AT THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (6TH EDITION, 1 AUGUST 2016)

SIAC ARBITRATION NO. 414 OF 2017

Between

1. SANUM INVESTMENTS LIMITED
2. LAO HOLDINGS N. V.
(Claimants)

And

1. SAN MARCO CAPITAL PARTNERS LLC
2. KELLY GASS
3. THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC
(Respondents)

AWARD

Dated this 11th day of August 2021

Registered in SIAC Registry of Awards as:
Award No. 084 of 2021
on 12 August 2021

EXHIBIT G

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (6TH EDITION, 1 AUGUST 2016)

BETWEEN

1. SANUM INVESTMENTS LIMITED (Claimant 1)
2. LAO HOLDINGS N. V. (Claimant 2)

Claimants

And

1. SAN MARCO CAPITAL PARTNERS LLC (Respondent 1)
2. KELLY GASS (Respondent 2)
3. THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC (Respondent 3)

Respondents

AWARD

Arbitral Tribunal

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)
Edna Sussman
Louis B. Kimmelman

Secretary to the Arbitral Tribunal
Rahul Donde

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TABLE OF ABBREVIATIONS

Baldwin WS I	Witness Statement of John Baldwin of 29 March 2019
BCEL	Banque Pour Le Commerce Exterieur Lao Public
BIT I Arbitrations	Lao Holdings N.V. v. The Government of the Lao People's Democratic Republic, ICSID Case No. ARB(AF)12/6 and Sanum Investments Limited v. Government of the Lao People's Democratic Republic, PCA Case No. 2013-13
BIT II Arbitration	Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/16/2 and Sanum Investments Limited v. Lao People's Democratic Republic, ICSID Case No. ADHOC/17/1
Casino	Savan Vegas Hotel & Casino
Chart of Proceedings	Chart setting out all the proceedings – commercial arbitration, investment arbitrations and court litigation – about Sanum's project in Laos
Chronology	Timeline setting out the main dates and events relevant to the dispute
Claimant's Reply PHB	Claimants' Reply Post-Hearing Brief of 20 August 2020
Claimants	Sanum Investments Limited and Lao Holdings N.V.
Claimants' Cost Statement	Claimants' Cost Statement of 26 September 2020
Claimants' Cost Statement Reply	Claimants' Reply Cost Statement of 17 October 2020
Claimants' PHB	Claimants' Post-Hearing Brief of 8 August 2020
Crawford WS	Witness Statement of Clay Crawford of 27 March 2019
Crawford WS II	Witness Statement of Clay Crawford of 8 April 2020
Deed	Deed of Settlement among Sanum Investments Limited, Lao Holdings N.V., and the Government of the Lao People's Democratic Republic, dated 15 June 2014
Delaware Action	*Sanum Investments Limited and Lao Holdings N.V. v. San Marco Capital Partners, LLC and Kelly Gass*, No. 1:16-cv-00320-SLR (D. Del.), filed 3 May 2016
ER	Expert Report
ER Searby	Expert Report of James Searby, FTI Consulting of 29 March 2019
Exh. C-	Claimants' Exhibit
Exh. CLA-	Claimants' Legal Authority
Fitchett WS	First Witness Statement of Mr. Michael Fitchett of 30 March 2019
Gaming Assets	Savan Vegas Hotel & Casino, the Lao Bao Slot Club and the Savannakhet Ferry Terminal Slot Club

GOL	The Government of the Lao People's Democratic Republic
Gore WS I	Witness Statement of Michael Gore of 27 March 2019
Gore WS II	Witness Statement of Michael Gore of 25 April 2019
JDB	Joint Development Bank
JDB Loan	SVCC's US$ 2 million loan from Joint Development Bank
Lao Holdings	Lao Holdings N.V., sole owner of Sanum
List of Evidence	List of evidence in the record of this arbitration that was not in the record of the Prior SIAC Arbitration
Management Contract	Management and Sales and Marketing Contract between San Marco Capital Partners LLC and the Government of the Lao People's Democratic Republic, dated 16 April 2015 (purportedly effective 15 March 2015)
Notice of Arbitration	Notice of Arbitration of 24 January 2017
Prior SIAC Arbitration	The Government of the Lao People's Democratic Republic v. Sanum Investments Ltd. and Lao Holdings, N.V., SIAC Case No. ARB/143/14/MV
Prior SIAC Award	Final Award, The Government of the Lao People's Democratic Republic v. Sanum Investments Ltd. and Lao Holdings, N.V., SIAC Case No. ARB/143/14/MV, dated 29 June 2017
Prior SIAC Tribunal	The tribunal in The Government of the Lao People's Democratic Republic v. Sanum Investments Ltd. and Lao Holdings, N.V., SIAC Case No. ARB/143/14/MV, consisting of Judge Rosemary Barkett (Presiding Arbitrator), Mr. William Laurence Craig, and Ms. Carolyn B. Lamm
R1&R2 PHB	Respondent 1 and 2's Post-Hearing Brief of 8 August 2020
R1&R2 Rej.	Respondent 1 and 2's Rejoinder of 22 May 2020
R1&R2 Reply PHB	Respondent 1 and 2's Reply Post-Hearing Brief of 20 August 2020
R1&R2's Cost Statement	Respondent 1 and 2's Cost Statement of 26 September 2020
R1's Response	Respondent 1's Response to the Notice of Arbitration
R2 Response	Respondent 1's Response to the Notice of Arbitration
R3 Rej.	Respondent 3's Rejoinder of 22 May 2020
R3 Reply PHB	Respondent 3's Reply Post-Hearing Brief of 20 August 2020
R3's Cost Statement	Respondent 3's Cost Statement of 26 September 2020
Rej. J.	Rejoinder on Jurisdiction of 24 October 2019
Rej. M.	Rejoinder on Merits of 27 September 2019
Reply	Statement of Reply of 27 August 2019

Respondents' Joint Cost Statement Reply	Respondents' Joint Cost Statement of 17 October 2020
Savan Vegas	An exclusive gaming zone, including the Savan Vegas casino hotel and resort
Second Material Breach Application	Lao Holdings' Second Material Breach Application, dated 26 April 2016 and Sanum's Second Material Breach Application, dated 23 February 2017 (BIT I Arbitrations)
Shepherd WS	Witness Statement of Tim Shepherd of 17 March 2019
Slot Clubs	Lao Bao Slot Club and the Savannakhet Ferry Terminal Slot Club
SoC	Statement of Claim of 15 April 2019
SoD	Statement of Defense of 28 May 2019
ST	ST Group Co., Ltd.
SVCC	Savan Vegas Hotel & Casino Company, Ltd.
SVLL	Savan Vegas Lao Limited
Tr.	Transcript of hearing

I. INTRODUCTION

A. The Parties

1. Claimant 1 (hereinbelow "Claimant 1" or "Sanum") is:

SANUM INVESTMENTS LIMITED
c/o FCLaw – Lawyers & Private Notaries
61 Av. De Almeida Ribeiro
13F Circle Square Bld., Macau
Attn: Jorge Menezes / Ken Kroot
Tel: +853 28330885
Email: jorge.menezes@fclaw.com.mo
ken.kroot@sanuminvestment.com

2. Claimant 2 (hereinbelow "Claimant 2" or "Lao Holdings") is:

LAO HOLDINGS, N.V.
L. G. Smith Boulevard 62
Miramar Building, Suite 304
Oranjestad, Aruba
Attn: President / CEO / Head of Legal Department

3. Claimants 1 and 2 are represented by:

STINSON LEONARD STREET LLP
3102 Oak Lawn Avenue, Suite 777
Dallas, Texas 75219
United States of America
Attn: Deborah Deitsch-Perez / Jeffrey T.Prudhomme
Tel: +1 214 560 2201
Fax: +1 214 560 2203
Email: deborah.deitschperez@stinson.com
jeff.prudhomme@stinson.com

4. Respondent 1 (hereinbelow "Respondent 1" or "San Marco" or "SM") is:

SAN MARCO CAPITAL PARTNERS, LLC
4575 Dean Martin Drive, Suite 1701
Las Vegas, Nevada 89103
United States of America
Attn: Kelly Gass
Tel: +1 305 297 5940
Email: kgass@sanmarcocapital.com
and
c/o Agents and Corporations, Inc.
One Commerce Center
1201 Orange Street, Suite 600
Wilmington, Delaware 19801
United States of America
Attn: President / CEO / Head of Legal Department

5. Respondent 2 (hereinbelow "Respondent 2" or "Kelly Gass" or "KG") is:

KELLY GASS
541 San Marco Dr.
Fort Lauderdale, FL 33301

United States of America
Email: kgass@sanmarcocapital.com
kellyegass@gmail.com

6. Respondent 3 (hereinbelow "Respondent 3" or "GOL" or "Laos") is:

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC
Ministry of Planning and Investment
Souphanouvong Road
Vientiane
Lao PDR 01001
Attention: Outakeo Keodouangsinh

7. Respondents 1 and 2 are represented by:

DREW & NAPIER LLC
10 Collyer Quay, 10th Floor
Ocean Financial Centre
Singapore 049315
Attn: Cavinder Bull, SC / Gerui Lim / Darryl Ho
Fax: +65 6220 0324
Email: cavinder.bull@drewnapier.com
gerui.lim@drewnapier.com
darryl.ho@drewnapier.com

8. Respondent 3 is represented by:

Mr. David Branson, Esq.
15 rus Danton, Saulieu
21 21210
France
Email: dbsanumgol@gmail.com

B. The Arbitral Tribunal

9. On 16 April 2018, pursuant to SIAC Rule 9.3 read with Rule 1.3, the Registrar acting in her capacity as the President of the SIAC Court of Arbitration appointed:

(i) as co-arbitrator jointly nominated by the Claimants:

Edna Sussman
SussmanADR LLC
20 Oak Lane
Scarsdale, New York 10583
United States of America
Email: esussman@sussmanadr.com

(ii) as co-arbitrator jointly nominated by the Respondents:

Louis B. Kimmelman
c/o SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
The United States of America
Tel.: +1 212 839 7322
Fax: +1 212 839 5599
Email: bkimmelman@sidley.com

10. On 26 June 2018, pursuant to SIAC Rule 11.3 read with Rule 1.3, the Deputy Registrar, acting in his capacity as the President of the SIAC Court of Arbitration, appointed as the Presiding Arbitrator:

Prof. Gabrielle Kaufmann-Kohler
Lévy Kaufmann-Kohler
3-5, rue du Conseil-Général
P.O. Box 552
1211 Geneva 4
Switzerland
Tel.: +41 22 809 62 00
Fax: +41 22 809 62 01
Email: gabrielle.kaufmann-kohler@lk-k.com

C. The Arbitral Secretary

11. With the consent of the Parties, the Tribunal appointed as Secretary to the Tribunal:

Mr. Rahul Donde
Lévy Kaufmann-Kohler
3-5, rue du Conseil-Général
P.O. Box 552
1211 Geneva 4
Switzerland
Tel: +41 22 809 62 00
Fax: +41 22 809 62 01
Email: rahul.donde@lk-k.com

12. The tasks of the Secretary were described in PO 1.

D. The Administering Institution

13. This arbitration is administered by the SIAC. The following team at the SIAC Secretariat is in charge of this case:

Qian Wu, Counsel
Surtini Sakiman, Senior Case Management Officer
28 Maxwell Road
#03-01 Maxwell Chambers Suites
Singapore 069120
Tel.: +65 6713 9777
Fax: +65 6713 9778
Email: qianwu@siac.org.sg
surtinisakiman@siac.org.sg

II. PROCEDURAL HISTORY

A. Initiation of the arbitration and constitution of the Tribunal

14. On 19 December 2017, the Registrar of the SIAC Court of Arbitration (the "Registrar") received a Notice for Arbitration from the Claimants of the same date (the "Notice"). Pursuant to Article 3.3 of the SIAC Arbitration Rules (6th edition, 1st August 2016) (the "SIAC Rules"), this arbitration was deemed to have commenced on 27 December 2017. The Claimants subsequently nominated Ms. Edna Sussman as arbitrator.

15. On 16 January 2018, Respondents 1 and 2 submitted their response to the Notice (the "Response"). They nominated Mr. Louis B. Kimmelman as arbitrator.

16. On 3 February 2018, the Government of the Lao People's Democratic Republic ("GOL") filed an Application for Joinder under SIAC Rule 7.1 (the "Joinder Application"). The Parties subsequently commented thereon.

17. On 9 April 2018, pursuant to SIAC Rule 7.4, the Court of Arbitration of SIAC (the "Court") granted the Joinder Application. From that date, GOL was added into this arbitration as the third Respondent.

18. On the same day, the Secretariat of the Court (the "Secretariat") requested the Claimants to confirm their nomination of Ms. Sussman and the three Respondents to confirm their joint nomination of Mr. Kimmelman. The Parties subsequently confirmed the nominations.

19. On 16 April 2018, the Registrar appointed Ms. Sussman and Mr. Kimmelman as co-arbitrators in this arbitration.

20. On 26 June 2018, the Deputy Registrar, acting in his capacity as the President of the SIAC Court, appointed Professor Gabrielle Kaufmann-Kohler as the presiding arbitrator.

21. On 4 July 2018, the Arbitral Tribunal confirmed that it had been duly constituted. It advised the Parties that it would submit a draft Procedural Order ("PO 1"), including a calendar for the arbitration, to be finalized at the preliminary meeting and commented upon by the Parties beforehand. It also asked the Parties whether they wished to hold the preliminary meeting by way of a telephone conference or an in-person meeting.

B. Preliminary meeting, jurisdictional objection

22. On 13 July 2018, the Parties indicated their preference to hold the preliminary meeting by way of a telephone conference and jointly proposed dates in September 2018 for the same. The Claimants raised a jurisdictional objection under Article 28 of the SIAC Rules in respect of Respondent 3, relying on their prior submissions on the Joinder Application ("Claimants' Jurisdictional Objection"). They requested the Tribunal to decide on such objection prior to the preliminary meeting. Respondents 1 and 2 opposed the Claimants' objection, while Respondent 3 did not comment thereon.

23. On 17 July 2018, the Tribunal invited the Parties to advise the Tribunal whether they would be available on either 24 or 25 September 2018 at noon (CET) for the preliminary meeting.

24. On 19 July 2018, the Tribunal submitted draft PO 1 for the Parties' comments and a procedural calendar in respect of the Claimants' Jurisdictional Objection. As a first step, the Claimants could supplement their submission of 13 July 2018 mentioned above, which relied on their earlier submissions on the Joinder Application, by 2 August 2018. The Tribunal also advised the Parties that it would greatly assist the overall cost and time efficiency of the proceedings if it had the benefit of a secretary. It proposed to appoint Mr. Rahul Donde, a lawyer at the President's firm for the role. His tasks were listed in draft PO 1.

25. On 26 July 2018, with the Parties' consent, the Tribunal appointed Mr. Donde as Tribunal Secretary. On the same day, Mr. Donde's signed Declaration of Independence, Impartiality and Confidentiality was sent to the SIAC Secretariat in accordance with paragraph 4 of the Practice Note for Administered Cases – On the Appointment of Administrative Secretaries.

26. Also on 26 July 2018, on the basis of the Parties' availability, the Tribunal scheduled the preliminary meeting via teleconference for 24 September 2018.

27. On 2 August 2018, the Claimants submitted their Jurisdictional Objection to the Joinder of the Government of the Lao People's Democratic Republic (the "Objection"). The Respondents' deadline to respond was set for 16 August 2018.

28. On 17 August 2018, the Respondents responded to the Objection ("Respondents 1 and 2's Response on the Objection" and "Respondent 3's Response on the Objection" respectively). Respondents 1 and 2 indicated that they would not be raising any jurisdictional objections of their own. Respondent 3 noted that it "maintain[ed] an objection on the admissibility (as opposed to jurisdiction) of Claimants' claims," but that such objection could be dealt with together with the merits.

29. On 14 September 2018, the Claimants replied to the Respondents' submissions just mentioned (the "Reply on the Objection").

30. On 21 September 2018, Respondent 3 indicated that it would make no further submissions on the Objection.

31. On 24 September 2018, the first procedural session was held via telephone. During the session, Respondents 1 and 2 confirmed that they would not make further submissions on the Reply on the Objection.

32. On 25 September 2018, PO 1, including the procedural calendar, was issued. The procedural calendar was subsequently modified on several occasions at the Parties' behest.

C. Application for Early Dismissal

33. On 5 October 2018, in accordance with the procedural calendar set in PO 1, Respondent 3 filed its "Application for Early Dismissal" (the "Application"), seeking, inter alia, an order from the Tribunal allowing the Application to proceed.

34. On the next day, Respondents 1 and 2 submitted their own application for early Dismissal, indicating that "[t]he grounds for the application are as set out in the 3rd Respondent's application for Early Dismissal." They also mentioned that they requested "similar reliefs" to those set out in the Application.

35. On 17 October 2018, the Claimants filed their "Response to the Government of the Lao People's Democratic Republic's Application for Early Dismissal" (the "Response on the Application").

36. On 23 October 2018, the Tribunal advised the Parties that it considered that the Application should not proceed, as it did not meet the relevant standard requiring a "claim […] manifestly without legal merit". The Parties were advised that in light of the short time available to make its decision, the Tribunal would provide the reasons for its determination at a later stage.

D. Written Phase

37. On 29 March 2019, the Claimants filed the Statement of Claim ("SoC") with legal and factual exhibits as well as the witness statements of Mr. Clay Crawford, Mr. Michael Gore, Mr. Tim Shepherd, Mr. Michael Fitchett, Mr. G. Arnold, Mr. W. Lin, J. Preissler and the expert reports of Messrs Kim and Macomber, Mr. Andrew Black, Mr. James Searby of FTI Consulting, Mr. William Bryson of Global Market Advisors and Messrs Kalt and Henson.

38. On 16 October 2019, the Respondents submitted their respective Statements of Defense ("R1&R2 SoD" and "R3 SoD" respectively).

39. In accordance with the procedural calendar, following the Claimants' document requests of 4 November 2019, the Respondents' objections thereto of 22 November 2019, and the Claimants' replies of 4 December 2019, on 17 January 2020, the Tribunal issued Procedural Order No. 8 ("PO 8") ruling on the Claimants' document production requests. The Respondents did not make any document requests.

40. On 10 April 2020, the Claimants filed the Statement of Reply (the "Reply") with the second witness statement of Mr. Clay Crawford.

41. On 22 May 2020, the Respondents filed the Rejoinders ("R1&R2 Rej." and "R3 Rej." respectively).

42. Various procedural issues arose in the course of the proceedings, which were resolved by the Tribunal through correspondence and procedural orders, specifically POs 2-11.

43. On 1 June 2020, the Respondents called Mr. John Baldwin, the owner of 50% of the shares of Lao Holdings, the sole owner of Sanum, for cross-examination at the hearing. They did not call any other fact witnesses or any experts for cross-examination. No fact or expert witnesses were presented by the Respondents.

E. Pre-hearing Conference

44. At the Tribunal's initiative, the Parties agreed to conduct the hearing in the arbitration remotely on the Zoom platform. Arbitration Place was appointed as the remote hearing service provider.

45. On 6 July 2020, the Tribunal held a pre-hearing telephone conference with the Parties (the "PHTC") to discuss the organization of the hearing scheduled from 26 July to 1 August 2020. The Tribunal and the Parties discussed a draft procedural order containing a hearing protocol which the Tribunal had circulated to the Parties beforehand.

46. On 8 July 2020, the Tribunal issued Procedural Order No. 10 on hearing organization, which it had finalized on the basis of the discussion at the PHTC.

47. On 26 July 2020, the members of the Tribunal, the Tribunal Secretary, the Parties' counsel and representatives, the witness Mr. Baldwin, Arbitration Place staff, and the court reporter held a trial videoconference to verify the proper functioning of the Zoom platform.

F. Hearing

48. The hearing took place as scheduled from 26 July to 1 August 2020. In the course of the hearing, the Tribunal heard opening arguments, the testimony of Mr. Baldwin, and closing arguments. It also asked the Parties a number of questions.

G. Post-hearing phase

49. On the last day of the hearing, the Tribunal and the Parties discussed further procedural steps and issues, which were restated in Procedural Order No. 11 of 4 August 2020 ("PO 11").

50. The Order provided that the Parties would file two rounds of post-hearing submissions on various questions that had arisen at the Hearing. Specifically, the Parties were to address (i) whether *res judicata*, collateral estoppel, and the Henderson Rule are to be characterized as procedural or substantive; and (ii) the content and application, if any, of the Henderson Rule in this case. In addition, the Parties were to submit (i) a chart setting out all the proceedings – commercial arbitration, investment arbitrations and court litigation – about Sanum's project in Laos ("Chart of Proceedings"); (ii) a list of evidence in the record of this arbitration that was not in the record of the Prior SIAC Arbitration ("List of Evidence"); and (iii) a timeline setting out the main dates and events relevant to the dispute before the Tribunal ("Chronology"). Respondents 1 and 2 were to respond to the Claimants' chart of 1 August 2020 containing the latter's comments on Respondent 1 and 2's chart of 31 July 2020 ("Preclusion Chart"). Finally, the Order provided directions for corrections to the transcript and costs statements.

51. In accordance with PO 11, on 8 August 2020, the Claimants and Respondents 1 and 2 filed their respective post-hearing submissions on the Henderson Rule and other defences ("Claimants' PHB" and "R1&R2 PHB" respectively). Reply post-hearing submissions were filed on 20 August 2020 ("Claimants' Reply PHB" and "R1&R2 Reply PHB" respectively), including a submission by Respondent 3 ("R3 Reply PHB").

