute between GOL, LHNV, and LHNV's wholly owned subsidiary ("Sanum"), relating to the development and operation of casinos, hotels, and clubs in the Lao People's Democratic Republic. Proceedings have been ongoing for more than ten years, spawning numerous awards and judgments.

Procedural History

4 The ICSID Award was issued on 6 August 2019: LHNV's claims were dismissed and LHNV was ordered to pay GOL US$481,622.95 for arbitration costs and US$1,467,483.72 for legal costs and expenses.

5 LHNV applied to set aside the ICSID Award by HC/OS 1389/2019 (later transferred to the Singapore International Commercial Court as SIC/OS 5/2020). LHNV's setting-aside application will be referred to as "OS 5".

6 OS 5 was filed on 6 November 2019, the last day of the 3-month period for a setting-aside application under Article 34(3) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law").

7 OS 5 was dismissed on 10 September 2021 (*Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2021] 5 SLR 228 at [403]) and LHNV's appeal against that decision was dismissed on 24 November 2022 (*Lao Holdings NV and another v Government of the Lao People's Democratic Republic* [2023] 1 SLR 55 at [162]).

8 On 11 May 2023, GOL made a "without notice" application to enforce the ICSID Award in Singapore by SIC/OA 18/2023. That was granted by order of court on 12 May 2023. On 4 September 2023, LHNV applied by Summons 2721 to set aside that court order.

Issues

9 There are two main issues. First, GOL contends that LHNV is precluded from bringing this application because it was aware of the facts relied on during its setting-aside application in OS 5 and should have raised the grounds of challenge in March 2020. Second, LHNV contends that the enforcement order should be set aside and enforcement should be refused, on the basis that: (a) the award of costs in the ICSID Award was contrary to public policy in Singapore, (b) the costs decision was a decision on a matter beyond the scope of submission to arbitration, and/or (c) the costs decision was not in accordance with the agreed arbitral procedure.

LHNV's application is an abuse of process

10 LHNV filed its setting-aside application in OS 5 on 6 November 2019, within the three-month time limit under Article 34(3) of the Model Law, the ICSID Award having been made on 6 August 2019. The same day it filed OS 5, LHNV filed an affidavit of Mr John K. Baldwin ("Mr Baldwin") in support of the application.

11 LHNV however made the mistake of filing the wrong affidavit of Mr Baldwin as the supporting affidavit for OS 5. What it filed in OS 5 on 6 November 2019 was Mr Baldwin's supporting affidavit for a different

application (Sanum's application to set aside the award made against it by HC/OS 1390/2019, which became SIC/OS 6/2020 ("OS 6")).

12 LHNV only realised this mistake after the parties had agreed on the relevant timelines for response and reply affidavits. The parties discussed this matter and agreed that LHNV could re-file its supporting affidavit for OS 5 – which it did on 8 June 2020 – and that GOL would file its response affidavit on 22 June 2020.[2] LHNV then filed its reply affidavit on 30 October 2020.

13 In those circumstances, GOL submits that the grounds which are now relied on to set aside the order to enforce the ICSID Award, which LHNV says came to its attention in March 2020, could and should have been brought in the proceedings under OS 5 and that LHNV is now precluded from relying on them in this application on the principle stated in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [101] and in *Beyonics Asia Pacific Ltd and others v Goh Chan Peng and another and another appeal* [2022] 1 SLR 1 ("*Beyonics*") at [50]. Those cases cited the doctrine in *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313 ("*Henderson*") at 114–115; 319 and *Johnson v Gore Wood and Co (a Firm)* [2002] 2 AC 1 ("*Johnson*") at 31.

14 LHNV contends that it could not have relied on those grounds in March 2020 (when it only came to know about GOL's fee agreement) for by then, LHNV was time-barred and precluded from introducing those grounds in OS 5. LHNV says that this was the reason why those grounds were not raised in OS 5.

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[2] WongPartnership's Letter to Court dated 9 June 2020 in respect of HC/OS 1389/2019 and HC/OS 1390/2019 (*ie*, OS 5 and OS 6).