52. On 28 August 2020, the Parties jointly filed the Chart of Proceedings, List of Evidence and Chronology, setting out (i) the agreed portions of the materials in black; (ii) the Claimants' comments and/or additions in red; and (iii) the Respondents' comments and/or additions in blue. On the next day, Respondents 1 and 2 submitted the completed Preclusion Chart.

53. On 29 August 2020, Respondents 1 and 2 requested the Tribunal to "disregard" the Claimants' footnote 7 and comments at items 12 and 109 in the Chronology. After receiving comments from the Claimants and Respondent 3, the Tribunal advised the Parties that it had noted their positions and would address the issues raised in the final award if necessary, which later turned out not to be the case.

54. On 22 September 2020, the Parties submitted their agreed revisions to the transcript. The Tribunal received the revised transcript on the same day.

55. On 26 September 2020, the Parties submitted their respective cost statements (the "Claimants' Cost Statement", "R1&R2 Cost Statement", and "R3 Cost Statement" respectively).

56. On 2 October 2020, the Respondents requested leave to reply to the Claimants' Cost Statement in respect of Respondent 3's entitlement to costs as an intervener. On the same day, the Claimants requested leave to reply to the Respondents' cost statements and sought certain documents from Respondent 3. On the next day, Respondents 1 and 2 sought certain clarifications from the Claimants.

57. In its ruling of 6 October 2020, the Tribunal recalled that pursuant to paragraph 14 of PO 11, the Parties were entitled to request an opportunity to file reply cost statements. Further, pursuant to paragraph 13 of PO 11, the Tribunal could, if requested, order the Parties to produce documents supporting their cost statements. In the circumstances, the Tribunal set a calendar for the next steps in the arbitration addressing the Parties' requests.

58. On 10 October 2020, the Claimants provided the clarifications requested by Respondents 1 and 2. On the same day, Respondent 3 commented on the Claimants' communication.

59. On 17 October 2020, the Claimants filed their reply cost statement (the "Claimants' Cost Statement Reply"). The Respondents filed their joint reply later on the same day ("Respondents' Joint Cost Statement Reply" respectively).

60. On 23 October 2020, Respondents 1 and 2 sought leave to update the figures in the Respondents' Joint Cost Statement Reply. On the same day, the Tribunal allowed the Respondents to do so, subject to any objections from the Claimants. The Statement was updated on 29 October 2020.

61. On 7 December 2020, Respondents 1 and 2 updated Respondent 3's costs figures in respect of the payment of SIAC fees.

62. On 31 May 2021, the Tribunal advised the Parties that it was in the process of finalizing its award and would soon close the proceedings. It attached invoices for the fees and expenses of the Tribunal Secretary, inviting the Parties to settle them within two weeks. The Parties were also invited to update the figures in their cost submissions.

63. On 7 June 2021, the Parties updated the figures in their respective cost submissions.

64. On 9 June 2021, the Tribunal closed the proceedings in accordance with Rule 32.1 of the SIAC Rules.

III. FACTUAL BACKGROUND

A. Sanum's investments in Laos

65. Claimant 1, Lao Holdings, through Claimant 2, Sanum Investments, held 80% shares in Savan Vegas and Casino Co. Ltd ("SVCC"). The remaining 20% was held by Respondent 3, GOL. SVCC owned the Savan Vegas Hotel and Casino ("Savan Vegas" or the "Casino") located in Savannakhet, Laos. In addition, Sanum owned a majority stake in the Ferry Terminal and Lao Bao slot clubs in Laos (the "Slot Clubs", and collectively with the Casino, the "Gaming assets").

B. Disputes between Sanum and Laos

66. Disputes emerged between Sanum and GOL which eventually lead to Sanum commencing a PCA administered arbitration against GOL (PCA Case No. 2013-13) (the "PCA Arbitration") under the bilateral investment treaty between The Government of the People's Republic of China and The Government of the Lao People's Democratic Republic (the "PRC BIT") on 14 August 2012.

67. On the same day, Lao Holdings commenced an ICSID administered arbitration under the ICSID Additional Facility Rules (Case No. ARB(AF)/12/6) (the "ICSID (AF) Arbitration") against GOL, pursuant to the bilateral investment treaty between The Government of the Lao People's Democratic Republic and the Kingdom of the Netherlands (the "Netherlands BIT").

68. The PCA Arbitration and the ICSID (AF) Arbitration were initiated by different claimants and under different investment agreements but were otherwise identical in all material respects. The claimants in both arbitrations alleged that certain actions taken by Laos negatively impacted the Casino and constituted violations of Laos' treaty obligations, causing loss to the investor (collectively, the "BIT I Arbitrations").

C. Deed of Settlement

69. The Parties eventually settled the BIT I Arbitrations by entering into a Deed of Settlement on 15 June 2014. Two days later, on 17 June 2014, the Parties entered into

a Side Letter amending, correcting and clarifying certain points in the Deed (the "Side Letter"). Particularly, in the Side Letter, GOL and the Claimants agreed that "Gaming Assets" would be understood to refer to Savan Vegas only, not the Slot Clubs.

70. The Deed set forth steps to be taken by both the Claimants and Respondent 3 to accomplish the primary goal of selling the "Gaming Assets" to a third party within approximately ten months. To accomplish this, the Deed provided for a time period within which Sanum was to sell the Gaming Assets, and a process for which a new tax rate for the Casino was to be set and paid. It also provided that management of the Casino would be monitored during this period and transferred to a third-party gaming operator should Sanum fail to sell the Casino by the specified deadline.

71. The BIT I Arbitrations were suspended pending completion of the terms of settlement. Section 32 of the Deed provided that, if it were established that GOL had committed a material breach of certain of its settlement obligations, either or both arbitrations could be resumed upon the Claimants' application.

D. Resumption of proceedings; initiation of new proceedings

72. On 17 June 2014, two days after the Deed was signed, Sanum refused to submit the Deed to the BIT I Tribunals, alleging that it had been procured by fraud. Laos denied these allegations.

73. On the next day, 18 June 2014, Laos initiated a SIAC arbitration against the Claimants seeking the enforcement of the Deed (SIAC Case No. ARB 14/14). Sanum eventually acknowledged that Laos had committed no fraud. A sole Arbitrator in SIAC Case No. ARB 14/14 issued a Consent Award stating that the Deed of Settlement, its annexes, and the Side Letter were valid, enforceable and binding.

74. A few weeks after the Deed was executed, Sanum sent GOL a Material Breach Notice alleging that the latter had breached the Deed by granting a gaming licence to third parties in Sanum's area of exclusivity. The parties were unable to resolve their disputes and on 4 July 2014, the Claimants applied to the BIT I Tribunals, seeking: (i) a determination whether GOL was in material breach of Section 6 of the Deed, and, if so (ii) the resumption of the BIT I arbitrations (the "First Material Breach Application"). This Application was eventually rejected by the BIT I Tribunals on 10 June 2015.

75. On 11 August 2014, the GOL initiated a SIAC arbitration against the Claimants (SIAC Case No. ARB/143/MV) (the "Prior SIAC Arbitration" heard by the "Prior SIAC

Tribunal"), alleging that the Claimants had breached the Deed. The Claimants raised several counterclaims also alleging that GOL had breached the Deed. A final award was rendered on 29 June 2017 (the "Prior SIAC Award") with a dissenting opinion by Ms. Carolyn Lamm (the "Lamm Dissent"). On 2 August 2019, the Singapore High Court enforced the award as a judgment of the Court.

76. On 26 April 2016 and 23 February 2017, each of the claimants in the BIT I Arbitrations filed a "Second Material Breach Application", alleging that certain additional actions taken by GOL had breached the Deed's provisions. This application was granted by the BIT I Tribunals on 15 December 2017. The BIT I Arbitrations were thus reinstated. The final award in the BIT I Arbitrations was issued on 6 August 2019.

77. The Deed provided that even if the BIT I Arbitrations were reinstated, no new claims could be brought in those cases. Thus, the Claimants initiated two new arbitrations against GOL: *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2 and *Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ADHOC/17/1 (collectively, the "BIT II Arbitrations"). To the knowledge of the Tribunal, the final award in the BIT II Arbitrations has not yet been issued.

78. On 16 April 2015, the day after the sale deadline set pursuant to the Deed had expired, GOL took control of the Casino.

E. Appointment of San Marco and Kelly Gass

79. On the same day, Respondent 3 entered into a Management Contract with San Marco for the management, sale and marketing of the Gaming Assets (the "Management Contract"). Kelly Gass signed the Contract as Respondent's "President". The Contract was effective from 15 March 2015, at which time Kelly Gass had allegedly begun to perform certain "pre-takeover date services" specified in the Contract.

80. On 22 April 2015, GOL took "physical control" of Sanum's assets in Laos, seizing the Casino and installing a management team.

81. On 28 September 2015, GOL issued a decree transferring all assets owned by SVCC to Savan Lao, a new entity that was solely owned by GOL, in order to accomplish the sale of the Casino.

F. US court proceedings and initiation of this arbitration

82. On 3 May 2016, while the Prior SIAC Arbitration was still ongoing, the Claimants filed a complaint in the United States District Court for the District of Delaware (the "Delaware District Court") against Respondents 1 and 2 alleging, inter alia, breaches of the respondents' fiduciary duties. The respondents opposed the complaint relying on an arbitration agreement in the Deed. They submitted that a SIAC arbitration was the proper forum to hear the dispute between the parties, and they expressly consented to SIAC arbitration to be seated in Singapore.[1]

83. On 12 July 2017, the Delaware District Court held that Respondents 1 and 2 could enforce the arbitration clause found in the Deed[2] and dismissed the complaint.

84. On 19 December 2017, the Claimants commenced this arbitration as described above.

IV. REQUESTS FOR RELIEF

A. The Claimants' request for relief

85. In their Statement of Claim, the Claimants sought the following relief:

> "202. Claimants request the following relief in respect of their claims:
> a) Damages for the deficient sale price of the gaming assets in the amount of at least $153.36 million;
> b) Alternatively, damages for amounts that should have been available and distributed to Sanum but that were lost due to San Marco and Gass's mismanagement, in the amount of approximately $28.8 million;
> c) Alternatively, damages for the amount of so-called taxes improperly withheld from Claimants from the Savan Vegas sale proceeds, in the amount of at least $21,327,200;
> d) Damages relating to cage and vault cash in the amount of $1.56 million;
> e) Damages relating to the JDB loan used to pay GOL's legal bills in the amount of $1,588,564;
> f) Disgorgement of compensation in the amount of $4,045,441;
> g) Damages for conversion of property in the amount of $2,151,287;
> h) An award of all the attorney's fees, expert's fees, and costs Claimants incurred in proceeding with this arbitration, including the

1 Exh. C-003, Declaration of Kelly Glass of 21 June 2016, §29 ("I [Kelly Glass], in my individual capacity and as the sole member of and manager of San Marco, consent and submit to SIAC arbitration in Singapore, where [the Claimants] agreed to arbitrate disputes pursuant to the Settlement Deed.").

2 Exh. C-001 ("The court finds that [the Claimants] are required to arbitrate this dispute pursuant to the arbitration clause in [the Deed] executed by [the Claimants] and [GOL].").

> fees and expenses of the arbitrators, and the fees and expenses of Claimants' counsel and SIAC costs;
> i) Pre-award and post-award interest at a rate to be fixed by the Tribunal, or, alternatively, the 9% statutory interest rate under New York law;
> j) Such further relief that counsel may advise and/or the Tribunal deems fit."[3]

86. On 6 September 2019, the Claimants advised the Tribunal that they had capped their damages claims at USD 40 million:

> "In Claimants' communication to SIAC of 6 August 2019, Claimants recognized the futility of seeking from San Marco and Gass damages reflecting the full extent of the harm they caused, and reduced the claim to an amount that Claimants hope the First and Second Respondents will be able to satisfy, as follows:
>
> Finally, while expert analyses make it plain that San Marco and Ms. Gass caused over $150 million in harm to Claimants, it also appears San Marco and Ms. Gass are unlikely ever to be able to satisfy an award of that magnitude. Recognizing the probable futility of seeking to collect an award reflecting the real harm that San Marco and Ms. Gass caused, Claimants hereby agree to cap their damages at $40 million, and request that SIAC adjust the cost deposits accordingly.
>
> We therefore request reduction of the cost deposits to reflect the adjusted claim amount."[4]

87. The Claimants confirmed this position in their Reply.[5]

88. In their Opening Presentation at the hearing, the Claimants rephrased their request for relief as follows:

> "Claimants seek an Award:
> 1. Finding that Respondents 1 and 2 breached their fiduciary duties to Claimants;
> 2. Finding that Respondent 1 breached the Management Contract;
> 3. Finding that Respondents 1 and 2 converted Claimants' property;
> 4. Awarding Claimants damages and disgorging ill-gotten payments from Respondents 1 and 2, as detailed [below];
> 5. Awarding Claimants all of their costs in this arbitration, including fees and expenses of Claimants' attorneys and experts; and
> 6. Awarding Claimants interest.
>
> Claimants' Damages Summary (Capped at $40 Million)

3 SoC, §202.

4 Claimants' communication of 6 September 2019.

5 Reply, §149 ("Claimants request that the Tribunal grant them the relief requested in their Statement of Claim, up to the $40 million at which Claimants agreed for practical purposes to cap their damages.").

1. Insufficient Sale Price ($153.36-270 million)
A. Alternatively: Lost Distributions/Payments ($28.8 million)
B. Alternatively: Misapplied Taxes ($21,327,200)
C. Alternatively: Excess Taxes ($408,023 - $1,078,064)
D. Alternatively: JDB Loan Draw Down ($1,589,364.32)
i. Alternatively: Double Fee Recovery ($533,894.08)
ii. Alternatively: Artificially Increased Fees ($203,700)
E. Alternatively: Management Compensation that Should Have Been Paid by SM ($752,008.21)

2. Loss of Cage Cash ($1.56 million) [Not Alternative]

3. Disgorgement of Compensation ($4,045,441) [Not Alternative]
A. Alternatively: Payments for eleven months Gass did not manage SV ($1,575,000)

4. Value of Converted Property [Not Alternative]
A. BCEL Bank Accounts ($135,375.76)
B. JDB Ferry Terminal Bank Accounts ($249,348) [part of $533,894.08 in 1.D.i and sought in the alternative]
C. Slot Machines ($178,046)"[6]

B. Respondent 1 and 2's request for relief

89. In their Statement of Defense, Respondents 1 and 2 requested the following relief:

> "The Claimants are not entitled to any of the reliefs claimed at [202] of their Statement of Claim. The Claimants' claims for breach of fiduciary duty, conversion and breach of contract should be dismissed in their entirety with costs."[7]

90. This request for relief was not subsequently modified.

C. Respondent 3's request for relief

91. In its Statement of Defense, Respondent 3 requested the following relief:

> "a. a dismissal of Claimants' claims, including:
>
> i. Dismissal of Claimants' claims for breach of fiduciary duty;
> ii. Dismissal of Claimants' claims for breach of contract;
> iii. Dismissal of Claimants' claims for conversion;
>
> b. award the Government its full costs and related expenses caused in the amount proven following dismissal; and
>
> c. such further or other relief as the Tribunal deems fit."[8]

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6 Claimants' Opening Presentation, §§176-177.

7 R1&R2 SoD, §201.

8 R3 SoD, §124.

92. This request for relief was not subsequently modified.

V. PRELIMINARY MATTERS

A. Jurisdiction of the Tribunal

93. On 19 December 2017, the Claimants commenced this arbitration on the basis of Section 35 of the Deed which provides as follows:

> "Commercial Terms and Conditions
>
> […]
>
> In the event that the Claimants fail to comply with their obligations under this Deed, Laos shall be entitled to commence a fresh arbitration to enforce the terms of this Deed. Such arbitration shall be conducted in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre for the time being in force. The seat of the arbitration shall be Singapore. The Tribunal shall consist of three arbitrators. Each Party shall nominate one arbitrator and the two nominated arbitrators shall nominate the presiding arbitrator. In the event that the two nominated arbitrators are unable to agree on a presiding arbitrator, the presiding arbitrator shall be appointed by the President of the SIAC Court of Arbitration. The language of the arbitration shall be English."

94. The Claimants note that Section 11(i) of the Management, Sales and Marketing Agreement of 16 April 2016 between the GOL and Respondent 1 also contains an arbitration clause referring disputes to SIAC.[9]

95. On 16 January 2018, Respondents 1 and 2 wrote that they consented to SIAC arbitration.[10] However, according to them, the "full" arbitration agreement between the

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9 Exh. C-005, Section 11(i) ("Governing Law/ Arbitration. This Agreement will be governed by and construed solely in accordance with the laws of the State of New York, United States of America, without giving effect to any choice or conflict of law provision or rule that would cause the application of the laws of any other jurisdiction. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, will be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) for the time being in force. The seat of the arbitration will be Vientiane. The Tribunal will consist of one arbitrator. The presiding arbitrator will be appointed by the President of the SIAC Court of Arbitration. The Parties expressly agree that the Tribunal is expressly prohibited from issuing an award of punitive damages. The language of the arbitration will be English. The GOL further expressly and irrevocably agrees and hereby waives any and all immunities and claims to immunity from attachment or execution upon GOL assets to satisfy any award rendered in favor of San Marco.").

10 Response, §5 ("The Notice of Arbitration asserts jurisdiction in paragraphs 5, 6 and 7. The Respondents accept the jurisdiction of the Tribunal to be appointed by the SIAC to determine the issues set out in the Notice of Arbitration."); §7 ("[T]he Respondents consent to SIAC arbitration pursuant to [paragraphs 35 and 42] in the Deed."), §10 ("The Respondents hereby consent to the Arbitration being conducted in accordance with the SIAC 2016 Rules […]").

Claimants and GOL was to be found in Sections 35 and 42 of the Deed. This latter provision reads as follows:

> "Governing Law
>
> This deed shall be governed by and construed solely in accordance with the laws of New York. Any dispute arising out of or in connections with this Deed, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre for the time being in force, including its emergency arbitration rules. The seat of the arbitration shall be Singapore. The Tribunal shall consist of three arbitrators. Each Party shall nominate one arbitrator and the two nominated arbitrators shall nominate the presiding arbitrator. In the event that the two nominated arbitrators are unable to agree on a presiding arbitrator, the presiding arbitrator shall be appointed by the President of the SIAC Court of Arbitration. The language of the arbitration shall be English."

96. On 2 August 2018, the Claimants submitted their "Jurisdictional Objection to the Joinder of the GOL". The Parties made several submissions on this issue as mentioned in the procedural history recounted above.

97. On 25 October 2018, the Tribunal issued its Decision on Jurisdiction, concluding that it had jurisdiction over Respondent 3.

B. The Language of the Arbitration

98. In accordance with Sections 35 and 42 of the Deed, this arbitration is conducted in the English language.[11]

C. The seat of the arbitration

99. In accordance with Sections 35 and 42 of the Deed, the seat of the arbitration is Singapore.

D. The applicable procedural rules

100. Section XI of PO 1 sets out the procedural rules applicable in this arbitration:

> "59. This arbitration shall be governed by (in the following order of precedence):
>
> a. The mandatory rules of the law on international arbitration applicable in Singapore;

11 Notice, §9 ("("The Arbitration to which the Parties have consented is to be […] conducted in English"); Response §10 ("The Respondents hereby consent to the Arbitration being conducted […] in English.").

b. The SIAC Rules, save where modified by this Procedural Order and other procedural rules issued by the Tribunal, and any amendments thereto.

60. If the provisions therein do not address a specific procedural issue, that issue shall be determined by agreement between the Parties or, in the absence of such agreement, by the Tribunal.

61. In addition, the Tribunal may seek guidance from, but shall not be bound by, the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules")."

E. The applicable substantive law

101. In accordance with Section 42 of the Deed, the Deed is governed by and to be construed solely in accordance with the laws of the State of New York, United States of America.[12] As mentioned in PO 1, the Parties are to establish the content of the applicable law, being understood that the Tribunal may, but is not required to, make its own inquiries into the content of the applicable law.

F. Gore Emails

102. On 26 April 2019, the Claimants advised the Tribunal that Mr. Michael J. Gore, the former President and General Manager of Savan Vegas and Casino Co., Ltd., had recently offered to provide the Claimants with correspondence which he sent or received while working at Savan Vegas. As some of the emails included communications with Mr. Branson, counsel to Respondent 3, the Claimants were concerned that Respondent 3 would seek protection from disclosure of those documents based on privilege. The Claimants accordingly asked the Tribunal to review the emails, possibly with the help of a "Special Master", and to resolve any issues of privilege.

103. On 2 May 2019, Respondent 3 responded to the Claimants' request. Respondents 1 and 2 declined to take a position. On the same day, the Claimants sent an unsolicited response to Respondent 3's comments, to which Respondent 3 replied again on the same day.

104. In Procedural Order No. 4 of 31 May 2019, the Tribunal observed that as the beneficiary of a potential privilege, it was for Respondent 3 to decide whether it wished to claim privilege over the emails or not. If and once it did so, the Claimants could then choose to object or not. If they opposed the claim for privilege, then and only then would the

12 Notice, §10 ("The Governing Law is that of the State of New York, United States of America."); Response §11 ("The Respondents agree that the Governing Law of the dispute is the law of the State of New York, United States of America […].").

Tribunal be in a position to rule on the privilege. The Tribunal could not decide on an anticipatory claim of privilege made by the Claimants on Respondent 3's behalf. As a result, the Tribunal denied the Claimants' request. The Tribunal set a time limit for the Claimants to obtain from Mr. Gore an identification of the date, time, sender, recipient and subject line for each of the emails and to provide this information to Respondent 3 (the "Gore Email Log"), after which the latter would have an opportunity to raise its objections (including privilege).

105. After the Claimants had filed the Gore Email Log, in PO 8, the Tribunal recorded that Respondent 3 had not specified its position on the emails listed in the Gore Email Log as contemplated, contending instead that all the documents mentioned there were privileged. In the absence of any explanation for its invocation of privilege, the Tribunal allowed the production of these documents in this arbitration. Five emails were subsequently introduced into the record (the "Gore Emails").[13]

G. Adverse inferences

106. In the document production phase, the Claimants requested several documents from the Respondents. The latter opposed the request *inter alia* on the basis that "Claimants already possess[ed] the documents from Savan Vegas' storage records and servers." Nevertheless, in PO 8, the Tribunal ordered the production of several documents, subject to the Respondents' stating whether or not they had responsive documents in their possession, custody or control.

107. Respondents 1 and 2 produced a limited number of documents. Respondent 3 did not produce any documents. The Claimants subsequently complained about the Respondents' compliance with PO 8, stating that the latter had not produced all responsive documents. The Respondents opposed the Claimants' complaint.

108. On 11 March 2020, the Tribunal ruled as follows:

> "[The Tribunal] does not consider it useful or efficient to rule at this stage on the Parties' compliance with PO 8. Indeed, those rulings continue to bind the Parties. If the Claimants consider that the Respondents have not complied with the Tribunal's rulings, they may make submissions to that effect in their forthcoming written submissions and at the hearing, including by requesting the Tribunal to draw adverse inferences from the Respondents' non-production of documents. If the Claimants choose this course, the Respondents will be able to put its responses forward in the same way, i.e. in its coming written and oral submissions."

13 Exhs. C-412, 414, 415, 420, 421.

109. As mentioned above, on 28 August 2020, the Parties jointly filed the List of Evidence identifying the evidence that was not in the record of the Prior SIAC Arbitration. In the comments included in the List, the Claimants submitted that their inability to obtain further evidence to support their case was "because of the destruction of all documents on the Savan Vegas server covering the time period San Marco and Gass were in control".[14] Accordingly, they requested the Tribunal to "draw the inference that the documents would have supported Claimants' case."[15] The Claimants further pointed out that "GOL [had] never provided evidence of the date of destruction [of the server] and so the Tribunal should further infer that the destruction occurred with full knowledge of this proceeding or at least the claims in this proceeding."[16]

110. On their part, the Respondents represented that the server images were deleted before the present arbitration commenced. Respondents 1 and 2 further stated that no inference should be drawn against them because they had no control or access to the Savan Vegas server after their engagement ended. They also pointed out that there was no reason for GOL to retain the server images after conclusion of the Prior SIAC Arbitration, and the Claimants made no request to this effect at the time. Finally, they argued that the Claimants too could have made copies of the server images, but failed to do so.

111. As mentioned in PO 1, the Tribunal may seek guidance from, but shall not be bound by the IBA Rules on the Taking of Evidence in International Arbitration. Article 9.5 of the IBA Rules provides in this regard:

> "If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."

112. Here, the Respondents have contended that the Savan Vegas servers were destroyed prior to the commencement of this arbitration. Kelly Gass and San Marco further represented that they had no access to the servers after the termination of their employment. The Tribunal sees no reason to doubt these representations, especially in circumstances where the Claimants have not cogently contested them. Neither have the Claimants established that GOL was under an obligation to retain a copy of the Savan Vegas servers after conclusion of the Prior SIAC Arbitration, or that the

14 List of Evidence, p.1.

15 List of Evidence, p.1.

16 List of Evidence, p.1.

Claimants had made a request to this effect. Thus, the Tribunal finds it inappropriate to draw adverse inferences from the Respondents' non-production as the Claimants request.

113. In this context, the Tribunal recalls the Claimants' argument that because the Respondents failed to present even a single witness in support of their case, including Ms. Gass, adverse inferences should be drawn. According to the Tribunal, it is for the Parties to decide which evidence to present to prove their claims. Each Party bears the burden of proving the facts on which it relies in support of its claim or defense. The fact that witnesses who may have had knowledge of the issues in dispute have not been presented is a factor that the Tribunal has kept in mind in its overall evaluation of the evidence on record.

VI. PRELIMINARY OBJECTIONS

114. The Tribunal notes that the Parties' written submissions on the Respondents' preliminary objections prior to the hearing were focused on the application of the doctrine of collateral estoppel under New York law. At the hearing, Respondents 1 and 2 made detailed submissions on the Henderson Rule under Singapore law, after which the Parties made additional written submissions on the issue. In the circumstances, the Tribunal first addresses the Parties' submissions on collateral estoppel under New York law ((A) below), then on the Henderson Rule ((B) below) and finally on abuse of process ((C) below).

A. Collateral Estoppel under New York law

1. Respondent 1 and 2's Position

115. Respondents 1 and 2 argue that the facts in this arbitration present a "classic" situation of collateral estoppel. In the Prior SIAC Arbitration, the Claimants had raised counterclaims under the Deed based on the same facts and conduct of GOL and its agents (including San Marco and Kelly Gass) as the claims brought here. In the circumstances, under the doctrine of collateral estoppel pursuant to New York law, all claims in this arbitration should be dismissed.

116. For these Respondents, the Claimants have not and cannot show how the findings of the Prior SIAC Tribunal would not apply to their claims in the present arbitration. Even on the Claimants' own test for the application of collateral estoppel, it is clear that the findings of the Prior SIAC Tribunal are on issues that are (i) identical to the ones raised

by the Claimants in the present Arbitration; (ii) essential to the Prior SIAC Award; and (iii) decisive of that prior action.

117. Respondents 1 and 2 submit that all the requirements for the application of the doctrine of collateral estoppel are met in this case and there is no reason for the Tribunal not to resort to collateral estoppel. The Claimants were given a "full and fair" opportunity of presenting their case in the Prior SIAC Arbitration, and the Prior SIAC Tribunal decided against them.

118. Respondents 1 and 2 reject the Claimants' submission that they cannot rely on the doctrine of collateral estoppel because the parties to the Prior SIAC Arbitration and the present arbitration are not the same or because the claims in the two arbitrations are different. What matters is that there is an "identity of issue[s]" between the two proceedings, which is the case in the current scenario. Indeed, the "fundamental pillars" of the Claimants' claim are "plainly duplicative" of claims that were raised and dismissed in the Prior SIAC Arbitration.

119. Respondents 1 and 2 refute the Claimants' assertions that collateral estoppel cannot apply because the former were not Respondent 3's agents. This directly contradicts the Prior SIAC Tribunal's finding that Respondents 1 and 2 were agents of Respondent 3. Besides, the Claimants cannot, on the one hand, contradict the Prior SIAC Tribunal's findings on this issue and, on the other, rely on these findings to argue that Respondents 1 and 2 owe fiduciary duties in respect of the management and sale of the Casino. Further, both the Deed and the Management Contract make clear that Respondents 1 and 2 were not "independent third parties" as the Claimants allege. Finally, the fact that Respondents 1 and 2 owed no duties to the Claimants is irrelevant – the contractual relationship between a principal and agent is not incompatible with duties being owed to a third party, and the Claimants have not established a case to the contrary.

120. Also, for these Respondents, the Claimants' attempt to "cherry pick" certain claims that have been advanced in this arbitration but were not raised in the Prior Arbitration should be rejected. First, under applicable New York law, it is not required that the prior tribunal expressly decided an issue identical to the one before the subsequent tribunal. It is sufficient that the prior tribunal decided an issue by "necessary implication" for the conditions of issue preclusion would be satisfied. Here, the Prior SIAC Tribunal unequivocally concluded that there was no impropriety on the part of Respondent 3 (or its agents) in respect of the appointment of Respondents 1 and 2, the management and sale of the Casino, the flat tax rate decided by Mr. Va, the chairman of the Flat Tax

Committee and Respondent 3's use of the sales proceeds. These conclusions show that the Prior SIAC Tribunal rejected the Claimants' allegations of impropriety by necessary implication.

121. Second, the Claimants are wrong to argue that issue estoppel does not apply because they are relying on different allegations, evidence, or witnesses than those before the Prior SIAC Tribunal. Indeed, the doctrine of *res judicata* applies not only to claims actually litigated but also to claims that could have been litigated. Even if (*quod non*) there are allegations in the present arbitration that were not addressed in the Prior SIAC Arbitration, this would only lead one to question why those allegations were not raised in the Prior SIAC Arbitration given that they arose from the same set of facts. For the Respondents, "it would make a mockery of the law if the Claimants could sidestep the collateral estoppel doctrine by holding back bits and pieces of allegations which they could have, but did not raise, during the earlier proceedings".[17]

122. Further, Respondents 1 and 2 oppose the Claimants' argument that the latter are not estopped from contesting the Prior SIAC Tribunal's findings on the reasonableness of the 28% flat tax rate because "there are conflicting judgments on the same issue". They note that the issues before the BIT I Tribunals and the Prior SIAC Tribunal were not the same. Indeed, the question before the BIT I Tribunals was whether the tax set by Mr. Va was a "flat tax" within the meaning of Section 8 of the Deed and not whether the 28% tax was "unfair or unreasonable" or "so high as to prevent a sale of Savan Vegas for maximum value". As for the Claimants' reliance on the Lamm Dissent, these Respondents submit that a dissenting opinion is in itself insufficient to preclude the application of collateral estoppel.

123. In response to the Claimants' submission that they did not have a "full and fair" opportunity to present their claims in the prior arbitrations, these Respondents note that the burden of proof is on the Claimants to establish such fact, which they have failed to do. In any event, if the Claimants were unsatisfied with the disclosure orders made in the Prior SIAC Arbitration, they should have objected at the time. Moreover, the Claimants have offered no reason for disagreeing with the discovery orders made by the Prior SIAC Tribunal. Finally, the Claimants' only example of the alleged lack of "critical disclosures" was their inability to "discover documents and evidence from San Marco and Kelly Gass" in the Prior SIAC Arbitration. However, despite having received documents from San Marco and Kelly Gass in this arbitration, the Claimants have not shown how these documents would have been critical to their case in the Prior SIAC

17 R1&R2 Rej. §25.

Arbitration, and how the lack of access to these documents deprived them of a full and fair opportunity to present their case at the time. It is also relevant – so say these Respondents – that the Claimants did not challenge the Prior SIAC Award on the ground that they were denied a full and fair opportunity to present their case.

2. Respondent 3's Position

124. Similarly to Respondents 1 and 2, Respondent 3 submits that "[e]very claim before this Tribunal was previously litigated in the first SIAC arbitration."[18] It points out that "New York does not allow Claimants to recast their breach of contract claims against the Government as breach of fiduciary duty claims by San Marco and so easily evade the prohibition of collateral estoppel and/or res judicata."[19] The Claimants are bound by the adverse findings of facts and conclusions of law in the Prior SIAC Award, which are dispositive of their claims before this Tribunal.

125. Respondent 3 further submits that, on 2 August 2019, the SIAC Final Award was enforced in the High Court of Singapore. It thus has the "full force and effect" of a Singapore domestic court judgment. Therefore, for Respondent 3, "as a matter of New York law, the Claimants are bound by the adverse findings of facts and conclusions of law in the SIAC Final Award, now a judgment of the Singapore Court, that are dispositive of their claims before this Tribunal."[20]

126. Respondent 3 rejects the Claimants' assertion that the Respondents have relied on outdated case law in support of their case. It notes that New York law on collateral estoppel "has not changed in the past forty years" and should lead the Tribunal to reject the Claimants' case.

3. The Claimants' Position

127. The Claimants contend that under New York law the application of the doctrine of collateral estoppel requires a "multi-factor, fact-intensive test". In addition, it is a discretionary doctrine dependent on an analysis of all relevant facts and circumstances. Indeed, New York courts have found that the doctrine need not be applied even if all the prerequisites for the application of the doctrine are satisfied. For the Claimants, "[t]he decision to apply collateral estoppel in any particular case should be based upon 'what are competing policy considerations, including fairness to the parties,

18 R3 SoD, §48.

19 R3 SoD, §37.

20 R3 SoD, §53.

conservation of the resources of the courts and the litigants, and the societal interests of consistent and accurate results.'"[21]

128. The Claimants further submit that collateral estoppel applies only to determinations that were essential to the prior decision. Here, the Respondents have not identified a specific determination by the Prior SIAC Tribunal "essential" to its decision and also "decisive" of an issue before this Tribunal. The Respondents have merely argued that "certain issues" were previously decided, with no discussion of their necessity to the decision in the Prior SIAC Award. Moreover, as the decisions in the Prior SIAC Award were reached on multiple, alternative grounds, the Tribunal can give preclusive effect to those decisions only when "it is clear that the issue was actually litigated, squarely addressed and specifically decided."[22]

129. The Claimants additionally argue that even if all the above stated minimum requirements are met, under New York law preclusive effect can still be denied for a number of reasons including "(1) the determination relied on as preclusive was itself inconsistent with another determination of the same issue; (2) the forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined; and (3) other compelling circumstances that make it appropriate to permit the party to relitigate the issue."[23] According to the Claimants, the preclusive effect, if any, of the Prior SIAC Award should be denied in this arbitration *inter alia* because "there are inconsistent prior decisions and different procedural opportunities, including the ability to obtain disclosures and evidence from SM&KG that was foreclosed in the [Prior SIAC Arbitration]."[24]

130. In support of their arguments for denying the preclusive effect urged by the Respondents, the Claimants note that both the Parties and the claims in this arbitration are different those in the Prior SIAC Arbitration. For instance, not only were

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21 Reply, §76 quoting Exh. CLA-0052, Russo, 49 A.D.3d at 1041, 854 N.Y.S.2d (quoting Exh. CLA-0055, Martin v. Reedy, 194 A.D.2d at 259-260, 606 N.Y.S.2d 455 and Exh. CLA-0041, Staatsburg Water Co. v. Staatsburg Fire Dist., 72 N.Y.2d 147, 153, 531 N.Y.S.2d 876, 527 N.E.2d 754, 756 (1988)).

22 Reply, §80 quoting Exh. CLA-0062, Matter of Atl. Mut. Ins. Co. v. Lauria, 291 A.D.2d 492, 493, 739 N.Y.S.2d 394, 396 (N.Y. App. Div. 2002).

23 Reply, §83.

24 Reply, §83.

Respondents 1 and 2 not parties to the Prior SIAC Arbitration but they did not even present witness statements on the merits in that Arbitration.

131. The Claimants reject the Respondents' argument that the preclusive effect of the doctrine of collateral estoppel applies to Respondents 1 and 2 even though the latter were not parties to the Prior SIAC Arbitration as they were Respondent 3's agents. Respondents 1 and 2 were not, in fact, Respondent 3's agents. The Management Contract makes clear that Respondents 1 and 2 were "independent third parties". Further, Respondents 1 and 2 owed fiduciary duties to the Claimants. They were also obliged not to act only for Respondent 3, but "for the mutual benefit and best interest of all stakeholders in the Gaming Assets, including the GOL and the [Claimants]."[25]

132. In further support of their arguments for denying the preclusive effect sought by the Respondents, the Claimants note that the issues decided in the Prior SIAC Arbitration were different from those currently before the Tribunal. For instance, the Prior SIAC Tribunal did not rule on Respondent 1 and 2's duty of candor. Neither did it decide whether Respondents 1 and 2 were "actually qualified" or "jointly appointed", or whether Respondents 1 and 2 breached their fiduciary duties by accepting their appointment. Neither did the Prior SIAC Tribunal rule on the Claimants' "many allegations of management and abdication". This proceeding requires the Tribunal to determine whether San Marco breached the Management Contract, something no prior tribunal has done. Finally, the Claimants stress that the present arbitration involves "different evidence and different witnesses" and that the "contracts, conduct, duties, and damages at issue" are also different.[26]

133. According to the Claimants, it is thus "woefully insufficient" for the Respondents to contend that "every claim" was litigated in the Prior SIAC Arbitration. Indeed, the Respondents have not demonstrated that the claims are identical, were actually decided, and were necessary to the Prior SIAC Award. In any event, in respect of the Claimants' conversion claims, the Respondents have not even argued that they were decided in the Prior SIAC Arbitration.

134. Another reason for denying the preclusive effect, so say the Claimants, is that under New York law, collateral estoppel is not "warranted" where there are conflicting prior judgments on the same issue and that the contrary determinations by the BIT I Tribunals and the Lamm Dissent "foreclose any collateral estoppel effect". For instance, the Claimants are not estopped from contesting the Prior SIAC Tribunal's findings on

25 Reply, §85, quoting Exh. C-0005, Management Contract, § 11(a).

26 Reply, §73.

the reasonableness of the 28% flat tax rate because there are conflicting decisions on the same issue. Indeed, the two BIT I Tribunals as well as the Lamm Dissent found that the application of the flat tax rate to the Casino was improper.

135. The final reason advanced by the Claimants for opposing the preclusive effect of the doctrine of collateral estoppel is that the Claimants did not have a "full and fair" opportunity to make their claims in the prior cases. In particular, the Claimants were denied "critical" disclosures in the Prior SIAC Arbitration including access to Respondent 1 and 2's emails. New York law precludes the application of the doctrine in such circumstances. Further, for the Claimants, "the ability to discover documents and evidence from SM&KG [in this arbitration] factors against applying collateral estoppel. Even if the elements of collateral estoppel were otherwise met here (which they are not), the doctrine should not be applied because Claimants are entitled to discover, and have discovered through their disclosure requests, new evidence that was not available in the prior proceeding."[27]

4. Analysis

136. It arises from the foregoing summaries of the Parties' positions that the Tribunal must answer the questions set out in the following subsections.

a. Is collateral estoppel procedural or substantive and how is it defined?

137. The Parties agree that, under New York law, collateral estoppel is substantive in nature.[28] The Parties also appear to agree that collateral estoppel prevents "re-litigation of an issue of law or fact that was raised, litigated, and actually decided by a judgment in a prior proceeding between the parties […] regardless of whether or not the two proceedings are based on the same claim".[29] The Tribunal finds that these propositions accurately reflect New York law.

27 Reply, §129.

28 C-PHB §52; R3 SoD, §§41, 43 adopted by Respondents 1 and 2. See R1&2 SoD, §§ 8, 77, 89, 91.

29 Exh. RLA1/2-015, Kim v. Ji Sung Yoo 311 F.Supp.3d 598 (2020), fn 2.

b. Is the application of the doctrine of collateral estoppel discretionary?

138. The Parties disagree on the discretionary nature of the doctrine of collateral estoppel. The Claimants rely on *Calhoun v. Ilion* where the New York Court of Appeals held that the doctrine was discretionary:

> "[I]t lies within the discretion of the trial court whether to apply the doctrine of collateral estoppel, and the doctrine need not be applied even if all of the prerequisites to the doctrine have been met."[30]

139. By contrast, Respondent 3 invokes *Peterson v. Forkey* where the same court made a different statement:

> "Application of the doctrine of res judicata (or collateral estoppel) is a question of law and does not rest in the court's discretion."[31]

140. Be this as it may, as will be seen below, the requirements of the "multi-factor, fact-intensive" test put forward by the Claimants for the application of the doctrine of collateral estoppel are fulfilled and none of the exceptions mentioned by the Claimants apply. On considering "all relevant facts and circumstances", as proposed by the Claimants,[32] the Tribunal finds no reason not to apply the doctrine.

c. Does the doctrine of collateral estoppel only apply to parties to the prior action? Were San Marco and Kelly Gass "agents" of GOL or otherwise in privity with the result that the doctrine applies to them?

141. The Claimants submit that the preclusive effect of the doctrine of collateral estoppel does not apply to San Marco and Kelly Gass as they were not parties to the Prior SIAC Arbitration and neither were they GOL's agents. The Tribunal does not agree. Several court decisions have observed that the doctrine of collateral estoppel is not so limited.

142. In *Ryan*, the Court of Appeals of New York stated that the doctrine of collateral estoppel extended to those in privity with a party:

> "[Collateral estoppel] precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in

30 Exh. CLA-0056, Calhoun v. Ilion Cent. Sch. Dist., 936 N.Y.S.2d 438, 441 (N.Y. App. Div. 2011).

31 R3 SoD, §50 relying on Exh. RLA3-025. Peterson v. Forkey, 376 N.Y.S.2d 560, 561 (1975); Exh. RLA3-063. Mandracchia v. Russo, 280 N.Y.S.2d 429, 432 (1967)).

32 Reply, §78 relying on Exh. CLA-0058, Siegel's N.Y. Prac. (6th ed., 2018) §467; Exh. CLA-0059, Read v. Sacco, 49 A.D.2d 471, 375 N.Y.S.2d 371, 375 (N.Y. App. Div. 1975) ("[C]ollateral estoppel should not be blindly applied to multiple litigation on the basis of a rigid rule; each case must be examined to determine whether, under all the circumstances, the party said to be estopped was not unfairly or prejudicially treated in the litigation in which the judgment sought to be enforced was rendered.").