It refers to the three-month time limit in Article 34(3) of the Model Law and submits that this time limit is strictly applied and not extendable, even in cases of fraud, relying on *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 1 SLR 1045 at [82]. LHNV says that it only discovered GOL's fee arrangement in or around March 2020 which was four months after the expiry of the three-month time limit on 6 November 2019. It therefore submits that by that time, it was time-barred from relying on the fee arrangement to set aside the ICSID Award.

15 LHNV also contends that it could not seek to amend its application because any application to do so under O 20 r(r) 5(2), 5(5) read with O 20 r 7 of the Rules of Court (2014 Rev Ed) ("Rules of Court") would not have succeeded. It refers to *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 ("*ABC*") and submits that the facts underpinning the new grounds for setting aside, which relate to the GOL fee arrangement, are "completely distinct" from those advanced in support of the original grounds in OS 5.

16 In reply to this, GOL submits that the three-month time limit in Article 34(3) only applies to the filing of the originating summons and not the affidavit in support. It refers to *BZW and another v BZV* [2022] 1 SLR 1080 ("*BZW*") at [47] in support of the proposition that there was no requirement for an affidavit to be filed at the same time as the originating summons within the three-month limit.

17 If LHNV were correct that the three-month time limit is strictly applied to supporting affidavits, then its incorrect filing of the OS 6 affidavit as the supporting affidavit for OS 5 would have been fatal on points not raised in the affidavit filed; but neither GOL nor the court regarded that to be the case, and

the filing of the correct affidavit was accepted outside the three-month time limit.

18 In this case, the originating summons for OS 5 set out the basis for LHNV's application to set aside the ICSID Award, in terms of the provisions of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") and Model Law which were relied upon. It was the affidavit of Mr Baldwin, belatedly filed on 8 June 2020 as the supporting affidavit for OS 5, that set out the grounds and particular facts to support the application contained in the originating summons.[3]

19 As set out by the Court of Appeal in *BZW*, the three-month time limit in Article 34(3) only applies to the originating summons and not to the supporting affidavit. In that case (at [47]), it was stated that O 69A r 2 of the Rules of Court required a setting-aside application to be made by an originating summons within three months from the date of receipt by the applicant of the award or the corrected award. It did not require the affidavit to be filed at the same time as the originating summons and as far as the grounds are concerned, the affidavit must "state the grounds in support of the application" and "set out any evidence relied on by the plaintiff".

20 In the present case, the only affidavit filed by LHNV in OS 5 within the three-month limit for setting-aside applications, was (erroneously) Mr Baldwin's supporting affidavit for a different application, *OS 6*. That was, however, not fatal to LHNV in OS 5. GOL agreed that the correct affidavit of Mr Baldwin could be filed as the supporting affidavit for OS 5, and that was

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3 Case Management Bundle Volume 2 at p 346.

done on 8 June 2020, well after the three-month limit for setting-aside applications had expired on 6 November 2019. The court accepted the supporting affidavit filed on 8 June 2020, and OS 5 proceeded accordingly. GOL's response affidavit of 22 June 2020 thus states that it is made "in response to the 1st Affidavit of John K. Baldwin (the "Supporting Affidavit") filed on behalf of LHNV on 8 June 2020."[4]

21 GOL explains the situation as follows: LHNV had filed an incorrect supporting affidavit in OS 5 which had caused some of LHNV's intended objections to the ICSID Final Award to be omitted in OS 5. After discussing this matter, parties agreed that LHNV could re-file its supporting affidavit for OS 5.[5]

22 In effect, on 8 June 2020 GOL permitted LHNV to add grounds to its initial affidavit of 6 November 2019. By that time LHNV had, since March 2020, been aware of the grounds now relied on in this application to set aside the enforcement of the ICSID Award. On the facts of this case, whatever would have been the result of an application to amend the affidavit in the light of the decision in *ABC*, it is clear that had LHNV raised the present grounds between March 2020 and 8 June 2020, when it eventually filed the correct supporting affidavit for OS 5 (adding grounds that had previously been omitted), GOL would have accepted that the present grounds should be included like the other grounds.

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4 1st Affidavit of Outakeo Keodouangsinh dated 22 June 2020 at para 5.