> privity, whether or not the tribunals or causes of action are the same."[33]

143. In *Buechel v. Bain*, the New York Court of Appeals observed:

> "In the context of collateral estoppel, privity does not have a single well-defined meaning (*Matter of Juan C. v. Cortines,* 89 N.Y.2d 659, 667, 657 N.Y.S.2d 581, 679 N.E.2d 1061 [1997]). Rather, privity is " 'an amorphous concept not easy of application' […] and 'includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action' " (*id.,* at 667–668, 657 N.Y.S.2d 581, 679 N.E.2d 1061 [citations omitted]). In addressing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion."[34]

144. In *Tepper v. Bendell*, a first action was brought by the plaintiffs against Fidelity Holdings, Inc. ("Fidelity"). Another action was then initiated against the officers and attorneys of Fidelity for the losses at issue in the first action. In dismissing the second action, the District Court for the Southern District of New York applied collateral estoppel to agents of a party in the first proceedings:

> "Collateral estoppel bars the relitigation of claims against an agent of a corporation whose liability has previously been adjudicated […] In situations where successive defendants share vicarious liability or their relationship can be characterised as principal/agent, a suit brought against either of the Defendants will foreclose a subsequent action against the other".[35]

145. In *Shaid v. Consolidated Edison Co.*, the New York Appellate Division observed that defensive collateral estoppel prevents a plaintiff from switching adversaries:

> "Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.' Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible."[36]

146. In the same vein, in *111 East 88th Street Partners v. Fine*, the Civil Court of the City of New York noted that collateral estoppel could apply even if the prior lawsuit involved a different defendant:

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33 Exh. RLA3-028, Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984) (emphasis added).

34 Exh. RLA3-006, Buechel v. Bain, 97 N.Y.2d 295 (2001).

35 Exh. RLA3-031, Tepper v. Bendell, 01 CIV. 6226 (SWK), 2004 WL 2210309 (S.D.N.Y. Sept. 30, 2004), aff'd, 169 Fed. App. 609 (2d Cir. 2006) (emphasis added).

36 RLA1/2-4, Shaid v. Consolidated Edison Co., 95 A.D.2d 610 (Supreme Court of New York, Appellate Division, 2nd Department) (1983), 618 (emphasis added).

> "When a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost against a different defendant this is called defensive collateral estoppel".[37]

147. Thus, New York law does not limit the application of the doctrine of collateral estoppel in the manner the Claimants suggest. Rather, it only requires privity between the party in the first action and the party in the second action. Here, the Tribunal finds that San Marco and Kelly Gass (parties in the present second action) were in privity with GOL (party in the first and second action) for the following reasons.

148. The Management Contract mentions that San Marco and Kelly Gass would manage and control the Casino as well as the sale of the Gaming Assets on behalf of the Claimants and GOL:

> "[t]he GOL is asserting its right under the Deed to have an independent third-party take over the management and operation of the Gaming Assets […] and to have such independent party manage and control the marketing and sale of the Gaming Assets".[38]

149. And further:

> "Granting San Marco the authority to exercise full and exclusive operational management and control over the Gaming Assets, as well as full and exclusive sales and marketing authority over the Gaming Assets pursuant to the terms of this Agreement."[39]

150. While the Management Contract does qualify San Marco and Kelly Gass as "independent third parties", this does not mean that, as the Claimants' suggest, San Marco and Kelly Gass were acting fully independently of GOL. San Marco and Kelly Gass were to maintain a level of discretion in the manner in which they exercised their functions under the Management Contract vis-à-vis GOL. Yet, they nevertheless were to carry out the management and sale of the Gaming Assets on GOL's (and the Claimants') behalf, as is stipulated in other provisions of the Management Contract.

151. Clause 2 of the Management Contract establishes San Marco as GOL's "agent":

> "Appointment. The GOL desires and has the right and authority to engage, and San Marco, having the requisite skills and expertise, desires to perform the services referred to above and more fully described below. In furtherance of this engagement, this Agreement constitutes the GOL's appointment of San Marco as sole and exclusive agent as of the Takeover Date and hereby, (i) grants San

37 Exh. RLA1/2-3, 111 East 88th Street Partners v. Fine, 110 Misc. 2d 960 (Civil Court of the City of New York, New York County) (1981), 962 (emphasis added).

38 Exh. C-0005, San Marco Management Contract, Whereas Clause 2.

39 Exh. C-0005, San Marco Management Contract, Clause §10(a).

> Marco full and exclusive operational management and control over the Gaming Assets, and (ii) authorizes San Marco, as the exclusive sales and marketing agent of the Gaming Assets for a period of twenty-four (24) months following the Takeover Date (the "Exclusivity Period"), to take all steps its deems reasonable and necessary to market and sell the Gaming Assets in accordance with the relevant terms of the Deed and pursuant to the terms of this Agreement."[40]

152. Clause 10 of the Management Contract also shows that San Marco is GOL's "agent":

> "Tribunal Order and GOL Instructions. The Parties agree that the following events must occur prior to the Takeover Date: (i) The Tribunal issues a final and binding order denying the Investors' application to enjoin the GOL from taking over the Gaming Assets, which occurred on April 14, 2014; and (ii) the GOL shall issue a directive to San Marco as its agent".[41]

153. In addition, GOL's lawyer, Mr. David Branson, referred to San Marco and Kelly Gass as "independent agents" of GOL in the course of the Prior SIAC Arbitration[42] and the Prior SIAC Award characterized San Marco and Kelly Gass as GOL's "agents".[43] Finally, the Delaware Court observed that San Marco and Kelly Gass had a "close relationship" with GOL.[44]

154. In light of the foregoing facts, the Tribunal finds that the relevant Parties, San Marco, Kelly Gass and GOL must be deemed to be in privity for purposes of the application of the doctrine of collateral estoppel.

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40 Exh. C-0005, San Marco Management Contract (emphasis added).

41 Exh. C-0005, San Marco Management Contract (emphasis added).

42 Exh. C-0264, 2015.06.16 GOL SIAC Provisional Measures Hearing Transcript, pp 122-23 ("The properties is supposed to be sold by an independent agent who has fiduciary duties to both parties. That's what we've installed, an independent agent who has fiduciary duties to both parties to sell the casino", and "As you will see, whenever you get this thing, that is references the deed, it says the agent, San Marco Capital, will have responsibilities to comply with the deed, to manage the casino and to tell the casino. That's the obligation that we undertook with this agent to give performance to the deed" (emphasis added).). See also, pp. 153-54 ("We have no ability as the government under this agreement to tell her who to sell it to, to tell her how much she can sell it for. We have no right to do that. As the gaming operator who has been appointed under the deed she has the authority and the responsibility to exercise her fiduciary obligations to both parties to maximize the sale", "Ms Gass will when she's ready, have an auction process and everybody will be able to participate.").

43 See, for instance, Prior SIAC Award, §123 citing the Tribunal's Order on Sanum's Application for Provisional Measures dated 30 June 2015 (Exh. C-0031): "[L]aos, and its agents operating the Casino, including of course, Ms Kelly Gass […]".

44 Exh. C-001, p.7 ("The complaint alleges that defendants are "agents" of Laos, and the allegation in the complaint describe an agency relationship. Accordingly, the defendants have a sufficiently close relationship to Laos that they may enforce the arbitration clause in the deed against plaintiffs, because all of the claims in the complaint are intertwined with the Deed.").

155. This finding is unaltered by the Claimants' argument that, since San Marco and Kelly Gass owed fiduciary duties to the Claimants as well as to GOL, they cannot be considered agents of GOL. As already mentioned, for the doctrine of collateral estoppel to apply, it is sufficient that the relevant parties are in privity. Here, San Marco and Kelly Gass were in privity with GOL and hence that requirement of the doctrine of collateral estoppel is met.

156. Further and in any event, if the Claimants' foregoing argument were accepted, the Tribunal would still reach the same conclusion regarding the applicability of the doctrine of collateral estoppel. Indeed, even if San Marco and Kelly Gass owed fiduciary duties to the Claimants (which the Respondents deny), that would not mean that they cease to have a relationship with GOL. The Claimants have not cited any relevant authority in support of their position that a contractual relationship of principal and agent is incompatible with fiduciary duties owed to a third party. Under New York law, an entity can be an agent of a party and also owe duties to another.[45]

d. What are the further requirements for the application of the doctrine of collateral estoppel?

157. Relying on *Staatsburg*, the Claimants identify "four bare minimum requirements" for the doctrine of collateral estoppel to apply, which the Respondents do not appear to dispute.[46] Accordingly, collateral estoppel requires:

i. The presence of identical issues;

ii. Which were necessarily decided in the prior action;

iii. And are decisive of the present action;

iv. Whereby the party facing estoppel had a full and fair opportunity to contest the prior decision.

(i) Identical issues

158. The Claimants insist that the doctrine of collateral estoppel cannot apply in this case as the issues before the Prior SIAC Tribunal were different from those before this Tribunal. The Tribunal does not agree.

45 Exh. RLA1/2-014, Greenwood v Koven, 880 F.Supp 186: "Under New York law, if agent and principal agreed that agent would act in interest of third party under certain circumstances, there is nothing improper about agent acting in agreed-to way, even if such actions are adverse to principal".

46 Claimants' Opening Presentation, p. 137 relying on Exh. CLA-0041, Staatsburg Water Co. v. Staatsburg Fire Dist., N.Y.2d 147, 531 N.Y.S.2d 876, 527 N.E.2d 754 (1988).

159. In *Kim v. Ji Sung Yoo*, the District Court for the Southern District of New York observed that:

> "Collateral estoppel 'will bar the relitigation of an issue of law or fact that was raised, litigated, and actually decided by a judgment in a prior proceeding between the parties, if the determination of that issue was essential to the judgment, regardless of whether or not the two proceedings are based on the same claim.' " McGuiggan v. CPC Int'l, Inc., 84 F.Supp.2d 470, 477–78 (S.D.N.Y. 2000) (quoting N.L.R.B. v. United Techs. Corp., 706 F.2d 1254, 1260 (2d Cir. 1983)). "In the context *of* issue preclusion, an issue can be one of fact or of law." Klein v. City of N.Y., No. 10 Civ. 9568 (PAE) (JLC), 2011 WL 5248169, at *6 (S.D.N.Y. Oct. 28, 2011) (internal quotation marks, alterations, and citation omitted), report and recommendation adopted, 2012 WL 546786 (S.D.N.Y. Feb. 21, 2012). "For issue preclusion to apply, a prior court need not have expressly decided the identical issue being litigated in a subsequent case; so long as the prior court decided that issue by necessary implication, the issue preclusion rule is satisfied." Id. (internal quotation marks, alterations, and citation omitted). "Trial courts have broad discretion in deciding when to permit the offensive use of collateral estoppel." Wills v. RadioShack Corp., 981 F.Supp.2d 245, 264 (S.D.N.Y. 2013)."[47]

160. Thus, the issues decided in the first and second actions need not be identical for collateral estoppel to apply; an issue decided "by necessary implication" in the first action would suffice to bar the second proceedings. Thus, even though the Prior SIAC Tribunal did not expressly decide whether Respondents 1 and 2 breached duties allegedly owed to the Claimants, or whether San Marco and Kelly Gass were "actually qualified" or "jointly appointed", or whether they breached their fiduciary duties by accepting their appointment, the absence of such rulings would not, in and of itself, rule out the applicability of collateral estoppel. Similarly, collateral estoppel is not to be discarded by the fact that the Prior SIAC Arbitration only discussed whether the Casino was "managed in good faith," an arguably lower standard than compliance with fiduciary duties argued in this arbitration.

161. As recounted in the procedural history, Respondents 1 and 2 presented a preclusion chart seeking to show the identity between the issues in the Prior SIAC Arbitration and those in this arbitration. The Claimants inserted their comments into the same chart, to which the Respondents replied, after which the completed Preclusion Chart was filed on 28 August 2020. An examination of this Chart reveals that the issues before this Tribunal are identical (identity being understood in the manner just described) to those before the Prior SIAC Arbitration. The content of the chart is discussed below.

47 Exh. RLA1/2-015, Kim v. Ji Sung Yoo 311 F.Supp.3d 598 (2020), 604, fn 2 (emphasis added).

a. Mismanagement of the Casino

162. In this arbitration, the Claimants contend that San Marco and Kelly Gass's "materially deficient management of the Casino" led to the "dramatic downturn" in financial performance, which, in turn, led to the reduction in the market value of the Casino.[48]

163. On this topic, the Prior SIAC Tribunal made the following findings:

> "Sanum argues that San Marco mismanaged the Casino. However, the Majority does not find that the evidence can support the conclusion that the Casino was not managed in good faith. For example, the evidence indicates that the profitability of the Casino was declining prior to Laos' takeover".
>
> […]
>
> (e) Additionally, in a Witness Statement submitted to this Tribunal, Mr. Gore stated that:
>
> "Ms. Gass has reassured the staff at every level that our jobs are secure and she is interested in running a first class Operation. The change has been the best event in the management of the casino since I have been there. For the first time, we have professional casino managers making decisions for the benefit of the employees and customers. The staff is very satisfied from the top to bottom. We are all working together as a team to improve the casino operation."
>
> […]
>
> It is inevitable that disagreements over management decisions or management styles will occur among operators. However, based on the evidence in the record, the Majority concludes that the disagreements, here, do not rise to the level being deemed mismanagement or a failure to act in good faith sufficient to support a claim of breach. Moreover, the evidence is insufficient for us to quantify the relationship between any asserted mismanagement to the value of Savan Vegas, a conclusion with which the Dissenting Opinion of Ms. Lamm agrees".[49]

164. The issues raised in this arbitration concerning the management of the Casino are identical to the issues raised in Prior SIAC Arbitration. Indeed, as already mentioned, the Prior SIAC Tribunal need not have expressly ruled on the precise issue being litigated in the present arbitration for the doctrine of collateral estoppel to apply. It suffices if an issue was decided by necessary implication.

165. The same identity of issues can be seen in respect of the Claimants' allegations concerning the US$ 2 million loan taken by SVCC from JDB (the "JDB Loan"). In this arbitration, the Claimants contend:

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48 SoC, §142. See also, §77.

49 Prior SIAC Award, §§245, 246.

> "Immediately after GOL's seizure of Savan Vegas, at GOL's instigation Gass caused SVCC – 80% owned by Claimants – to seek [the JDB Loan] which was eventually approved for $2 million in July 2015 […]. In the GOL SIAC Arbitration, GOL asserted that the JDB Loan had been needed to cover Savan Vegas's payroll. But that assertion was false. In fact […] the loan was used to pay – primarily with Claimants' own money – Branson's legal bills in representing GOL against Claimants."[50]

166. In the Claimants' Memorial on Counterclaims dated 14 October 2016 in the Prior SIAC Arbitration, the Claimants alleged that:

> "[A] US$2 million line of credit that Mr. Branson directed SVCC to take out soon after the seizure was used to pay attorneys' fees, including for work done prior to the seizure […] This is entirely contrary to Mr Branson's claims before this [SIAC Tribunal] that the loan was taken out because [Claimants] had failed to leave sufficient cash at he Casino to meet its obligations".

167. In this connection as well, the Prior SIAC Tribunal rejected the Claimants' allegations that the Casino was not managed in good faith.[51] It went on to dismiss all other claims and counterclaims.[52]

168. The Prior SIAC Tribunal's ruling on the management of the Casino and its dismissal of all claims and counterclaims in that arbitration at least impliedly rules on the Claimants' allegations concerning GOL's use of the JDB loan, which is sufficient to satisfy the "identity" requirement for the doctrine of collateral estoppel to apply.

169. An identity of issues can also be seen in respect of the Claimants' allegations that the Casino's expenses increased under San Marco and Kelly Gass' management.[53] The Prior SIAC Tribunal expressly ruled on the profitability of the Casino prior to its sale, an issue which is sufficiently identical to the Claimants' allegation in this arbitration that San Maco or Kelly Gass's mismanagement of the Casino resulted in losses to the Casino.

170. Identity of issues is also evident in respect of the Claimants' allegations that San Marco and Kelly Gass "failed to effectively manage gaming revenue and expenses" and that "[t]hese failures included refusing to maintain the property". The Claimants further allege that this supposed "failure" arose from San Marco and Kelly Gass's omission to conduct substantial renovation on Savan Vegas.[54]

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50 SoC, §87.

51 Prior SIAC Award, §§245, 246.

52 Prior SIAC Award, §328(k).

53 SoC, §§76-77.

54 Fitchett WS, §§11-13.

171. In this context, the Prior SIAC Tribunal found that no renovation was contemplated under the Deed:

> "The Deed called for the sale to occur within ten to 13 months. This period was deemed to be sufficient time for the Casino, in its current condition to be sold. It was never contemplated that the Parties would delay selling the Casino until it was refurbished or upgraded or market conditions improved in order to generate a higher price"[55]

172. To the extent relevant to the management of the Casino, the Claimants' allegations that (i) they were not afforded a "full and fair opportunity to be heard" in the Prior SIAC Arbitration; (ii) new evidence is available to this Tribunal; (iii) San Marco and Kelly Gass's alleged mismanagement was not "necessarily decided" in the Prior SIAC Arbitration, *inter alia* because San Marco and Kelly Gass were not parties before the Prior SIAC Tribunal; and (iv) the Prior SIAC Tribunal's findings are not decisive are all addressed below (§§210 et. seq.).

b. Insufficient information provided to the Claimants

173. In this arbitration, the Claimants put forward the following contention:

> "San Marco and Gass did not come close to fulfilling their duty of candor. To the contrary, they refused to provide Claimants with basic financial and operational information concerning the Gaming Assets, let alone any information regarding Respondents' efforts to sell the Gaming Assets. San Marco continued that refusal even after Claimants made repeated requests for such information, and even purported to bar Claimants from communicating directly with San Marco and Gass. In fact, San Marco and Gass brazenly stated that they had "no specific reporting obligation to Sanum" and that Sanum was not "entitled to the information it has requested [...]." San Marco and Gass claimed further that they had "no obligation to give operational reports of any kind to Sanum," contending that "Sanum is no longer the operator of the Casino and has no reasonable expectation of receiving operating reports."[56]

174. In support of their contention, the Claimants principally rely on a letter of 21 June 2015 in which Mr. Baldwin identified 19 missing pieces of information to Ms. Gass.[57] On the information provided, the Prior SIAC Tribunal made the following finding:

> "On 30 June 2015, the Tribunal issued the Order on Respondents' Amended Application for Provisional Measures, denying the application to the extent that it sought the return of the operation of the casino to Respondents […] However, the Tribunal did require Claimant to provide Respondents with regular and ongoing financial information pertaining to the operation of the casino".

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55 Prior SIAC Award, §§264.

56 SoC, §153. See also §§64-65.

57 Exh. C-0089, Letter from J. Baldwin to K. Gass, dated 21 June 2015.

> […]
>
> The Tribunal issued Procedural Order 7 on 13 August 2015 requesting […] (b) Claimant to report to the Tribunal and to Respondents the steps taken to provide Respondents with ongoing financial and marketing information concerning the casino as required under the Tribunal's Order on Respondents' Amended Provisional Measures Application.
>
> […]
>
> During the hearing of 16 December 2015, the Parties agreed on many of Respondents' requests for financial and tax information.
>
> […]
>
> [T]he Tribunal did require Laos to provide Sanum with regular and ongoing financial information pertaining to the operation of the Casino and to the efforts to sell the Casino including marketing".[58]

175. The Prior SIAC Tribunal thus ruled on the disclosure of information to the Claimants, thereby impliedly ruling on the Claimants' allegations in this arbitration. As stated above, this is sufficient to satisfy the "identity" requirement for the doctrine of collateral estoppel to apply.

176. This being so, the Tribunal is aware of the Claimants' argument that the Prior SIAC Tribunal did not rule on the 19 missing pieces of information identified by the Claimants in their letter of 21 June 2015 "because it never considered them".[59] The Tribunal does not agree. It is true that the 30 June 2015 order of the Prior SIAC Tribunal does not mention the Claimants' 21 June 2015 letter. However, this does not mean that the Prior SIAC Tribunal did not rule on the Claimants' document requests contained in that letter, either in that ruling or in subsequent rulings. Indeed, the Prior SIAC Tribunal considered the provision of financial and marketing information to the Claimants on at least two further occasions: through Procedural Order 7 on 13 August 2015 and during the hearing on 16 December 2015 at which the Parties agreed on many of Respondents' requests for financial and tax information. Further and in any event, it remains that this issue of provision of information to the Claimants was repeatedly addressed by the Prior SIAC Tribunal. Thus, at the very least, the Prior SIAC Tribunal ruled on the issue by "necessary implication".

177. To the extent relevant to the provision of information, the Claimants' allegations that (i) they were not afforded a "full and fair opportunity to be heard" in the Prior SIAC

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58 Prior SIAC Award, §§26, 29, 32, 123. The hearing of 16 December 2015, inter alia, concerned the Claimants' request of 29 September 2015 to the Prior SIAC Tribunal to order GOL to provide additional financial, tax and corporate information with respect to the casino.

59 Reply, §96.

Arbitration; (ii) new evidence is available to this Tribunal; (iii) the issue was not "necessarily decided" in the Prior SIAC Arbitration *inter alia* because San Marco and Kelly Gass were not parties before the Prior SIAC Tribunal; and (iv) the Prior SIAC Tribunal's findings are not decisive are all addressed below (§§210 et. seq.).

c. Appointment and remuneration of San Marco and Kelly Gass

178. In this arbitration, the Claimants submit that San Marco and Kelly Gass received excessive compensation, stating that:

> "San Marco and Gass breached their contractual and fiduciary obligations to Claimants the minute they agreed to manage, operate, market, and sell the Gaming Assets. The Management Contract Gass signed as President of San Marco specifically stated that San Marco was being employed – at Claimants' expense – for the purpose of providing services "as contemplated in Sections 12, 13 and 16 of the Deed,"137 of which San Marco and Gass were thus explicitly on notice. Deed Section 12 provides that: (a) the gaming operator was to be appointed by agreement of Claimants and GOL – not by either party unilaterally – and failing agreement, by an explicitly specified mechanism; and (b) only a qualified gaming operator was eligible for appointment. Ignoring Deed Section 12's provisions, GOL unilaterally appointed the unqualified San Marco, with the unqualified Gass as its president, without even seeking – let alone obtaining – Sanum's agreement, and without following the explicitly specified mechanism for appointing the operator absent such agreement. San Marco and Gass nevertheless accepted GOL's unilateral appointment and executed the Management Contract despite the failure of the appointment to comport with Deed Section 12's requirements, thereby instantly violating their obligations to act for the benefit and in Claimants' best interests."[60]

179. In this connection, the Prior SIAC Tribunal reached the following findings:

> "Laos' choice of San Marco and Ms Gass was not arbitrary or unreasonable. Rather, it was based on the recommendation of RMC, which […] the Deed recognized as a qualified agent and gaming operator.
>
> […]
>
> [B]y repeatedly refusing to cooperate with Laos to appoint RMC or another entity to manage and sell Savan Vegas, Sanum chose to exclude itself from the process of appointment the gaming operator. Under the totality of the evidence, it was reasonable for Laos to move forward and appoint the gaming operator independently"
>
> […]
>
> Laos is claiming that it has borne US$4,162,339.49 in sale costs set forth as follows…b. The Ministry of Finance paid San Marco a brokerage fee of US$2,520,000.00. The Majority finds these

60 SoC, §56. See also §157.

> amounts, which total US$4,162,339.49 to be applicable and substantiated sale costs which are due to Laos and must be deducted from Sanum's portion of the purchase price pursuant to Paragraph 16 of the Deed".[61]

180. The Prior SIAC Tribunal thus ruled on San Marco and Kelly Gass' appointment and compensation, thereby at least impliedly ruling on the Claimants' allegations in this arbitration. Indeed, if San Marco and Kelly Gass were unqualified to manage and sell the Casino as the Claimants allege in this arbitration, then GOL would not have acted reasonably in appointing them. Similarly, if San Marco and Kelly Gass' appointment was reasonable, then it could not have been unreasonable for them to accept that appointment. Hence, the issues are sufficiently identical for purposes the application of the doctrine of collateral estoppel.

181. The Claimants' allegations that (i) San Marco and Kelly Gass's appointment and compensation was not "necessarily decided" in the Prior SIAC Arbitration because San Marco and Kelly Gass were not parties before the Prior SIAC Tribunal; and (ii) the Prior SIAC Tribunal's findings are not decisive are addressed below (§210 et. seq.).

d. GOL directed and controlled the Casino's operations

182. In this arbitration, the Claimants put forward the following allegations:

> "Abdicating their fiduciary duties to Claimants, San Marco and Gass did GOL's bidding as directed by its counsel, David Branson. When they were not doing Branson's bidding, San Marco and Gass acquiesced in his usurpation of the "complete operational control" with which they were entrusted, permitting him to adversely micromanage the Casino's operations."[62]

183. As for the Prior SIAC Tribunal, it held the following view:

> "Laos was also to comply with the principles of Annex E to the Deed [Annex E contains the Scope of Services to be performed by the gaming operator to manage and sell the Gaming Assets.] by retaining and assisting a broker to market and sell the Casino. In this regard, this Tribunal also observed that Laos had acknowledged that it had, as did its agents such as Ms. Gass, a "fiduciary duty to Sanum in managing the casino and making efforts to obtain the maximum price at a sale"."[63]

184. The Prior SIAC Tribunal thus found that Kelly Gass was an agent of GOL for the benefit of GOL and Sanum, responsible for managing, marketing and selling the Casino and that there was no mismanagement of the sale of the Casino (see below §§185 et. seq.).

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61 Prior SIAC Award, §§244, 318.

62 SoC, §59. See also §§60-62.

63 Prior SIAC Award, §§117.

Put differently, GOL's actions, either directly or through its agents San Marco and Kelly Gass, were examined by the Prior SIAC Tribunal, which concluded that they did not result in a mismanagement of the sale of the Casino[64] nor, as a consequence, adversely affect the Claimants' rights in the sale of the Casino. These issues are sufficiently identical to the issues raised in this arbitration about whether San Marco and Kelly Gass allowed GOL to direct and control the Casino's operations to the detriment of the Claimants.

e. Mismanagement of the sale of the Casino

185. In this arbitration, the Claimants contend that "[a]t best, San Marco and Gass completely mismanaged the sale process. At worst, they deliberately sabotaged it."[65] According to them, San Marco and Kelly Gass "[were] nothing more than a loss leader to secure the real transaction between GOL and Macau Legend".[66] They further contend that San Marco and Kelly Gass had an "admitted" fiduciary duty to the Claimants to maximize the sales price of the Gaming Assets, but they "abandoned" that duty.

186. The Prior SIAC Tribunal made the following findings:

> "[A]fter San Marco and Ms. Gass were appointed to sell and manage the Casino on the recommendation of RMC, they began to prepare for the auction, expending substantial resources to do so. For example, they retained experienced, international counsel […] to lead the Laos' corporate team and to oversee the sale generally. They also retained gaming law experts, IT specialists to prepare a data room and marketing experts and drafted the SOI, which was distributed and also announced by several websites, and accepted responsive submissions from 13 entities. San Marco and Ms. Gass then organized a conference call for all approved bidders on 7-8 April 2016, providing the approved entities with an opportunity to meet with Laotian officials and view the Casino.
>
> […]
>
> [T]he evidence does not indicate that Ms. Gass or San Marco rushed or compressed the process or overlooked buyers in bad faith but, rather in good faith, endeavoured to sell the Casino in accordance with the Deed's requirement of an expeditious sale […] Laos' efforts, through Ms. Gass and San Marco, followed upon [Claimants'] failure to take any steps to comply with any provisions of the Deed, and especially to take steps to sell the Casino by the Sale Deadline of 15 April 2015"[67]

64 Prior SIAC Award, §§245-247.

65 SoC, §137.

66 Reply, §42.

67 Prior SIAC Award, §§200, 252, 255, 261, 262, 263, 264.

187. The issues raised in this arbitration concerning San Marco and Kelly Gass's mismanagement of the sale of Casino are thus identical to the issues raised in Prior SIAC Arbitration.

188. In this context, the Claimants cite numerous "egregious examples" of the Respondents' wrongdoing, including "refusal to communicate with Claimants regarding the management and operation of the Gaming Assets, or to respond to Claimants' repeated requests for regular and ongoing financial information"; "failure to advise Claimants about efforts to market and sell the Gaming Assets, or to accept input from Claimants into those efforts – instead allowing GOL to direct the sale for its own benefit"; "refusal to honor their fiduciary obligations to Claimants to maximize proceeds from the sale of the Casino"; "abdication of critical aspects of the sale process to counsel for GOL"; "failure to adequately advocate for and obtain a fair and reasonable Casino tax appropriate for the circumstances" and others.[68] These allegations have been examined and have been found to be identical to the issues raised in the Prior SIAC Arbitration.

189. The same identity of issues can also be seen in respect of the Claimants' allegations concerning the auction process being "abandoned" and a "sweetheart deal" being made with Macau Legend to reduce the price of the Casino.[69] In these respects, the Prior SIAC Tribunal reached the following conclusions:

> "Regarding the sale process, Respondents allege that Laos abandoned the auction process to arrange a "sweetheart deal" with Macau Legend in order to depress the sale price and benefit from a higher tax rate. The evidence indicates, however, that Laos intended to sell the Casino by auction and, due to the circumstances, terminated the auction process to ensure the highest value for the Casino.
>
> […]
>
> [T]he evidence indicates that Laos' decision to pre-empt the auction process and sell the Casino to Macau Legend was made to ensure the highest price, aligning with Paragraph 11's [of the Deed] requirement that the sale occurs "on a basis that will maximize Sale proceeds," not necessarily via an auction.
>
> […]
>
> While it is possible that some interested entities may have desired additional information during the sale process, Respondents have failed to adduce sufficient evidence that Ms. Gass or Laos actively and intentionally excluded information from them, intentionally discouraged them from participating in the sale process, or included

68 SoC, §12.

69 SoC, §127.

> them in the sale process as a mere smoke screen to legitimize a pre-planned sale to Macau Legend. These assertions cannot be reconciled with the totality of the evidence, including Ms. Gass' contact with the bidders, and are not sufficient to support a conclusion that San Marco or Ms. Gass failed to conduct the sale process in good faith."[70]

190. In this arbitration, the Claimants further submit that IKGH's queries during the bidding process were ignored.[71] That same issue was raised before the Prior SIAC Tribunal which addressed it as follows:

> "[W]ith respect to the argument that San Marco ignored queries from IKGH, another potential bidder, the evidence demonstrates that Ms. Gass initiated contact with Mr James' Priessler, an Independent Director of IKGH, with whom she was previously acquainted, in order to interest him in participating in the sale in February 2016 […] his witness statement indicates that he sought the information prior to when the data room, which would contain the financial information, had been made available to all approved bidders and also that when IKGH had been approved as a bidder, IKGH decided not to move forward with the bid. On 18 April 2016, Ms, Gass wrote to IKGH noting that she had not received the infonmation she requested on 11 March 2016 and requesting "any update you might have regarding the requested information on IKGH's continued participation in the sale of Savan Vegas". There was no response from anyone at IKGH […]
>
> […]
>
> While it is possible that some interested entities may have desired additional information during the sale process, Respondents have failed to adduce sufficient evidence that Ms. Gass or Laos actively and intentionally excluded information from them, intentionally discouraged them from participating in the sale process, or included them in the sale process as a mere smoke screen to legitimize a pre-planned sale to Macau Legend. These assertions cannot be reconciled with the totality of the evidence, including Ms. Gass' contact with the bidders, and are not sufficient to support a conclusion that San Marco or Ms. Gass failed to conduct the sale process in good faith."[72]

191. Similarly, in this arbitration, the Claimants contend that ISMS, another potential bidder for the Casino, was "intentionally excluded".[73] The same contention was reviewed by the Prior SIAC Tribunal in the following terms:

> "Regarding the assertion that […] ISMS, was not approved as a bidder [Claimants] have provided nothing more than supposition and hearsay that ISMS was intentionally and improperly excluded.

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70 Prior SIAC Award, §§252, 255, 263.

71 SoC, §120.

72 Prior SIAC Award, §§261-263.

73 SoC, §126.

> (Also fn 235: "Gareth Arnold, a principal at ISMS […] admits that Ms. Gass responded to his inquiries and met him twice in person in Bangkok).
>
> […]
>
> While it is possible that some interested entities may have desired additional information during the sale process, Respondents have failed to adduce sufficient evidence that Ms. Gass or Laos actively and intentionally excluded information from them, intentionally discouraged them from participating in the sale process, or included them in the sale process as a mere smoke screen to legitimize a pre-planned sale to Macau Legend. These assertions cannot be reconciled with the totality of the evidence, including Ms. Gass' contact with the bidders, and are not sufficient to support a conclusion that San Marco or Ms. Gass failed to conduct the sale process in good faith."[74]

192. Yet again, in this arbitration, the Claimants' complain that the Tak Chun Group, a junket operator and prospective buyer, was not seriously considered as a potential bidder.[75] The identical issue was before the Prior SIAC Tribunal:

> "However, the overwhelming evidence is that this buyer – who [Claimants] eventually alleged was Tak Chun – never made a credible expression of interest prior to the execution of the Deed.
>
> […]
>
> Despite producing no evidence of Tak Chun's interest in Savan Vegas prior to the Deed and never even speaking with the corporate officers of Tak Chun prior to the Deed, Mr. Baldwin maintains that the "Stevens" – whose last names he did not know, with whom he never completed a deal, and whose authority to make any large business acquisition he could not describe – could ensure that Tak Chun would purchase Savan Vegas. Given the totality of the evidence, the Majority cannot find Mr. Baldwin's assertions to be credible.
>
> […]
>
> While it is possible that some interested entities may have desired additional information during the sale process, Respondents have failed to adduce sufficient evidence that Ms. Gass or Laos actively and intentionally excluded information from them, intentionally discouraged them from participating in the sale process, or included them in the sale process as a mere smoke screen to legitimize a pre-planned sale to Macau Legend. These assertions cannot be reconciled with the totality of the evidence, including Ms. Gass' contact with the bidders, and are not sufficient to support a conclusion that San Marco or Ms. Gass failed to conduct the sale process in good faith."[76]

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74 Prior SIAC Award, §§262, 263.

75 Baldwin WS I, §93.

76 Prior SIAC Award, §§200, 201, 263.

193. The Claimants insist that their arguments in this arbitration are different from those in the Prior SIAC stating that "[w]hether Tak Chun made a particular expression of interest in Savan Vegas in 2014 is not dispositive of whether San Marco and Gass reached out to Tak Chun, Donoco, ST and numerous others with the potential to be credible bidders and ultimately create a more robust sale process."[77] The Tribunal disagrees. The Claimants' allegation here is effectively that San Marco and Kelly Gass mismanaged the sale process, an issue which, as stated above, was fully addressed by the Prior SIAC Tribunal. In addition, the Prior SIAC Tribunal also found that there was no viable buyer prior to signing of the Deed,[78] an issue which effectively encompasses the Claimants' complaint in this arbitration that San Marco and Kelly Gass did not reach out to credible buyers to create a robust sale process.

194. In this arbitration, the Claimants contend that the bidding process was "circumvent[ed]" to the disadvantage of Silver Heritage.[79] On this matter, the Prior SIAC Tribunal held as follows:

> "[A]t about this time, the Government also learned that Silver Heritage lacked funding. Since neither RGB nor Silver Heritage was able to bid, Laos worried that Macau Legend would be the only bidder at the auction and therefore offer a low bid".
>
> Under the circumstances presented by Silver Heritage and RGB, the Majority finds that the evidence does not establish that Laos' decision to pre-empt the auction and arrange a sale with Macau Legend was made in bad faith. Rather, we find the evidence indicates that Laos' decision to pre-empt the auction process and sell the Casino to Macau Legend was made to ensure the highest price"[80]

195. The Tribunal further notes an identity of issues in both arbitrations in respect of the Claimants' allegation that San Marco and Kelly Gass improperly diverted US$ 26,659,000 of the sale proceeds of the Casino for payment of taxes.[81] This is not how the Prior SIAC Tribunal characterized the situation:

> "Of the US$42,000,000 paid by Macau Legend for Savan Vegas, Claimant was entitled to collect US$26,659,000 as Savan Vegas'

77 Preclusion Chart, item 12.

78 Prior SIAC Award, §202 ("We find that the only reasonable conclusion based on the totality of the evidence in this record, articulated above, is that there was no viable "credible" or "interested" buyer prior to the signing of the Deed").

79 SoC, §13.

80 Prior SIAC Award, §§254, 255.

81 SoC, §131.

> unpaid tax liability, and the remaining US$15,341,000.00 constituted the sales price".[82]

196. In respect of the concerns of potential buyers regarding the development of a similar project near the Casino raised in this arbitration,[83] the Prior SIAC Tribunal offered the following remarks:

> "[T]he evidence presented proved that even if the online reference to a rival casino might be sufficient evidence of breach, any such breach would have been cured by the direct statements of the Government's officials denying the cyber- gossip and correcting the misleading newspaper articles within approximately two weeks of the Notice of Material Breach".
>
> […]
>
> Laos produced three written witness statements of the relevant Laotian Ministers denying that any such license was granted, as well as statements from the developers correcting and clarifying that there was no agreement to develop a casino. Even Mr. John Baldwin admitted "in cross examination that he had no personal knowledge of such Government approval [of the issuance of a competing license]"."[84]

197. The BIT I Tribunals also ruled on this issue.[85]

198. Further, in this arbitration, the Claimants allege that San Marco and Kelly Gass failed to accept any recommendations from the Claimants in connection with the marketing and sale of the Casino.[86] This issue was addressed by the Prior SIAC Tribunal, which denied the Claimants' application for an order to require GOL to provide written reasons for the rejection of any of the Claimants' suggestions on the marketing materials for the sale of the Casino. The Prior SIAC Tribunal determined that GOL was to consider, but was not bound by suggestions and input from Sanum:

> "The Tribunal issued the Order on Respondents' Requests for Provisional Measures and Claimant's Motion for a Stay of Discovery and Motion Practice on 6 January 2016, resolving the remaining requests as follows: […] The Tribunal denied [Claimants'] request to require [GOL] to provide written reasons for the rejection of any of [Claimants'] suggestions on the marketing materials.
>
> [Claimants] next contend that the sale process was a sham because [GOL] did not consider and accept all the comments and suggestions made by [Claimants] during the sale process […] However […] Laos was obligated to "in good faith consider any –

82 Prior SIAC Award, §328(g).

83 SoC, §147.

84 Prior SIAC Award, §§162, 163.

85 Decision on the Merits, Lao Holdings N.V. v. The Government of the Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6 at §12, and §§100-102.

86 SoC, §108.

> not take all– suggestions and input from Sanum". We do not find that there is sufficient evidence establishing that Laos' rejection of some of Respondents' comments amounts to a failure to consider in good faith Respondents' input".
>
> Regarding [Claimants' argument that Laos ignored their suggestions of potential purchasers, the record indicates that Sanum's only suggestions of potential purchasers were made on 1 May 2015 by Ms. Deborah Deitsch-Perez […] none of these entities or individuals made a submission after the SOI was published by Laos and announced by several websites…On this record, there is insufficient evidence to conclude that Laos in bad faith failed to consider other credible and interested buyers".[87]

199. In this arbitration, the Claimants also allege that San Marco and Kelly Gass took US$ 1.95 million in currency from the cage and vault:

> "Further, on the day GOL physically took possession of Savan Vegas […] there was $1.95 million in currency in the cage and vault. San Marco and Gass did not return this money to Claimants, nor did they sell it separately to the buyer of Savan Vegas, Macau Legend. Instead, Macau Legend paid only the purchase price of $42 million negotiated in May 2016 even though its financial statements show that there was approximately $1 million […] in cash at Savan Vegas when Macau Legend took over on 1 September 2016. Typically the seller would keep the cash or the buyer would separately pay for it."[88]

200. The Tribunal recalls that the Asset Purchase Agreement of 19 August 2016 governing the sale of the Casino to Macau Legend included USD 1 million in cage cash.[89] The Claimants' allegation is thus essentially an allegation that the sale process was mismanaged, an issue on which the Prior SIAC Tribunal has ruled (see above §§185 et. seq.). The issues in this arbitration are thus sufficiently identical to those raised in the Prior SIAC Arbitration. Further and in any event, the Prior SIAC Tribunal's dismissal of all claims and counterclaims in that arbitration at least impliedly rules on the Claimants' allegations that Respondents 1 and 2 took US$ 1.95 million in currency from the cage and vault, which is also sufficient to satisfy the "identity" requirement for the doctrine of collateral estoppel to apply.

201. Finally, in this arbitration, the Claimants' argue that Respondents 1 and 2 breached their duty of care by failing to pursue the expansion of the Savannakhet airport to allow

87 Prior SIAC Award, §§32, 256-258.

88 SoC, §128.

89 Exh. R3-014, Asset Purchase Agreement for the Savan Vegas Hotel and Entertainment Complex, dated 19 August 2016.

its use by larger aircrafts.[90] This issue was equally addressed by the Prior SIAC Tribunal:

> "All the evidence submitted indicates that the runway at Savannakhet Airport could not be extended on the airport's existing land while complying with ICAO regulations and at no cost to Laos, as required by the Deed. To accommodate Boeing 737 planes, the runway would need to extend at least 2200m and ideally 2400m. However, an unrebutted report issued by RSE Associates Inc […] stated that to comply with ICAO regulations, the runway could be extended on the airport's existing land only to a length 1829m. Any additional extension would require building on adjacent residential land not owned by the Government.
>
> […]
>
> [T]he plain language in Paragraph 25 of the Deed, which governs Laos' obligation with respect to the runway extension, does not obligate Laos to take whatever measures are necessary to ensure the extension […]
>
> […]
>
> Thus, the Majority concludes that Claimant did not breach any obligation under these circumstances by failing to grant the new buyer the right to extend the runway at Savannakhet. Although it is unclear from the Dissenting Opinion of Ms. Lamm whether she determines that any breach occurred, it is clear that the Dissenting Opinion does not find any quantifiable damage attributable to the airport issue to have been proved".[91]

202. It follows from the foregoing that the issues raised in this arbitration concerning the mismanagement of the sale of the Casino are identical to the issues in the Prior SIAC Arbitration.