5 Claimant's Written Submissions dated 4 January 2024 at para 75.

23 LHNV's argument that it could not have raised the present grounds in OS 5 rings hollow when neither GOL nor the court held LHNV to the grounds in the supporting affidavit that was erroneously filed together with the setting-aside application on 6 November 2019.

24 On that basis we find that LHNV could and should have brought the present grounds relating to GOL's fee agreement within the application it made on 6 November 2019 to set aside the ICSID Award, *ie*, OS 5. Having failed to do so, we find that, as submitted by GOL, LHNV is now precluded from relying on the present grounds in seeking to set aside the order for enforcement.

25 As cited in *TT International* (at [101]), Sir James Wigram V-C held in the English case of *Henderson* (3 Hare 100 at 114-115; 67 ER 313 at 319) that:

> …[W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, in advertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to *every point which properly belonged to the subject of litigation, and which [the] parties, exercising reasonable diligence, might have brought forward at the time.* [emphasis added]

26 Equally, as cited in *Beyonics* (at [51]), Lord Bingham said in the English case of *Johnson* (at 31):

> It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

> That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

27 We therefore hold that the grounds based on GOL's fee agreement could and should have been brought in the original application to set aside the ICSID Award and to raise them now would be to misuse or abuse the process of the court and therefore LHNV is precluded from raising those grounds in these proceedings.

28 In any event, for the reasons set out below, we do not consider that there is merit in LHNV's argument that GOL's fee agreement gives rise to grounds for resisting enforcement of the ICSID Award.

Enforcement of the ICSID Award should not be refused because of GOL's fee cap agreement

GOL's fee cap agreement includes a conditional element

29 LHNV says that, in or around March 2020, LHNV came into possession of a report by the Ministry of Planning and Investment of the Lao People's Democratic Republic to the Prime Minister dated 19 February 2020 (the "February Report"). The relevant part of the February Report (translated into English) is as follows:[6]

> … Besides the problems mentioned above, the assembly also discussed the expenses in the lawsuits that the ICSID and PCA ruled that the government be awarded $3,727.357.28 U.S. dollars for defending the case. So far, the government has *paid*

6 Case Management Bundle Volume 4 ("**CMB-4**") at p 81.

> *the attorney fees on a flat rate basis in the amount of 1.5 million U.S. dollars* and the reason why the international dispute resolution committee awarded the government *more than the money that the government paid to the attorneys* is because in the actual course of work, the real expenses increased (those expenses are responsible by the attorneys). Therefore, when submitting the documents for the expenses to the international dispute resolution committee, the attorneys included the increased expenses. Therefore, when the international dispute resolution committee issued the ruling, they agreed to add this amount as suggested by the attorneys. Therefore, the amount that the international dispute resolution committee awarded the government also includes the attorney fees (about 1,280,735 U.S. dollars) …
>
> [emphasis added]

30 Based on this document, LHNV submits that GOL had paid and agreed to pay its attorneys on a "flat rate basis" the sum of US$ 1.5 million for the ICSID Arbitration and another arbitration on the basis of a fee cap of US$1.5 million. It also submits that GOL had claimed, and the tribunals had awarded, "more than the money that [GOL] paid to the attorneys" in both arbitrations, in order to recover additional expenses above that fee cap of "about 1,280,735 U.S dollars" that were "responsible by the attorneys", which LHNV submits are therefore to be borne by GOL's attorneys.[7]

31 GOL's position in relation to its fee agreement is dealt with by Mr David J. Branson ("Mr Branson") in his affidavit[8] and summarised by GOL in its written submissions.

32 Mr Branson says, at paragraph 29 of his affidavit:

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7 2nd Affidavit of Deborah Deitsch-Perez dated 26 September 2023 ("**DDP-2**") at [17]–[18].

8 1st Affidavit of David J. Branson dated 19 September 2023 ("**DJB-1**") at [17]–[31].

> The agreement I reached with GOL in February 2018 had a US$1.5 million fee cap, but also a conditional element for GOL to pay its counsel any amount above the US$1.5 million fee cap which was awarded as costs and expenses by the BIT I Tribunals and recovered.

33 He also says at paragraph 21 of his affidavit that:

> … GOL and its lawyers agreed to a fee cap only around or after February 2018. It applied to the period of the [Second Material Breach Application] only.

34 LHNV submits that, based on the February Report, the fee agreement was simply that there was a fee cap of US$1.5 million and not, as Mr Branson says, a fee cap and a conditional element. There is, it points out, nothing in the February Report which mentions the conditional element. It also says that the wording of "responsible by the attorneys" means that that amount is to be borne by the attorneys and so would not be payable to the attorneys, indicating that there was no conditional element. Further LHNV says that the February Report contains no statement as to what is to happen to the excess sum of about US$1.28 million.

35 LHNV also submits that GOL does not seek to refute or explain the February Report. It also says that, if there had been a conditional element, GOL would have been expected to disclose that fact to the ICSID Tribunal, as it did in relation to an agreement in those terms made in an SIAC arbitration between the parties (the "SIAC Arbitration").

36 On that basis, LHNV contends that having put forward a *prima facie* case that the fee agreement was only for US$1.5 million and nothing else, the onus was on GOL to adduce evidence that the fee agreement was not just the fee cap but had the additional conditional element. However it says that GOL

has not done so and has not provided an explanation as to why a fee agreement document has not been produced. LHNV relies on the statement by Prakash J in *Mohamed Amin bin Mohamed Taib and others v Lim Choon Thye and others* [2011] 2 SLR 343 ("*Mohamed Amin*") that the court should draw an adverse inference in the absence of the fee agreement being disclosed.

37 GOL submits that, first, it has produced evidence of the fee agreement from the person who made it – Mr Branson. It says that his evidence is clear and there is no need for there to be any explanation of what was said in the February Report. In any event, it contends that the terms of the February Report are consistent with Mr Branson's evidence. In particular, it notes that (at the end of the paragraph cited at [29] above) it is stated that "[t]herefore, the amount that the international dispute resolution committee awarded the government also includes the attorney fees (about 1,280,735 U.S. dollars)." The reference here to "attorney fees" of about US$1.28 million is, GOL submits, consistent with that sum being payable to its attorneys. In relation to the phrase "the real expenses increased (those expenses are responsible by the attorneys)" is not a statement that they are to be borne by the attorneys. Rather, GOL submits that the phrase means that the attorneys were responsible for those expenses, which is the position if they are not awarded and recovered from LHNV.

38 In relation to the terms of the fee agreement, GOL says that LHNV had never requested a copy of any fee agreement and, if it had done so, the position was that Mr Branson discussed the fee agreement with GOL and came to an agreement but nothing formal was prepared. This was similar to the position in the SIAC Arbitration where no written conditional fee agreement was produced; the fee agreement was just referred to in the costs submissions. In the circumstances, GOL submits that the agreement explained by Mr Branson is the

fee agreement. GOL obviously accepts that there was a fee cap of US$1.5 million without there being a written agreement and the fee cap was part of the fee agreement which also included the conditional element.

39 In those circumstances, GOL submits that the court should find that there was a fee agreement which included both the fee cap of US$1.5 million and the conditional element.

40 We accept GOL's submission. The existence of a fee agreement which contained a fee cap of US$1.5 million is not in dispute. We find that the affidavit evidence of Mr Branson, the person who made the fee agreement, is clear. He says that the fee agreement had a fee cap "but also a conditional element for GOL to pay its counsel any amount above the US$1.5 million fee cap which was awarded as costs and expenses by the BIT I Tribunals and recovered."[9] We have no reason to consider that Mr Branson's statement, under oath, is anything but the truth.