203. To the extent pertinent to this topic, the Claimants' allegations that (i) they were not afforded a "full and fair opportunity to be heard" in the Prior SIAC Arbitration; (ii) new evidence is available to this Tribunal; (iii) the issue was not "necessarily decided" in the Prior SIAC Arbitration *inter alia* because San Marco and Kelly Gass were not parties before the Prior SIAC Tribunal; and (iv) the Prior SIAC Tribunal's findings are not decisive are all addressed below (§§210 et. seq.).

f. 28% tax

204. In this arbitration, the Claimants advance the following allegations with respect of the setting of the tax:

> "[San Marco and Kelly Gass] continued to sit back and take $150,000 a month of Claimants' money while failing to take

90 Preclusion Chart, item 16 referring to SoC, §132.

91 Prior SIAC Award, §§235 et. seq.

> appropriate steps to ensure GOL's compliance with the Deed's prescribed tax-setting process and requirement that a flat tax be set, to provide the Macau accountant with information that would enable a fair and reasonable flat tax to be set, or to provide Claimants with information with which to persuade the Barkett Tribunal, which was supervising Deed performance, to require GOL to comply with the Deed's tax provisions."[92]

205. The Claimants submit that it is undisputed that San Marco and Kelly Gass had a fiduciary duty to maximize the sale proceeds of the Gaming Assets. They further argue that allowing a 28% ad valorem tax instead of the required reasonable flat tax breached that duty as the ad valorem tax failed to maximize the sale proceeds. In reality, it directly and significantly reduced the sales price, as the BIT I Tribunals also recognized. For the Claimants, "[i]mposing the wrongful and massively harmful 28% tax was a material breach of the Deed, and SM&KG's allowing it to negatively affect the sales price was a breach of their fiduciary duty."[93]

206. The Prior SIAC Tribunal addressed the issue of the establishment of the Flat Tax Committee and the appointment of Mr. Va, who was entrusted with setting the tax.[94] It then went on to find:

> "The Majority finds that there is also insufficient evidence that the process by which Mr. Va set the 28% tax rate was biased. The evidence indicates that Mr. Va was a qualified, impartial, and independent professional […] Additionally, there is no indication that, other than giving Mr. Va three reports on taxation upon his formal engagement, the Government interfered with or sought to influence Mr Va's determination or that the Government contacted him at any point while he was determining the tax rate".
>
> […]
>
> As stated in Laos' notice of 29 December 2014, if the FT Committee did not establish a new flat tax, Laotian tax law indisputably would apply to Savan Vegas, imposing a rate of 35% on GGR and an additional 10% VAT […] Sanum chose not to participate in the FT Committee, and in so doing, forwent its opportunity to influence the tax rate. Therefore, had Laos opted not to ask the Macau Society to appoint an accountant to determine the flat tax, Savan Vegas would be subject to the tax rate imposed under Laotian tax law – 35% on revenue and 10% VAT - as this Tribunal would have no authority to relieve Sanum from this obligation absent a new flat tax agreement between the Parties".
>
> […]
>
> Moreover […] if no new flat tax agreement were concluded, the default would have been to tax Savan Vegas according to the rates

92 SoC, §71.

93 Reply, §53.

94 Prior SIAC Award, §§169-175.

> imposed under Laotian tax law, not according to the expired, prior flat tax agreement. Given that Mr. Va's 28% tax on GGR is lower than the rate imposed by Laotian tax law and Sanum was explicitly and repeatedly told that Laotian tax law would apply if no new flat tax were negotiated, the Majority finds nothing unfair or unreasonable about the outcome […] The Majority is also not persuaded that this 28% tax rate was so high as to prevent a sale of Savan Vegas for the maximum value – most notably because Savan Vegas was sold subject to this 28% tax rate and multiple bidders were interested in purchasing the Casino".
>
> […]
>
> [T]here is no requirement under the Deed that the tax rate set by the FT Committee fall within a certain range. Indeed, the two times Mr. Baldwin testified before this Tribunal, he made it clear that the Parties knew they would be bound by whatever determination the FT Committee made".[95]

207. The issues raised in this arbitration concerning the 28% tax are thus identical to those decided in the Prior SIAC Arbitration. Indeed, the Prior SIAC Tribunal addressed the process for setting the tax and the imposition of a 28% tax rate, finding it fair and reasonable. Thereby, it necessarily implied that San Marco and Kelly Gass's conduct in respect of such tax was in conformity with their contractual duties.

208. Finally, the Tribunal notes that the claims made in the Complaint filed in Delaware District Court are nearly identical to those in this arbitration. The Delaware Court regarded these claims as "intertwined" with the Deed, which, as noted above, was the subject matter of the Prior SIAC Arbitration.[96]

209. It follows that the issues in this arbitration are identical to the issues in the Prior SIAC Arbitration and, hence, that the first requirement for collateral estoppel is met.

(ii) Necessarily decided in the prior action

210. Turning now to the second requirement, the Claimants submit that the Respondents have not "identif[ied] a specific determination by the [Prior SIAC Tribunal] essential to their decision".[97] They add that GOL "repeatedly argues that certain issues were previously decided, with no discussion of their necessity to the decision in the GOL SIAC Award."[98] They further assert that, as San Marco and Kelly Gass were not parties

95 Prior SIAC Award, §§271 et. seq.

96 Exh. C-001, p.7 ("Accordingly, the defendants have a sufficiently close relationship to Laos that they may enforce the arbitration clause in the deed against plaintiffs, because all of the claims in the complaint are intertwined with the Deed.").

97 Reply, §79.

98 Reply, §79.

before the Prior SIAC Tribunal, any statements made regarding them in the Prior SIAC Award are dicta. No such statements could have been "necessarily decided" in those proceedings, and thus the Prior SIAC Award cannot have preclusive effect.

211. The Tribunal does not agree with the Claimants' submissions. *In re Neal*, the Court of Appeals of New York noted that "[c]ollateral estoppel applies only to determinations that were essential to the [prior] decision".[99] In *American Ins. Co. v. Messinger*, the same Court held that collateral estoppel or issue preclusion applies even where the parties are not the same in both proceedings:

> "'Issue preclusion' refers to discrete issues of fact or law rather than to claims or causes of action, and may arise in either of two situations: where the parties are the same and one is barred from relitigating an issue which was adjudicated in the prior action or proceeding between them; or where the parties are not the same but nonetheless one of the parties to the subsequent action or proceedings is foreclosed in the second from relitigating an issue which was determined in the first action or proceeding".[100]

212. Thus, the fact that San Marco and Kelly Gass were not before the Prior SIAC Tribunal is not decisive. Only the determinations made by the Prior SIAC Tribunal that were essential to the Prior SIAC Tribunal's conclusions are decisive and carry collateral estoppel effects.

213. In the Prior SIAC Arbitration, the Claimants counterclaimed that GOL had breached the Settlement Deed. In a nutshell, and as is clear from the excerpts from the Prior SIAC Award reproduced above, the Prior SIAC Tribunal found that (i) there was no mismanagement of the Casino; (ii) the sale process was executed expeditiously and in good faith; (iii) the 28% tax set by Mr. Va was fair and reasonable; and (iv) there was no evidence of loss suffered by the Claimants. From its review of the Prior SIAC Award, the Tribunal concludes that these determinations were essential to the Prior SIAC Arbitration.

214. Accordingly, this requirement for collateral estoppel is also fulfilled.

(iii) Decisive of the present action

215. The Claimants submit that the Respondents have not "identif[ied] a specific determination by the [Prior SIAC Tribunal] decisive of an issue before this Tribunal […]."[101] The Tribunal does not consider this submission well-founded. As was just

99 Exh. CLA-0060, In re Neal, 75 A.D.2d 741, 741, 427 N.Y.S.2d 432, 433 (N.Y. App. Div. 1980).

100 RLA1/2-1, American Ins. Co. v Messinger, 43 N.Y. 2d 184 (Court of Appeals of New York) (1997), at 11, footnote 2.

101 Reply, §79.

noted, the Prior SIAC Tribunal found that (i) there was no mismanagement of the Casino; (ii) the sale process was executed expeditiously and in good faith; (iii) the 28% tax set by Mr. Va was reasonable; and (iv) there was no evidence of loss suffered by the Claimants. Each of these determinations was decisive of the claims brought in this proceeding, which is evident from the Tribunal's analysis above (§§215 et. seq.). Each of the issues raised in this arbitration (with the exclusion of the Conversion Claims, considered later, (§303et. seq.), were decided by the Prior SIAC Tribunal (whether directly or by implication) and were necessary to the Prior SIAC Award.

216. In this context, the Tribunal addresses another objection raised by the Claimants, namely that the Tribunal should consider the Prior SIAC Award with "[a] big grain of salt" because in reaching its conclusions, the majority relied on Mr. Gore's first witness statement in the Prior SIAC Arbitration that he later repudiated.[102] The Tribunal recalls that Mr. Gore submitted three witness statements in the Prior SIAC Arbitration, the first of which allegedly supported GOL and the latter two in favor of the Claimants. The Prior SIAC Tribunal relied on Mr. Gore's first witness statement, a fact which was noted in the Lamm Dissent. It is not for this Tribunal to comment on the appropriateness of the Prior SIAC Tribunal's assessment of the evidence before it and its reliance on Mr. Gore's testimony. As is mentioned below, the Claimants did not seek to set aside the Prior SIAC Award, let alone on the basis that the Prior SIAC Tribunal had erroneously relied on evidence that Mr. Gore allegedly later repudiated.

217. The reasoning above equally applies to the Claimants' challenge to the Prior SIAC Tribunal's findings in respect of the propriety of the application of the 28% tax during the sales process,[103] on that tribunal's allegedly erroneous reliance on Mr. Branson's representations,[104] and on any allegations of fraud/forgery advanced in respect of the evidence before the Prior SIAC Tribunal.[105] This is not the appropriate forum for the Claimants to litigate these issues.

218. Therefore, the Tribunal comes to the conclusion that this requirement too is met.

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102 Tr. (Day 1) 100:19-25.

103 Claimants' Opening Presentation, p. 165. See also Claimants' Closing Presentation, p. 75 and Preclusion Chart, p.10 ("The Majority's findings would not be decisive of this action in any case because they depend on the propriety of the application of the 28% tax during the sales process.").

104 Preclusion Chart, Item 9, "Mr. Branson's representations to the Barkett tribunal, plainly influenced the Tribunal's view of the good faith and probity of the process."

105 Chronology, item 50.

(iv) **Full and fair opportunity to contest the decision**

219. The Claimants insist that the "full and fair opportunity" requirement is not met in this case as they were denied "critical disclosures" in the Prior SIAC Arbitration including San Marco and Gass's email communications. The Tribunal disagrees with the Claimants for the reasons mentioned below in the context of the Tribunal's analysis of the whether different procedural opportunities are available in this arbitration that were not available in the Prior SIAC Arbitration (§§230 et. seq.).[106]

220. Further, while the Claimants insist that "the full and fair opportunity standard is different than the failure of due process standard for annulment or set-aside",[107] they have not explained how the standards are different. In any event, the Claimants only argue that they were not given a "full and fair opportunity" because they were denied document production in the Prior SIAC Arbitration. As noted above this argument is rejected and discussed below (§§230 et. seq.). Even if the standards were different as the Claimants contend, this would not change the Tribunal's decision on this issue.

221. The Tribunal also finds it significant that the Claimants did not seek to set aside the Prior SIAC Award on grounds that they were denied a full and fair opportunity to present their case or that they had been prejudiced by the manner in which the arbitration was conducted. In fact, they did not seek annulment of the Prior SIAC Award at all. When GOL filed an application to enforce the Prior SIAC Award, the time for the Claimants to seek annulment had lapsed. After the Singapore High Court issued an ex parte order granting GOL leave to enforce the Prior SIAC Award, the Claimants applied to set aside the ex parte order and sought to resist enforcement of the Prior SIAC Award principally on the premise that the Prior SIAC Award had been performed.[108] While the Tribunal does not have the full record of the Singapore Court proceedings before it, the transcript of the hearing on the Claimants' application suggests that the Claimants did raise some due process concerns with the Prior SIAC Award.[109] Yet, after hearing the parties, the Singapore High Court dismissed the Claimants' application, issuing a judgment setting out the terms of the Prior SIAC Award.

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106 See Reply, §128 ("This issue [having a full and fair opportunity] also reflects the new procedural opportunity afforded to Claimants in this forum, namely the ability to discover documents and evidence from SM&KG, which also factors against applying collateral estoppel.")

107 Claimants' Opening Presentation, slide 137.

108 See Exh. R1&2-027, Defendants Written Submissions For OS 1439_SUM 737.

109 Exh. R1&2-026, Transcript of hearing in HC OS 1439, p.89 ("Your Honour has seen they're actively saying with bias and no natural justice and there would be real practical benefit to having an order that would put paid to arguments that the SIAC award is somehow defective in a legal sense."); see also, pp. 73-75.

222. As a result, the Tribunal finds this requirement satisfied.

223. Consequently, all the requirements for the application of the doctrine of collateral estoppel are met. The Tribunal reaches this conclusion on the basis of the requirements as they were framed by the Claimants. The Tribunal's conclusion relies on the review of each of these requirements, which is mandated by the doctrine of collateral estoppel. The outcome of this analysis is corroborated by a more holistic view of the subject matter of the dispute before this Tribunal and the Prior SIAC Tribunal. Indeed, in both arbitrations, the essential subject matter of the dispute is the same – the alleged mismanagement of the operation and sale of the Gaming Assets by San Marco, Kelly Gass and GOL thereby depriving the Claimants from the revenue to which they were entitled.

224. The Claimants however oppose the application of the doctrine of collateral estoppel, arguing that this case falls under the exceptions to the doctrine. The Tribunal analyzes the Claimants' arguments below.

e. Is there an exception to the doctrine of collateral estoppel that applies in the present case?

225. The Claimants submit that collateral estoppel has many exceptions and relies on the following three:

i. There are conflicting or inconsistent prior decisions;[110]

ii. The procedural opportunities in the two proceedings are different;[111]

iii. New evidence is brought in the second action.[112]

(i) Conflicting/inconsistent prior decisions

226. The Claimants contend that two decisions conflict with the Prior SIAC Award, namely (i) the decision by the BIT I Tribunals to revive the Treaty claims;[113] and (ii) the Lamm Dissent. These "contrary determinations", so say the Claimants, "foreclose any collateral estoppel effect".[114] The Tribunal does not agree.

110 Exh. CLA-0037, Gaston v. Am. Transit Ins. Co., 11 N.Y.3d 866, 867-88 (2008).

111 Exh. CLA-0039, West v. Ruff, 961 F.2d 1064, 1066 (2d Cir. 1992); Exh. CLA-0040 PenneCom B.V. v. Merrill Lynch & Co., Inc., 372 F.3d 488 (2d Cir. 2004).

112 Exh. CLA-0075, Schwartz v. Public Adm'r of Bronx County, 24 N.Y.2d 65, 72 (1969).

113 Reply, §§118-119.

114 Reply, §89.

227. On (i), the BIT I Tribunals found that the 28% tax was not a flat tax and expressly refused to rule on whether the 28% tax was unreasonable or whether it caused loss to the Claimants.[115] As a result of this refusal and because the nature of the tax is not in issue before this Tribunal, there can be no question of a conflicting or inconsistent earlier decision.

228. In respect of the Lamm Dissent ((ii) above), the Tribunal considers that a dissenting opinion cannot be equated with a prior decision. To the contrary, the prior decision is found in the majority opinion, that is, in the Prior SIAC Award. The Claimants have not cited any authority in support of their proposition that a dissenting opinion is in itself sufficient to preclude the application of collateral estoppel. In *Gaston*, on which the Claimants rely, the court held that an insurer was not collaterally estopped from litigating the issue whether the car that collided with the bus in which the injured plaintiffs were traveling was insured as there were conflicting judgments involving different claims and parties arising from the same bus accident.[116] The Tribunal fails to see the analogy with the present situation.

229. As a consequence, the exception related to the existence of conflicting or contradictory earlier decisions does not apply on the facts of this case.

(ii) Different procedural opportunities

230. The Claimants submit that the doctrine of collateral estoppel cannot apply in this arbitration as they were not given a full and fair opportunity of litigating their case in the Prior SIAC Arbitration. Specifically, the Claimants note that they were denied "critical" disclosures in the prior proceedings, including access to Respondents 1 and 2's emails. They also point out that the Prior SIAC Tribunal refused to order disclosure of Mr. Branson's communications with Ms. Gass or even the submission of a privilege log.[117]

231. In *Gramatan*, the New York Court of Appeals stated that there is no right to re-litigate an issue if there had been a full and fair opportunity to litigate it in the first place:

> "a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action […]. This principle, so

115 Exh. C-033, ICSID Tribunal Decision on the Merits of 2nd Material Breach Application dated 15 December 2017, §174; Exh. C-007, PCA Decision on 2nd Material Breach Application dated 15 December 2017, §162.

116 Reply, §116 relying on Exh. CLA-0037, Gaston v. Am. Transit Ins. Co., 11 N.Y.3d 866, 867-68, 901 N.E.2d 743, 744, 873 N.Y.S.2d 250, 251 (2008).

117 Exh. C-0035, Order on Parties' Motions Concerning Privilege Logs, 1 November 2016, §§17-18, §§29-32.

> necessary to conserve judicial resources by discouraging redundant litigation, is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again."[118]

232. The Restatement (Second) of Judgments confirms that re-litigation may be permitted when the second action offers procedures that were not available in the first proceedings:

> "Preclusion may be withheld when the party against whom it is invoked can avail himself of procedures in the second action that were not available to him in the first action and that may have been significantly influential in determination of the issue."

233. The Tribunal recalls that at least six orders concerning discovery, privilege and production of documents were made in the Prior SIAC Arbitration.[119] Particularly on the allegedly privileged communications between Mr. Branson and Ms. Gass, the Claimants requested 41,500 emails, including 25,374 emails to Mr. Branson showing Ms. Gass as the sender or as another recipient and 16,269 emails to Ms. Gass showing Mr. Branson as the sender or as another recipient. The Prior SIAC Tribunal ruled on this request on 1 November 2016, denying the Claimants' requests by majority, as they had failed to demonstrate specificity, relevance, materiality and proportionality of the requests.[120] The majority also stated that, in the circumstances, it could dispense with addressing arguments on privilege and its potential application to these communications.[121] The reasons for the Prior SIAC Tribunal's denying this request are well-established requirements for the production of documents in international arbitration, as is for instance shown by Articles 3(3) and 9(2) of the IBA Rules on the Taking of Evidence, and nothing on this record indicates that the document production orders in the Prior SIAC Arbitration were wrong or unreasonable or otherwise breached the Claimants' opportunity to be heard. The Claimants merely complain that their document requests were denied by the Prior SIAC Tribunal. This is not, therefore, a case of the Claimants not having had a full and fair opportunity of litigating their case. This is rather a case of the Claimants being dissatisfied with the outcome of the procedural decisions of the Prior SIAC Tribunal and now seeking to revisit those decisions. This is not sufficient for the purposes of excluding the application doctrine of collateral estoppel.

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118 Exh. RLA3-011, Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485 (1979) (emphasis added).

119 See Exh. R1/2-018 through Exh. R1/2-023.

120 Exh. C-0035, Order on Parties' Motions Concerning Privilege Logs dated 1 November 2016.

121 Id.

234. It is also notable that the Claimants did not seek to set aside the Prior SIAC Award on the basis that they had been denied an opportunity to present their case because of non-production of documents by their opponents. That they did not do so is all the more significant as they now stress that Arbitrator Lamm "frequently dissented" to the majority's refusal to order "crucial disclosures" necessary to allow the Claimants to make their case and treat the Parties with equality.[122]

235. The Claimants cite two decisions in support of their position, which appear inapposite.[123] In *West v. Ruff*, the plaintiff was given one day notice of his trial. His counsel were not notified and he could neither obtain documents nor the presence of witnesses. The court therefore observed that he had not had a full and fair opportunity of presenting his case.[124] The circumstances in this case are, of course, different. The Claimants had full notice of the Prior SIAC Arbitration and, in fact, actively participated. In *PenneCom v. Merrill Lynch*, the second authority on which the Claimants rely, the court did not hold that collateral estoppel would not apply only because the plaintiff had been denied discovery. Instead, the court granted PenneCom discovery to collect evidence that might show whether PenneCom had been denied a full and fair opportunity to prove its loss in arbitration.[125]

236. Further and in any event, even if they did not have a full and fair opportunity in the Prior SIAC Arbitration, *quod non*, the Claimants have not indicated how the information/documents for which they were denied production would have impacted the outcome of the Prior SIAC Arbitration. The Claimants themselves recognize that this requirement must be satisfied.[126] The same applies in respect of the financial information provided to the claimants in the Prior SIAC Arbitration. While Mr. Branson and Ms. Gass may have misapplied the Prior SIAC Tribunal's order to produce financial

122 Reply, §127 and exhibits mentioned therein.

123 Reply, §126.

124 Exh. CLA-0039, West v. Ruff, 961 F.2d 1064, 1066 (2d Cir. 1992).

125 Exh. CLA-0040, PenneCom B.V. v. Merrill Lynch & Co., Inc., 372 F.3d 488, 493 (2d Cir. 2004) ("PenneCom must be allowed discovery to collect evidence which might support a finding either that PenneCom was not afforded a full and fair opportunity to prove its loss in the arbitration, or that Merrill Lynch should be precluded by its own (alleged) misconduct from asserting the equitable doctrine of collateral estoppel.").