41 Whilst LHNV seeks to cast doubt on Mr Branson's statement by reference to the February Report, we do not see any inconsistency between the February Report and what is said by Mr Branson. First, they both refer to a fee cap of US$1.5 million. Second, we find that when read in its entirety, the February Report is consistent with there being the conditional element. We do not accept that the reference to the increased expenses being "responsible by the attorneys", a phrase which is a translation, can be construed to mean that the increased expenses are to be borne by the attorneys and are never recoverable by the attorneys. At most that phrase indicates, consistent with the conditional

9 DJB-1 at [29].

element, that the expenses are the responsibility of the attorneys because they incurred them and had to bear them initially. It does not lead to a conclusion that, contrary to what Mr Branson says, there was no conditional element. This is particularly so when the February Report refers to the excess over the fee cap of about US$1.28 million as "attorney fees", which is consistent with Mr Branson's evidence. If, indeed, the US$1.28 million were seen by GOL as a windfall which GOL could recover and retain then we are certain that this would have been an important matter to have been noted in the February Report but it was not. Instead, the sum was referred to as attorney fees.

42 This is not a case where there is any need for a written fee agreement and there is no ground for any adverse inference as in the case of *Mohamed Amin*. The point of whether there was a written agreement was raised late and we are satisfied with the explanation given by GOL. The issue of a written fee agreement is therefore irrelevant to our consideration.

43 Accordingly, we find that the relevant fee agreement was that there was a US$1.5 million fee cap but that GOL was to pay its counsel any amount above the US$1.5 million fee cap which was awarded as costs and expenses by the tribunals and was recovered.

GOL was not under an obligation to disclose the terms of its fee agreement to the ICSID Tribunal

44 Whilst LHNV's primary position is that there was a fee agreement which contained only the fee cap and no conditional element and that that should have been disclosed to the ICSID Tribunal, it also submits that, even if there were a conditional element, the terms of the fee agreement should still have been disclosed to the ICSID Tribunal. LHNV contends that the terms of the fee

agreement were material and should have been disclosed so as not to mislead the ICSID Tribunal. It submits that this is necessary so that so that submissions can be made on the terms of the fee agreement and the Tribunal can then decide if there was an obligation to pay something additional to the fee cap and whether that additional amount was reasonable and would be the subject of a costs order.

45 LHNV draws support for this submission from the position in the SIAC Arbitration, where there was disclosure of the fee agreement. Submissions were then made on the terms of that agreement and the SIAC Tribunal considered submissions on whether there was an obligation to pay costs by GOL and whether the costs were reasonable. LHNV submits that, because GOL was unclear as to what it had paid or should be paying its attorneys, the SIAC Tribunal deducted 40% off the time costs that were claimed by GOL.

46 LHNV refers to paragraphs 347 to 348 of the SIAC Award, which stated:

> 347. The Claimants finally object to any award towards Respondent 3's costs as, according to them, GOL would not be liable for or incur any legal fees in excess of the cap. The Tribunal cannot follow this argument. As Respondent 3 clarified, it has incurred legal fees and expenses above the cap agreed with its counsel. It will be required to pay these fees if it is able to obtain and/or collect costs from the Claimants. Respondent 3 is thus under an obligation to pay its counsel should the Tribunal award costs in its favor. That said, it remains that Respondent 3's description of the fee arrangement with its counsel is unclear. For instance, Respondent 3 has not disclosed the amount it paid or is obligated to pay to its own counsel, other than the fees to Respondent 1 and 2's counsel. This is another factor the Tribunal has borne in mind while allocating the Parties' costs below.
>
> 348. The Tribunal thus (partially) rejects the Claimants' arguments seeking a departure from 'the costs follow the event' rule. It also recalls that the Henderson Rule defence was raised rather late in the proceedings, requiring two rounds of post-hearing briefing. Further, it has not been established that the Tribunal can award the costs incurred as a result of the

> Delaware Reinstatement Action, which was arguably occasioned by the Respondents' own failure to timely pay its share of the advances towards arbitration costs. In the circumstances, the Tribunal determines that the Claimants should bear the entire arbitration costs and 60% of the Respondents' legal costs. This means that the Claimants must pay the following amounts:
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> … to Respondent 3: USD 348,770 representing approximately 50% of the total costs of the arbitration of SGD 945,746.44 converted into US currency, being the Respondents' share of the arbitration costs paid from deposits held by SIAC;
>
> … to Respondents 1 and 2: USD 437,200.00 representing approximately 60% of the legal costs and disbursements of these Respondents;
>
> … to Respondent 3: USD 513,655.00 representing approximately 60% of the legal costs and disbursements of Respondent 3.[10]

47 LHNV therefore submits that the SIAC Tribunal was able to take into account the unclear nature of the fee agreement and the fact that GOL had not disclosed the amount it had paid or was obliged to pay to its own counsel as part of its decision to award GOL 60% of its costs. In the same way, LHNV submits that the ICSID Tribunal would have been able to carry out a similar exercise and, given the unclear nature of the fee agreement, could have reduced the time costs claimed by GOL in this case.