126 See Reply, fn.199 citing Restatement CLA-0038, Restatement (Second) of Judgments (Am. Law Inst., 1982), §29, cmt. d ("Preclusion may be withheld when the party against whom it is invoked can avail himself of procedures in the second action that were not available to him in the first action and that may have been significantly influential in determination of the issue" (emphasis added)).

information as the Claimants allege,[127] it remains that the Claimants have not explained how that information would have influenced the determination of the issues in the Prior SIAC Arbitration.

237. It is a further submission of the Claimants that they were denied an opportunity of presenting their case before the Prior SIAC Tribunal because they were unable to obtain Mr. Branson's communications with Ms. Gass from Mr. Gore because of GOL's claims of privilege.[128] The Tribunal recalls that Mr. Gore submitted two witness statements in support of the Claimants in the Prior SIAC Arbitration. The Claimants have not explained why in the Prior SIAC Arbitration they could not produce the documents which they have filed in this arbitration. This is especially difficult to understand knowing that Mr. Gore's third witness statement was filed on 16 December 2016, a month before the final hearing in that arbitration, and long after Mr. Gore stated he was no longer under GOL's alleged control. Why did the Claimants not introduce the Gore Emails in the Prior SIAC Arbitration as they have done here? Privilege would not have been an obstacle as they insist that no privilege applied to those documents and the Prior SIAC Tribunal did not rule on privilege. The record does not suggest that there was any other bar to the production of the Gore Emails in the Prior SIAC Arbitration. It is thus difficult to see how a full and fair opportunity to litigate would have been denied. It is further telling that the Claimants did not seek to set aside the Prior SIAC Award on this ground.

238. For the foregoing reasons, the Tribunal concludes that this exception to the application of the doctrine of collateral estoppel does not apply in this case.

(iii) New evidence

239. The Claimants submit that "new or previous evidence" "put[s] an entirely different complexion on" the issue to be estopped. For the Claimants, this evidence could not have been adduced in the Prior SIAC Arbitration by reasonable diligence. They also point out that there is "material new [witness] testimony" available to this Tribunal that was not available to the Prior SIAC Tribunal.

240. At the Tribunal's behest, the Parties submitted a joint list of the evidence that is included in this record, but was not before the Prior SIAC Tribunal. It is a long list. However, on

127 Claimants Opening Presentation, slide 153 relying on Exh. C-420, Email from D. Branson to K. Gass et al., 30 June 2015 where Mr. Branson and Ms. Gass disscuss that they were "free to decide" how much financial information they would provide to the Claimants.

128 See Parties' Joint "List of Exhibits Not Before The Barkett Tribunal" filed on 29 August 2020.

a closer examination, it turns out that most of the "new" exhibits are case documents from the other proceedings between the Claimants and GOL.

241. For the so-called new documents (which have not been separately identified on an issue by issue basis), the Claimants have given no reason why they were unable to produce them in the Prior SIAC Arbitration. Indeed, if the documents were available (or could have been available) to the Claimants in that arbitration, the "novelty" requirement would not be met.[129] For example, in respect of the so-called "new evidence" from Mr. Gore, the Claimants have not cogently explained why in the Prior SIAC Arbitration they could not produce that evidence when they could here.

242. The Claimants have provided no explanation either to show that these "new" documents would have been material to their case in the Prior SIAC Arbitration. For instance, they have not substantiated the relevance or materiality of the nine emails[130] that are new in this arbitration (five of which were obtained from San Marco and Kelly Gass).[131]

243. Similar reasoning applies to the Claimants' arguments concerning "material new testimony". First, the Tribunal notes that the Claimants have taken a narrow approach of the testimony before the Prior SIAC Tribunal. In some instances, they claim that testimony is "new" because the witness statements submitted in the Prior SIAC Arbitration did not contain the same words as those used in the witness statements before this Tribunal, even though the same facts were addressed.[132] While the Tribunal understands that San Marco and Kelly Gass were not parties to the Prior SIAC Arbitration and therefore the focus of the testimonies in that arbitration was somewhat different, it remains that where the testimony addresses evidence or facts that was before (or could have been before) the Prior SIAC Tribunal, it cannot be considered as "new" for present purposes. Second, here again, the Claimants have not explained why they could not produce the so-called "new" testimony already in the Prior SIAC Arbitration. For instance, in support of their allegations concerning the Respondents' mismanagement of the JDB Loan, the Claimants rely on the expert testimony of

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129 The Claimants themselves recognize that this requirement must be satisfied. See Reply, fn.199 citing Restatement CLA-0038, Restatement (Second) of Judgments (Am. Law Inst., 1982), §29, cmt. d ("Preclusion may be withheld when the party against whom it is invoked can avail himself of procedures in the second action that were not available to him in the first action and that may have been significantly influential in determination of the issue." (emphasis added)).

130 Exh. C-0411, C-0412, C-0419, C-0424, C-0425.

131 C-PHB 1, §78.

132 See, for instance, Joint List of Evidence, pp.12-13.

Mr. James Searby. They have offered no reason for not submitting this evidence to the Prior SIAC Tribunal. The same is true of Mr. Shepherd's testimony, which the Claimants' contend casts new light on the application of the 28% tax.[133] It is also the case of Mr. Searby's and GGH's testimony, which the Claimants invoke to argue that San Marco's and Kelly Gass's conduct negatively impacted the sales price.[134] Third and in any event, there is no indication that this "new" testimony would have been material to the outcome of the Prior SIAC Arbitration.

244. Finally, the Claimants responded to the preclusion chart produced by the Respondents pointing to the similarity of the issues before this Tribunal and the Prior SIAC Arbitration. Doing so, in response to several allegations, the Claimants only made generic statements that "new evidence" was available, without indicating what the new evidence was, how it would have affected the decision of the Prior SIAC Tribunal or how it should be weighed by this Tribunal to reach a different conclusion than the Prior SIAC Tribunal.[135] Moreover, in the few instances where the Claimants designated specific "new" evidence, they made no assertions about materiality for the Prior SIAC Tribunal or for this Tribunal's assessment. For instance, the Claimants argue that "[n]ew evidence in this proceeding is that Gass argued that the [28%] tax was too high to maximize the sale price […] but that the Government had no intention of listening to Ms. Gass", on the basis of Mr. Gore's testimony in this arbitration and one of the Gore Emails.[136] Yet, this evidence does not prove a breach of fiduciary duty by either San Marco or Kelly Gass. Quite to the contrary, it demonstrates that Kelly Gass raised the tax level with GOL. To take another example, the Claimants assert that San Marco and Kelly Gass violated their duty of care by failing to pursue the expansion of the Savannakhet airport.[137] In support, they invoke one of the Gore Emails.[138] However, contrary to the Claimants' allegation, this email reveals that Kelly Gass and San Marco made efforts to ensure that the sale process was conducted properly.[139]

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133 Claimants' Opening Presentation, p.149, relying on WS Shepherd §§11-12.

134 Claimants' Opening Presentation, p.161, relying on Searby ER §§3-4 and GGH ER, §§10, 35-38, 52-112.

135 See, for e.g., Preclusion Chart, Item Nos. 1, 10, 11 and 13.

136 Preclusion Chart, p.11 relying on Gore WS II §41 and Exh. C-0412.

137 Preclusion Chart, item 16 referring to SoC, §132.

138 Exh. C-414, Email from K. Gass to D. Branson dated 25 November 2015.

139 Exh. C-414, Email from K. Gass to D. Branson dated 25 November 2015 ("You cannot disclose that [a runway expansion] is allowed and neglect to inform investors that the extension that will be permitted does nothing at all to improve the current situation. That is very close to if not fraud from a sellers perspective. [...]. If you want to go this route, that is fine, but all of this needs to be

245. As a result, the Tribunal comes to the conclusion that this exception to the doctrine of collateral estoppel does not apply in this case.

f. Are the claims barred by the doctrine of collateral estoppel?

246. It follows from the foregoing analysis that the "multi-factor, fact-intensive" test proposed by the Claimants to decide on the application of the doctrine of collateral estoppel is satisfied and that none of the exceptions which the Claimants raised is fulfilled. Thus, the Tribunal cannot but hold that the claims (with the exclusion of the Conversion Claims), are barred by the doctrine of collateral estoppel.

247. Respondent 3 contends that, in addition to collateral estoppel, the doctrine of *res judicata* also applies to bar the claims in this arbitration. It points out that under New York's "transactional approach" towards *res judicata*, "all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy".[140] The Claimants oppose this position, stating that the doctrine is inapplicable here, *inter alia* because the parties to the first and second actions, i.e. in the Prior SIAC Arbitration and the present arbitration, are not the same. The Tribunal is of the opinion that, for reasons of procedural economy, it can dispense with resolving this issue. Indeed, the Tribunal has reached the conclusion that the doctrine of collateral estoppel – which is a component of *res judicata*[141] – bars the claims in this arbitration (except for the Conversion Claims considered below). Therefore, it would make no difference in outcome if the claims were equally precluded on grounds of *res judicata*.

248. The Tribunal further notes that the Respondents have not argued that all the Conversion Claims are barred by collateral estoppel.[142] Thus, these claims are

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disclosed accurately. I believe your approach of telling people the government will allow an extension and provide an incomplete report and not disclosing the material and relevant facts is false and misleading. As Travis noted, this seems to be a legal check the box exercise (given what is in the deed of settlement) and has no merit for the sales process. I agree, and believe we should provide either a fulsome report that is accurate and considers the facts or provide no report at all.").

140 R3 Rej. §20 citing Exh. RLA3-059 Toscano v. 4B's Realty VIII Southampton Brick & Tile, LLC, 921 N.Y.S.2d 882, 883 (2011) (emphasis added), quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687 (1981).

141 See Exh. RLA3-011, Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485 (1979) ("Collateral estoppel, together with its related principles, merger and bar, is but a component of the broader doctrine of res judicata which holds that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action").

142 See for e.g. Preclusion Chart, p.22.

considered further below (Section VII). Before it turns to the merits of these claims, the Tribunal must consider the other preliminary objections raised by the Respondents, *i.e.* the Henderson Rule (Sections (B) and abuse of process (C) below).

B. Henderson Rule under Singapore law

1. Respondents 1 and 2's Position

249. Respondents 1 and 2 submit that the rule set out in *Henderson v. Henderson* applies to all arbitrations seated in Singapore being part of the procedural law of the seat. Under that rule, parties are prevented from raising in subsequent proceedings claims and defences which could and should have been pursued in earlier proceedings (the "Henderson Rule"[143]). The Henderson Rule, so say these Respondents, "is grounded in the procedural rules preventing abuse of process and is juridically distinct from the substantive doctrine of res judicata".[144]

250. Respondents 1 and 2 argue that three questions must be answered affirmatively for the Henderson Rule to apply: (i) could the claimant have brought its claims against the defendant in the earlier proceeding?; (ii) should it have done so?; and (iii) if the first two questions are answered affirmatively, do the circumstances show that there has been an abuse of process? For these Respondents, all of these requirements are met.

251. On (i), Respondents 1 and 2 submit that the Claimants could have added San Marco and Kelly Gass to the Prior SIAC Arbitration either by joining them to the Prior SIAC Arbitration or by initiating a new arbitration against them and consolidating the two arbitrations. Although they did not sign the Deed, San Marco and Kelly Gass are parties falling within the scope of the arbitration agreement in the Deed. In addition, in their submissions to the Delaware Court, both San Marco and Kelly Gass consented to arbitration before the Prior SIAC Tribunal. According to these Respondents, it is immaterial whether Respondent 3 would have consented to joining San Marco and Kelly Gass to the Prior SIAC Arbitration. What matters is that the Claimants chose not to seek to join them and "must live with the consequences of that choice".

252. On (ii), the Respondents 1 and 2 contend that the Claimants should have brought all their claims against them arising from the management and sale of Savan Vegas before the Prior SIAC Tribunal. After all, so they say, the claims for breach of fiduciary duty are "closely intertwined" with the claims made against GOL in the Prior SIAC Arbitration.

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143 The Parties interchangeably use the terms "Henderson Rule", "Henderson doctrine", "extended res judicata" or "abuse of process".

144 R1&2's PHB, §2.

For these Respondents, "both sets of claims arise from the same factual background, depend on the same allegations of mismanagement of Savan Vegas and the sale process, and even seek damages for the same loss allegedly arising from the diminution of Savan Vegas' sales price as a result of the purported mismanagement."[145] The Claimants complain that they were denied "critical disclosures" in the Prior SIAC Arbitration because San Marco and Kelly Gass were not parties, which supposedly shows that they recognize that the two should have been added to the Prior SIAC Arbitration.

253. On (iii), Respondents 1 and 2 first note that it is sufficient for the Tribunal to find that the first two requirements just mentioned are satisfied for it to conclude that this arbitration is an abuse of process. Yet, if the Tribunal were to enquire into the third requirement, the outcome would remain unaltered as the Claimants' conduct was clearly abusive: "[t]he Claimants, having lost the Prior SIAC Arbitration against GOL, are blatantly seeking to re-argue matters and reverse the Barkett Tribunal's findings that *inter alia* there was no mismanagement of the Casino and that the sale to Macau Legend maximised the price of the Casino".[146] They add that the Claimants' "collateral attack against the Barkett Tribunal's decision undermines the principle of finality and demonstrates the abusive nature of the present arbitration."[147]

254. Respondents 1 and 2 deny that the Henderson Rule does not apply to international arbitration. They observe that the Singapore courts have applied the Henderson Rule in relation to arbitration proceedings. In addition, the rationale behind the rule, i.e. to promote finality and prevent "wasteful and potentially abusive duplicative litigation", applies to arbitration as well as to litigation.

255. Respondents 1 and 2 further dispute the Claimants' argument that the Henderson Rule only comes into play in favor of a party to the prior proceeding. According to them, "privity of interests" suffices to justify the application of the Henderson Rule. Here, so they argue, it cannot be "seriously disputed" that this requirement is fulfilled, since Respondent 3 was the principal of Respondents 1 and 2 and is also the indemnifier of the claims brought against them.

145 R1&R2 PHB, §55.

146 R1&R2 PHB, §58.

147 R1&R2 PHB, §58.

2. Respondent 3's Position

256. Respondent 3 "aligns itself with [Respondent 1 and 2's] submissions on abuse of process under the lex arbitri, which principles are consonant with the abuse of process arguments raised by GOL under international law."[148] It too requests that all claims be dismissed.

257. Respondent 3 further challenges the Claimants' assertion that they could not have joined San Marco and Kelly Gass to the Prior SIAC Arbitration in June 2016, because it would have opposed the joinder to avoid delays. It stresses that the Claimants made no application to join San Marco or Kelly Gass to the Prior SIAC Arbitration, and therefore the question of its opposition could not arise. Furthermore, while it is true that GOL refused the adjournment of the merits hearing beyond January 2017, it did so because it believed that such hearing was to proceed ahead of the BIT I Second Material Breach Application. It insists that the hearing dates were not "set in stone" and could have been moved if circumstances so required.

258. Respondent 3 also disputes the Claimants' position that GOL would not have consented to joining San Marco and Kelly Gass. This issue, so it argues, is "besides the point", as there was no opportunity for GOL to consent in the first place. The fact is that the Claimants did not seek to join either Respondent 1 or Respondent 2 in the Prior SIAC Arbitration. Similarly, they did not initiate a separate arbitration against those Respondents and then request consolidation.

3. The Claimants' Position

259. It is the Claimants' submission that the Henderson Rule has been around for 177 years and that it was "untimely and without merit" for the Respondents to first raise at the hearing. In any event, so say the Claimants, "[b]ecause the Henderson Rule is substantive Singapore law, it does not apply to this arbitration, which is governed by New York law".[149] Further still, the Claimants contend that there are good reasons for not applying the Henderson Rule in international arbitration. First, "[w]hile a court is obviously concerned with using its own rules to determine if an action is barred, that does not mean that an arbitral tribunal should use those rules for its procedural determinations".[150] Moreover, the Tribunal should be "cautious about using abuse of process" due to "the absence of an effective right of appeal in arbitration". For the

148 R3's Reply PHB, §10

149 Claimants' PHB, §62.

150 Claimants' PHB, §70.

Claimants, as there is a doubt about the correctness of the Prior SIAC Award, this Tribunal should not resort to the Henderson Rule.

260. In any event, the Claimants submit that the Henderson Rule only bars claims that could and should have been brought in the prior proceedings. Hence, it finds no application here as the Claimants could not have raised claims against San Marco and Kelly Gass in the Prior SIAC Arbitration.

261. The Claimants note that the Prior SIAC Arbitration was brought under the 2013 SIAC Arbitration Rules. To join a third party under that edition of the Rules, two conditions had to be satisfied. First, the third party had to be a party to the arbitration agreement and, second, it had to provide specific written consent to be joined to the proceedings. Neither of these requirements are met in this case.

262. In connection with the first requirement, the Claimants remark that joinder was not possible as San Marco and Kelly Gass were not parties to the arbitration agreement in the Deed. For the Claimants, "the party to be joined must be an actual party to the arbitration agreement; not simply a third party who might be bound by the agreement in some other fashion."[151]

263. With respect to the second condition, the Claimants assert that San Marco and Kelly Gass did not consent in writing to the joinder. The reference to "the SIAC Tribunal" by San Marco and Kelly Gass in their filings in Delaware was simply a reference to "a hypothetical Singapore-seated SIAC Tribunal".[152] Other references to "the" SIAC Tribunal, were used merely to operate a distinction vis-à-vis other possible courts and tribunals, namely the Delaware Court or a SIAC tribunal with seat in Laos. Respondents 1 and 2 argued that "Asia" was the more convenient forum for resolving the dispute pending before the Delaware Court. Had they truly believed that San Marco and Kelly Gass had only consented to arbitrate under the Prior SIAC Arbitration, they would have mentioned "Singapore" and not "Asia".

264. The Claimants further claim that, in their initial pleadings in this arbitration, Respondents 1 and 2 did not mention that San Marco and Kelly Gass had consented to be joined in the Prior SIAC Arbitration. If it had been San Marco and Kelly Gass's "real intent" to agree to be joined to the Prior SIAC Arbitration, there would have been written communications to that effect. Yet, there were no such communications. Neither did San Marco or Kelly Gass or GOL seek to join the Prior SIAC Arbitration. The

151 Claimants' PHB, §18.

152 Claimants' PHB, §30.

Claimants caution that Singapore courts have refused to enforce arbitral awards where the arbitral tribunal joined parties despite the opposition of one of the existing parties in the arbitration. Additionally, the Claimants contend that they could not have joined San Marco and Kelly Gass as parties to the Prior SIAC Arbitration even if they consented to be joined, because the Claimants would still have required GOL's consent, which was not given. The Claimants explain that although GOL's consent was not necessary under the then applicable SIAC Rules, Singapore Courts have held that regardless of whether institutional rules allow joinder, a tribunal still must have jurisdiction. For the Claimants, "GOL's consent was required because as a sovereign nation it enjoys sovereign immunity".[153] They explained that "unless it has signed a treaty like a bilateral investment treaty, or has agreed in a contract like the Deed, it cannot be subjected to arbitration"[154] and that here Respondent 3's consent was given only in the Deed, i.e. in a contract with the Claimants, with the result that "in its arbitration against the sovereign Laos, Claimants were not free to join others without GOL's consent."[155]

265. The Claimants also argue that they could not have consolidated an arbitration against San Marco and Kelly Gass with the Prior SIAC Arbitration because the 2013 SIAC Rules did not provide for consolidation.

266. Moreover, neither joinder nor consolidation would have been feasible in the Prior SIAC Arbitration, say the Claimants, because they could have occurred only in June 2016, five months before the hearing in the Prior SIAC Arbitration. Even though that hearing was eventually postponed to January 2017, it remains that GOL was "unalterably opposed" to any postponement in the Prior SIAC Arbitration and would have been equally opposed to delays due to joinder or consolidation. Considering the "substance and the reality" of the Prior SIAC Arbitration in June 2016, it would not have been practical to add a new party, in spite of the Respondents' speculations to the contrary.

267. Furthermore, the Claimants also consider that it would be "inequitable" to apply the Henderson Rule because San Marco and Gass would be able to choose when they should be bound to arbitration awards concerning other parties, which would result in a "problem of lack of mutuality". While the Claimants recognize that mutuality is not always strictly required to invoke abuse of process, "extraordinary circumstances" must exist to bar a claim made in a later proceeding against someone who was a stranger to the first arbitration. Here, neither San Marco nor Kelly Gass are GOL's privies such

153 Claimants' PHB §39.

154 Claimants' PHB §39.

155 Claimants' PHB §40.

that the Claimants ought to have proceeded against all of them in one and the same action.

268. It is the Claimants' further argument that the present arbitration is not abusive because there is "new or previous evidence" which "put[s] an entirely different complexion" on the claims and which "could not by reasonable diligence have been adduced in [the Prior SIAC Arbitration]".[156] They note that a well-recognized exception to the Henderson Rule is that "there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings."[157] As San Marco or Kelly Gass were not parties to the Prior SIAC Arbitration, so say the Claimants, "the new evidence adduced by them in this arbitration, particularly Kelly Gass's communications, are such material, supported by the inferences that should be drawn from GOL's destruction of additional communications while disputes among the parties were still ongoing."[158]

4. Analysis

269. From the summary of the Parties' positions it arises that the Tribunal must determine whether the Henderson Rule is procedural or substantive and how it is defined (a); whether it applies in international arbitration (b); if so, whether it only applies in favor of a party to a prior arbitration (c); and finally what its elements are and whether they are present in this case (d).

a. Is the Henderson Rule procedural or substantive in nature? How is it defined?