48 In particular, LHNV says that it is unlikely that the ICSID Tribunal would have permitted full recovery of the claimed costs in this case. It says that, contrary to GOL's assertions, the fee agreement with the conditional element did not cover the entirety of legal costs and expenses generated in the Claim Period. LHNV refers to Mr Branson's Affidavit and says that, on GOL's own case, the fee agreement covered only fees and expenses generated in the BIT I

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[10] 1st Affidavit of John K. Baldwin dated 20 December 2021 at p 111–112.

Arbitrations beginning from an undefined date in "February 2017".[11] GOL furthermore confirmed that prior to the 2nd Material Breach Applications, it was only "billed" for and had made payment of fees and expenses for the BIT I Arbitration generated "from August 2012 through June 2014", and "from June 2014 through June 2015".[12]

49 LHNV submits that this meant that any such fees and expenses in the period from 26 April 2016 to the undefined date in "February 2017", the quantum of which is unspecified and for which GOL claimed 100% in the ICSID Arbitration, were not billed to GOL. LHNV says that these fees were not covered by the fee agreement and were therefore neither payable nor paid by GOL. In other words, GOL had not incurred and the ICSID Tribunal would likely not have awarded, costs for that period.

50 Moreover, LHNV states that GOL does not specify how the fee agreement apportioned the legal fees and expenses between the ICSID and PCA Arbitrations. It therefore submits that the ICSID Tribunal would have been likely to reduce the quantum of costs awarded to GOL substantially to account for the fact that GOL potentially did not in fact incur the full extent of the costs claimed in the ICSID Arbitration, in the same way as was done in the SIAC Arbitration.

51 LHNV therefore submits that disclosure of the fee agreement would have been likely to have had an effect on the costs order made by the ICSID Tribunal and should therefore have been disclosed to that tribunal.

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11 DJB-1 at [9(vi)].

12 DJB-1 at [9(i)]–[9(ii)], [22].

52 GOL submits that it was not under an obligation to disclose the fee agreement to the ICSID Tribunal and that, in any event, it would have made no difference to the outcome of the costs award.

53 GOL refers to LHNV's costs submissions which were made to the ICSID Tribunal. In particular, it refers to the section where LHNV/Sanum dealt with the position if they prevailed on the merits and submitted that GOL should pay their costs, including attorney's fees in full. At [23] and [24] of their costs submissions, LHNV/Sanum submitted:

> 23. The fact that Debevoise represented Respondents (sic) on a partially contingent basis does not change the application of this principle. Claimants do not seek to hold Respondent responsible for paying the entire amounts specified in the Debevoise contingency fee arrangement. Instead, pursuant to customary practice, Claimants seek the amount of the fees arrived at based on the time the Debevoise lawyers and legal support staff devoted to this matter at their usual hourly rates.
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> 24. When presented with contingency fee arrangements in the context of decisions on cost allocation, other international investment tribunals have awarded costs to the prevailing party to reflect the fees incurred by the party's legal team at their normal hourly rates, and not based on the terms of the contingency agreement. For example, the ICSID Tribunal in Siag v. Egypt awarded costs to a prevailing claimant based on his attorneys' 'fees equal to the value of time worked by their counsel' even though the attorneys had agreed to a contingency arrangement under which they would be paid 'only on a successful recovery.' An award to Claimants based on their attorneys' customary hourly rates also is fair to Respondent because its liability for attorneys' fees is then the same as it would have been in the absence of a contingency arrangement.

54 GOL submits that LHNV's submissions on costs were based on the fact that the contingency fee agreement was irrelevant and that the assessment of costs should be based on time costs which was both customary and fair. On that basis, GOL submits that it is inconsistent for LHNV to submit in this application

that the fee agreement with a conditional element was so material to the assessment of costs that it should have been disclosed and would have affected GOL's costs recovery which was put forward on a similar basis of time costs. GOL refers to its schedule of costs which was in precisely the same format as LHNV's schedule of costs. Therefore, GOL submits that the existence of a contingency or conditional fee agreement does not affect the way in which the costs are presented or assessed by an arbitral tribunal.

55 Whilst GOL made the following submission in its reply costs submissions, it submits that the position under its fee agreement is different:

> Claimants' claim for costs is manifestly excessive - totaling nearly USD $21 million. To request that these Tribunals order the Lao Government to pay Claimants $21 million is outrageous—especially in light of that fact that Claimants are not responsible for paying the vast majority of these legal fees under their contingency agreement.[13]

56 GOL submits that the focus of this submission was on the excessive amount of costs being claimed by LHNV rather than on the fact of the contingency agreement.

57 In relation to the position in the SIAC Arbitration, GOL submits that the 40% discount on fees was not related to GOL's conditional fee agreement. GOL refers to the relevant paragraphs of the SIAC Award and says that the basis for the 40% discount is not explained. However, in the SIAC Arbitration, there were two defences put forward, one on collateral estoppel based on US law and one based on the rule in *Henderson*, with the one on collateral estoppel failing. Those defences were pursued by all three respondents, including GOL.

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[13] DDP-2 at p 1267.

Therefore, as the 40% discount was applied to all respondents' costs, GOL says that in fact no deduction was made for the matters related to GOL's conditional fee agreement.

58 In any event GOL submits that it appeared that the SIAC Tribunal was concerned that GOL had not disclosed the amount it had paid or was obliged to pays its counsel. That is not the position here, where GOL set out the position clearly in its costs submissions and there was no issue on this aspect. The other issue about the fee agreement being unclear arose because GOL referred to a "piercing of the corporate veil" being required. This caused a debate about that issue and how it affected the position. Again, GOL submits that there is no such uncertainty here. In terms of the disclosure of the conditional fee agreement in the SIAC Arbitration, GOL stated that this was disclosed because the Singapore lawyers considered that they should do so to comply with the Professional Conduct Rules.

59 In relation to the point made by LHNV concerning the obligation to pay fees from 26 April 2016 to February 2017, GOL submits that, in this period preceding the conditional fee agreement, the obligation of GOL was to pay its attorney's fees on the usual lawyer and client time basis.

60 We do not consider that GOL were under an obligation to disclose the fee agreement in the ICSID arbitration as it could not have been material to the award of costs made by the ICSID Tribunal.

61 As was accepted by LHNV in the oral submissions, a party does not have to disclose the fee agreement with its lawyers if it is claiming an amount that is equal to or lower than the amount payable by the client. We consider this

to be correct. It follows that where costs between a party and its lawyers are agreed to be on a time basis or where there was a cap but a conditional additional amount on a time basis, as here, there is no obligation on a party to disclose the terms of the fee agreement. The underlying indemnity principle is that the costs award being sought should not be more than the liability of the client to pay costs to its lawyers. In coming to this conclusion, we say nothing about how lawyers in particular jurisdictions, including Singapore, should act under their professional conduct rules or on the basis of their usual practice.

62 We are not persuaded that the particular facts of the SIAC Arbitration lead to the conclusion that a conditional fee agreement of the type in the present case has to be disclosed on the basis that it is material. In that case, it is not clear whether, in fact, any element of the 40% discount was related to what the SIAC Tribunal considered to be a lack of clarity in the terms of the fee agreement or in the amount GOL had paid or were obliged to pay its lawyers. Assuming that it was, then the particular facts including the reference to "piercing the corporate veil" in the fee agreement disclosed in that case may explain the SIAC Tribunal's view. More importantly, the SIAC Tribunal appeared to have concerns as to the amount paid or which GOL was obliged to pay in terms of the costs claimed.

63 In the present case, on our findings as to the fee agreement, there are no such concerns and there could be nothing material in the fee agreement which called for disclosure by GOL.

64 In relation to the "contingency agreement" which LHNV had with Debevoise, this appears to have been a different type of agreement to the conditional fee agreement between GOL and its attorneys. Although, in oral

submissions, GOL said that the agreement was a similar conditional fee agreement, that does not appear to be correct. As explained by LHNV in its costs submissions and in its oral submissions at the hearing before us, it did not seek to hold GOL responsible for paying "the entire amounts specified in the Debevoise contingency fee arrangement". We consider that this description is closer to a "contingency" agreement where a party agrees to pay a lawyer a sum based on the sums it recovered. In such cases, the practice is to assess a party's costs by reference to reasonable time costs but limit the recovery to the sum payable under the contingency arrangement. In such a case, it would be necessary, on the principle we have set out above, for the contingency fee agreement to be disclosed so that the costs awarded would not exceed the amount payable under that type of agreement.

65 We consider that this is likely to explain the submission by GOL, in its reply costs submissions in the SIAC Arbitration, that LHNV/Sanum were not responsible for paying the vast majority of the US$21 million under their contingency agreement. In any event, we do not consider that such a submission would be relevant if the "contingency agreement" were a conditional fee agreement of the type which we have found existed between GOL and its attorneys in this case.

66 Nor do we think that there is anything in the point raised by LHNV in relation to an apparent gap in the explanation of the fees claimed in the period between April 2016 and February 2017. To the extent they were not included in and recoverable under the fee agreement, they would be recoverable as part of the original agreement by GOL to pay its attorneys. Those costs have either been claimed in the costs awarded or have not been claimed and not awarded.

67 On that basis, we conclude that GOL was not under an obligation to disclose the fee agreement, which could not have been material to the costs award which the ICSID Tribunal had to make.

68 Having come to that conclusion, it follows that there was no improper conduct, and certainly no fraudulent conduct, in GOL not disclosing the fee agreement in the ICSID Arbitration and no grounds that could possibly lead to the refusal to enforce the ICSID Award.

69 We would observe that, even if we had come to a different conclusion and had found that the fee agreement should have been disclosed, the non-disclosure could not possibly have reached the high threshold required for a finding that enforcement of the ICSID Award would be contrary to public policy in Singapore. First, we do not consider that LHNV has established any evidence that the conduct was fraudulent. Second, to show that enforcement of the ICSID Award was contrary to public policy would have required LHNV to establish that the upholding of the award would "shock the conscience" or be "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public"; or violate "the forum's most basic notion of morality and justice", as the relevant test has been set out in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") (at [59]) as applied in *Sanum Investments Ltd and another v Government of the Lao People's Democratic Republic and others and another matter* [2022] 4 SLR 198 (at [45]) and in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 ("*Sui Southern*") (at [48]), relating to an arbitration award. Accordingly, the grounds under Article 36(1)(*b*)(ii) of the Model Law have not and would not have been made out.

70 Nor in those circumstances do we consider that the award made by the ICSID Tribunal contained a decision on matters beyond the scope of submission to arbitration and so was susceptible to challenge on enforcement under Article 36(1)(*a*)(iii) of the Model Law nor under Article 36(1)(*a*)(iv) of the Model Law on the basis that the arbitral procedure was not in accordance with the agreement of the parties.

Conclusion

71 Accordingly, LHNV's application seeking to set aside the order giving GOL permission to enforce the ICSID Award, fails and is dismissed.

72 Unless the parties can agree on costs by 9 May 2024, they are to file their respective costs submissions by 23 May 2024 and any replies thereto by 30 May 2024.

Andre Maniam
Judge of the High Court

Vivian Ramsey
International Judge

Douglas Jones
International Judge

Lim Gerui, Tan Yuan Kheng, Tan Sih Si (Chen Shisi) and Teo Jue Luo Melinna (Drew & Napier LLC) for the claimant;
Lin Weiqi Wendy, Chong Wan Yee Monica (Zhang Wanyu), Hoh Zi Quan Marcus and Chen Kin Wye Andrew (WongPartnership LLP) for the respondent.