270. The Claimants contend that the Henderson Rule is substantive in nature. In support, they invoke the decision of the Singapore High Court in *Petroships*, in which, quoting the Singapore Court of Appeals in *TT International*, the High Court stated as follows:

> "Although there have been attempts to decant the rule in Henderson v Henderson from the substantive doctrine of res judicata into the procedural doctrine of abuse of process, […] the consensus now appears to be that the rule operates on the substantive plane and is therefore in truth an aspect of the doctrine of res judicata, albeit one which is quite clearly concerned with, and therefore overlapping with, abuse of process. As the Court of Appeal said in [*TT International*] at [102]:

156 Claimants' PHB §78.

157 Claimants' PHB §78.

158 Claimants' PHB §78.

> "… As mentioned earlier, this 'extended' doctrine has come also to be known by the name 'abuse of process'; and at first glance, that might be confusing because res judicata and abuse of process are 'juridically very different', the former being a 'rule of substantive law' and the latter, 'a concept which informs the exercise of the court's procedural powers', as Lord Sumption notes in Virgin Atlantic (at [25]). However, as Lord Sumption proceeds to explain, res judicata and abuse of process are 'overlapping' concepts 'with the common underlying purpose of limiting abusive and duplicative litigation', such that there is no difficulty in conceiving of the 'extended' forms of cause of action and issue estoppel as being 'concerned with abuse of process' while simultaneously being 'part of the law of res judicata'."[159]

271. By contrast, Respondents 1 and 2 are of the view that the Henderson Rule is procedural. They invoke a 2017 decision of the Singapore Court of Appeal in *Lim Geok Lin Andy* ("*Andy Lim*"),[160] in which the court first observed that "abuse of process" was procedural:

> "Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation."[161]

265. The *Andy Lim* court then went on to observe that "abuse of process" underlies the Henderson rule:

> "It is therefore clear from the authorities that the principles that underlie the doctrine of abuse of process under the rule in Henderson ([2] supra) is both well established as well as uncontroversial […]."

272. The Court of Appeal is the highest court in Singapore. Its judgments thus prevail over those of the High Court. In any event, the excerpt relied upon by the Claimants only shows that there is an overlap between collateral estoppel and substantive *res judicata,* which *Andy Lim* recognizes as well, and whether the Henderson Rule is procedural or substantive was not at issue in *Petroships.* Finally, *Andy Lim* and the UK Supreme Court decision in *Takhar v. Gracefield Developments*[162] were recently cited by the

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159 Exh. CLA-0251, Petroships Investment Pte Ltd v. Wealth Plus Pte Ltd (in members voluntary liquidation) [2018] 3 SLR 687 at §85, relying on Exh. CLA-0254, The Royal Bank of Scotland v. TT International [2015] 5 SLR 1104 at §102 ("TT International").

160 Exh. RLA1&2-024, Lim Geok Lin Andy v. Yap Jin Meng Bryan [2017] 2 SLR 760.

161 Exh. RLA1&2-024, Lim Geok Lin Andy v. Yap Jin Meng Bryan [2017] 2 SLR 760, §39.

162 Exh. RLA1&2-026, Takhar v. Gracefield Developments Ltd [2019] 2 WLR 984; cited in Exh. RLA1&2- 022, Beyonics Asia Pacific Ltd and others v Goh Chan Peng [2020] SGHC(I) 14, §56.

Singapore High Court in *Beyonics*,[163] quoting the paragraphs from these judgments that found that the *Henderson* doctrine was procedural in nature.[164] The scholarly writings which the Claimants put forward do not appear to support their position,[165] and could not change the court's conclusion. Therefore, following the decision in *Andy Lim*, the Tribunal considers the Henderson Rule a procedural matter under Singapore law.

273. In *Beyonics,* the scope of the Henderson Rule was described as covering issues which were not raised or decided in a prior action:

> *"*Whereas res judicata is a rule of substantive law, abuse of process is a concept which informs the exercise of the court's procedural powers. These are part of the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even in cases where the relevant question was not raised or decided on the earlier occasion […]".[166]

274. *Andy Lim*, *Beyonics* and others have all recognized the "wider doctrine of res judicata" also known as the Henderson Rule under Singapore law. The Singapore High Court recently reiterated the scope of the Henderson Rule as follows:[167]

> "[T]he "extended doctrine of *res judicata*" has also been referred to as the defence of abuse of process: *BNX v BOE* at [127] and *Goh Nellie* ([40] *supra*) at [41]. The extended doctrine of *res judicata* has its origins in the seminal decision of Sir James Wigram VC in *Henderson v Henderson* [1843] 3 Hare 999 at 114, and has been developed incrementally in both England and Singapore.
>
> […]
>
> [T]he extended doctrine of *res judicata*, unlike cause of action estoppel and issue estoppel, is based on a more pragmatic rationale of not allowing parties to repeatedly come to court for matters which should have been dealt with in earlier proceedings. The extended doctrine is more concerned with the proper administration of justice than the fact that parties' rights have been extinguished by reason of an estoppel. Cause of action estoppel and issue estoppel are unified on the basis that they address considerations which had in fact been raised in earlier proceedings, but the extended doctrine

163 Exh. RLA1&2- 022, Beyonics Asia Pacific Ltd and others v Goh Chan Peng [2020] SGHC(I) 14, §56.

164 Beyonics, §§54 and 56.

165 See R1-2 PHB, §§8 et. seq., convincingly refuting the Claimants' reliance on Exh. CLA-0255, D. Williams and M. Tushington, The Application of the Henderson v Henderson Rule in International Arbitration, 26 SAcLJ 1036 (2014).

166 Beyonics, §56 quoting the UK Supreme Court in Takhar v Gracefield Developments Ltd and others [2019] 2 WLR 984 (emphasis added).

167 CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and others [2020] SGHC 133 (not cited by the Parties).

> of *res judicata* goes beyond that to consider points which *should have* been raised, but were not in fact raised."[168]

b. Does the Henderson Rule apply to an international arbitration seated in Singapore?

275. There are examples of the Henderson Rule being applied in international arbitrations under the law of the seat.[169] The UK High Court has also held that the Henderson Rule can be resorted to in international arbitration,[170] which the Claimants do not deny.

276. In *CKR Contract Services*, the Singapore High Court noted the policy reasons underlying the Henderson Rule:

> "In Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others [2018] 3 SLR 117 ("Antariksa Logistics"), […] George Wei J expressed the view (at [82] of that judgment) that the doctrine aims to bring finality to litigation and avoid multiplicity of proceedings. This promotes the public interest of efficiency and economy in the conduct of litigation, and also prevents litigants from being oppressed and unfairly harassed by legal proceedings.
>
> […]
>
> What is evident from my summary of the applicable legal principles is that the extended doctrine of res judicata, unlike cause of action estoppel and issue estoppel, is based on a more pragmatic rationale of not allowing parties to repeatedly come to court for matters which should have been dealt with in earlier proceedings. The extended doctrine is more concerned with the proper administration of justice than the fact that parties' rights have been extinguished by reason of an estoppel."[171]

277. In the Tribunal's opinion, this rationale applies equally in international arbitration. This being so, it is true that the Singapore courts have warned that the Henderson Rule must be applied with caution in light of the right of access to justice:

> "[A]buses must be balanced against a party's indisputable right of access to justice and protection of the law. [I]t is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon."[172]

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168 CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and others ("CKR") [2020] SGHC 133 §§30 et. seq. (not cited by the Parties).

169 Exh. CLA-0255, D. Williams and M. Tushingham, The Application of the Henderson v. Henderson Rule in International Arbitration, 26 SAcLJ 1036 (2014), §40.

170 Nomihold Securities INC v Mobile Telesystems Finance SA [2012] Bus LR 1289.

171 CKR, §§47-48.

172 Exh. RLA1&2-022, Beyonics at §55 (quoting Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others [2018] 3 SLR 117 at §84.

278. The authorities to which the Claimants cite to challenge the application of the Henderson Rule in an international arbitration seated in Singapore do not directly address the issue.[173] Their reliance on the Singapore High Court's decision in *Goh Nelli* (which, in turn, relies on the UK decision in *Arnold*)[174] is inapposite as the Singapore High Court there was not discussing the Henderson Rule but rather exceptions to strict issue estoppel rules.[175]

c. Does the Henderson Rule apply "only in favor of a party to the prior action"?

279. The Claimants submit that the Henderson Rule applies "only in favour of a party to the prior action", a position which the Respondents oppose. The Tribunal need not rule on this issue as its determination would not affect its conclusion that the Henderson Rule does not apply in this arbitration as the Respondents did not consent to be joined in the Prior SIAC Arbitration (§284 et. seq.).

d. What are the elements of the Henderson Rule in the context of this arbitration?

280. Relying on *Beyonics*,[176] Respondents 1 and 2 submit that the elements of the Henderson Rule are as follows:

i. Could the Claimants have brought the claims in this arbitration before the Prior SIAC Tribunal?[177]

ii. Should the Claimants have done so?

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173 See R1-2 PHB, §§12 et. seq., convincingly refuting the Claimants' reliance on Exh. CLA-0255, D. Williams and M. Tushington, The Application of the Henderson v Henderson Rule in International Arbitration, 26 SAcLJ 1036 (2014), Exh. CLA-0252, Born, International Commercial Arbitration (2d ed. 2014), p. 3768-69, Exh. CLA-0262, G. Born, Ch. 11: Legal Framework for International Arbitral Proceedings, in International Commercial Arbitration (2d ed. 2014) p. 1594-95, and Exh. CLA-0257, M. Pika, Ch. 8: Transnational Res Judicata and Third-Party Effects Before Arbitral Tribunals, in Third-Party Effects of Arbitral Awards: Res Judicata Against Privies, Non-Mutual Preclusion and Factual Effects, Int'l. Arb. L. L. 49, 233 (2019), p. 250.

174 Exh. CLA-0265, Goh Nellie v Goh Lian Teck [2006] SGHC 211, §43; citing Arnold v National Westminster Bank plc [1991] 2 AC 93.

175 Id. pp 108-109.

176 Beyonics, §71 et. seq.

177 The only Singapore authority cited by Respondents 1 and 2 is Utrapolis where the Singapore High Court found that a party's failure to raise a counter-claim in a prior arbitration prevented it from subsequently bringing the same claim in Singapore Court proceedings: "the re-litigation in a Singapore court of an issue which could have been raised in an earlier arbitration can amount to an abuse of process". Exh. RLA1&2-028, Denmark Skibstekniske Konsulenter A/S I Likvidation v Utrapolis 3000 Investments Ltd [2011] 4 SLR 997 at §31.

iii. If both (i) and (ii) are satisfied, do the circumstances show that there has been an abuse of process?

281. This is, indeed, the test set out in *Beyonics*. The Claimants have not taken a contrary view.[178]

282. The first requirement is whether the Claimants could have brought the claims pending in this arbitration before the Prior SIAC Tribunal. It is common ground between the Parties that the only manner in which the Claimants could have done so is through joinder or consolidation.

283. Rule 24(b) of the SIAC Rules (2013) applicable to the Prior SIAC Arbitration empowers an arbitral tribunal to join a third party where (i) the third party has given its consent in writing and (ii) such third party is a party to the arbitration agreement.[179]

284. On (i), the Respondents rely on San Marco and Kelly Gass's submissions before the Delaware court to establish that the latter consented to arbitrate in the Prior SIAC Arbitration. A review of these statements, however, does not evidence such consent:

- "The SIAC is a well-regarded, competent and respected forum for resolving disputes, and Plaintiffs and GOL currently have claims and counterclaims pending before the SIAC Tribunal regarding terms and obligations of the Deed. Plaintiffs' claims all arise and are connected to the Deed, as evidenced by the numerous citations to the document in the Complaint. Moreover, Plaintiffs have already accepted SIAC as a proper forum for its Deed disputes with GOL. Therefore, the intertwined claims asserted in the Complaint should also be arbitrated under the Deed in SIAC";[180]

178 These tests were recently affirmed in CKR, where the Singapore High Court, observed:

"At [77] of Antariksa Logistics, Wei J outlined the test for the extended doctrine of res judicata. Specifically, the focus is on whether, "in all the circumstances, a party is abusing the process of the court by seeking to raise before it an issue which could have been raised before". The Court may also consider other factors, including whether there are bona fide reasons why an issue that ought to have been raised in the earlier action was not raised, and whether, holistically speaking, the later proceedings are in substance nothing more than a collateral attack on the previous decision." (CKR, §47).

179 Rule 24(b): "[...] the Tribunal shall have the power to: [...] upon the application of a party, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party [. . .] ."

180 Exh. C-002, Motion to Dismiss, p.2

- "Although Gass is not a party to the Contract and thus, undertook no activities in her individual capacity, she consents to arbitration with the SIAC Tribunal in Singapore";[181]
- "[T]he only proper forum for this dispute is the SIAC Tribunal. The only question is under which agreement the Court should enforce arbitration. The circumstances warrant arbitration under the Deed with the SIAC Tribunal in Singapore: Plaintiffs as signatories of the Deed, recognize SIAC and currently have claims pending there on the same underlying facts regarding the very same issues";[182]
- "Accordingly, Defendants request that the Court dismiss this action for Plaintiffs to pursue their claims in Singapore pursuant to the SIAC Arbitration Rules";[183]
- "[A]n adequate alternative forum exists with SIAC";[184]
- "Here, all factors demonstrate the forum should be SIAC in either Singapore or Laos";[185] ("In addition, the *forum non conveniens* factors weigh heavily in favour of this Court dimissing this action. This actions lacks sufficient ties to Delaware, and Asia is the more convenient forum")[186]
- "The SIAC Tribunal is presently adjudicating the disputes between the GOL and Plaintiffs";[187]
- "Since both the Settlement Deed and the Marketing Contract selected SIAC as the arbitral forum, San Marco, and the Plaintiffs, should expect that any claims regarding its services would be addressed in a SIAC arbitration proceeding, and not in the Federal District Court in Delaware;"[188]
- And most importantly, the actual submission to jurisdiction: "I, in my individual capacity and as sole member and manager of San Marco, consent and submit

181 Exh. C-002, Motion to Dismiss, p.2, fn.2.

182 Exh. C-002, Motion to Dismiss, p.6.

183 Exh. C-002, Motion to Dismiss, p.11.

184 Exh. C-002, Motion to Dismiss, p.13.

185 Exh. C-002, Motion to Dismiss, p.15.

186 Id. at §8-9.

187 Ex. C-003, Declaration in support of Motion to Dismiss, §16.

188 Exh. C-0003, Declaration in support of Motion to Dismiss, §29.

to SIAC arbitration in Singapore, where Plaintiffs agreed to arbitrate disputes pursuant to the Settlement Deed."[189]

285. While the mentions of the "SIAC Tribunal" might appear ambiguous, most of the statements just quoted are not: they speak of "SIAC as a proper forum", "SIAC", "pursue claims in Singapore pursuant to SIAC Arbitrations Rules"; "Asia". None of these formulations can reasonably be understood as a reference to a specific pending arbitration, which is even clearer on a full review of the submissions before the Delaware court.[190] If any doubt remains, the formal consent wording demonstrates the absence of any specific reference to a pending arbitration when stating: "I […] submit to SIAC arbitration in Singapore."

286. This conclusion is corroborated by the language used in the Statement of Defence in this arbitration:[191]

- "San Marco and KG also stated that they consented to SIAC arbitration in Singapore;"
- "With San Marco and KG's clear agreement to submit to SIAC arbitration in Singapore, the Claimants could have proceeded to commence and consolidate arbitration proceedings and/or join San Marco and KG to the Prior SIAC Arbitration;"
- "On 12 July 2017, more than a year after San Marco and KG had consented to SIAC arbitration in Singapore (which the Claimants opposed), the Delaware Court dismissed the Claimants' lawsuit Arbitration."

287. It follows that San Marco and Kelly Gass did not consent to being joined to the Prior SIAC Arbitration. As a result, the first requirement for a joinder is not fulfilled and no joinder could have been effected.

288. The Respondents further argue that the Claimants could have initiated a new arbitration against Respondents 1 and 2 and then sought to consolidate the new arbitration with the Prior SIAC Arbitration.

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189 Ex. C-003, Declaration in support of Motion to Dismiss, §29.

190 The submissions contain specific references to the Prior SIAC Tribunal. See, for instance, Exh. C-002, Motion to Dismiss, pp.3-4 ("The SIAC arbitration panel is currently addressing claims between GOL and Plaintiffs in connection with their disputes under the Deed, with a hearing on the merits scheduled in November 2016.").

191 R1&2 SoD, §§70-72.

289. The 2013 SIAC Arbitration Rules governing the Prior SIAC Arbitration did not contemplate consolidation. While a 2014 Practice Note issued by the SIAC Secretariat does mention consolidation, it imposes several prerequisites, including the consent of all parties.[192] The Tribunal is also mindful of the fact that the Prior SIAC Arbitration commenced in 2014 and was well underway in mid-2016, which would have been the earliest time at which consolidation could have been attempted. Thus, even if the Claimants could have initiated a new arbitration against Respondents 1 and 2, it is not established that such arbitration could then have been consolidated with the Prior SIAC Arbitration.

290. Therefore, the Tribunal concludes that the Claimants could not have brought the claims pending in this arbitration before the Prior SIAC Tribunal. Hence, one of the conditions for the application of the Henderson Rule is not met. As a consequence, the claims are not barred by the Henderson Rule.

C. Abuse of Process

1. Respondents 1 and 2's Position

291. Respondents 1 and 2 submit that, in the Prior SIAC Arbitration, the Claimants made the same allegations of mismanagement and breaches of fiduciary duty by Respondent 3 and its agents Respondents 1 and 2, as those they put forward in this arbitration. In effect, the two proceedings concern the same conduct, by the same entities, arising from the same set of facts. For the Respondents, "the Claimants' attempt to get a second bite at the cherry is an abuse of process and contrary to the interests of justice and finality."[193] They insist therefore that all claims in this arbitration must be dismissed.

2. Respondent 3's Position

292. Respondent 3 joins with Respondents 1 and 2 in contending that all claims in this arbitration must be dismissed on the basis of an abuse of process:

> "[In the Prior SIAC Arbitration] Claimants' claim [was] that the [Respondent 3] had materially breached the Deed, causing a low sale price because, *inter alia*, of the 28% tax, because of mismanagement of the casino's profitability, because of the lack of airport expansion, because of the 'secret deal' with Macau Legend, and that low sale price was a material breach which had cost the

192 Exh. RLA1&2-032, SIAC Practice Note on Administered Cases (2 January 2014), §22 ("[s]hould the parties reach an agreement to consolidate related cases, consolidation would generally take place after the constitution of the Tribunal, upon the parties' request, and pursuant to directions issued by the Tribunal").

193 R1&R2 Rej., §2.

> Claimants hundreds of millions in damages. That claim, in all its parts, was rejected in full by the SIAC Award of June 29, 2017. The Tribunal held expressly that price Macau Legend paid, $42 million, was the maximum value of the casino. Yet in this case, Claimants make the identical claim, this time that San Marco has materially breached its duties, causing a low sale price because, *inter alia*, of the 28% tax, because of mismanagement of the casino's profitability, because of the lack of airport expansion, because of the 'secret deal' with Macau Legend, and those material breaches have cost Claimants hundreds of millions in damages. That claim has been decided in a fair and full arbitration in which Claimants fully participated--- this case is an abuse of process."[194]

293. Additionally, Respondent 3 submits that by not disclosing the Prior SIAC Award to the Tribunal in their Statement of Claim, the Claimants have breached their "duty of candor to the Tribunal". For that Respondent, the Claimants' lack of candor "is part and parcel of Claimants' abuse of process" and yet another reason to dismiss all claims.

294. Respondent 3 further submits that "[t]he act of obstructing justice and committing fraud on the tribunal is an abuse of Claimants' right to arbitrate afforded by the contract which must [be] conducted in good faith."[195] Here, the Prior SIAC Award concluded that the Claimants had committed a "fraud on the tribunal" relating to facts and events that arise out of the same Deed that is before this Tribunal. Further, the BIT I Tribunals determined that the Claimants had obstructed justice. Faced with the Claimants "[attempt] to defraud the tribunals, manipulate the arbitral process and obstruct justice",[196] Respondent 3 contends that this Tribunal should dismiss all claims in this arbitration as the Claimants have "forfeited […] any right to 'relief of any kind from an international tribunal'."[197]

295. Finally, Respondent 3 submits that the Claimants are well aware that GOL is contractually required in the present arbitration to indemnify Respondents 1 and 2. By initiating this arbitration the Claimants are thus taking a "second shot" at claiming exactly the same damages from GOL this time by suing its agents. For this Respondent, "[a]llowing these claims to continue […] would allow the same economic claims to be adjudged twice—which in any legal order should be deemed to be an abuse of process."[198]

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194 R3 Rej., §28.

195 R3 SoD, §115.

196 R3 SoD, §121.

197 R3 SoD, §123.

198 R3 SoD, §114.

3. The Claimants' Position

296. The Claimants dispute having committed an abuse of process by initiating the present arbitration in spite of the dismissal of claims in prior arbitrations. Each of the earlier arbitrations involved different parties, different claims for relief, and different remedies. For instance, Respondents 1 and 2 were neither parties to nor witnesses in the Prior SIAC Arbitration. Moreover, the Claimants asserted no claims against Respondent 3 in this arbitration. They did not join GOL as a party either; it chose to do so itself. Therefore, it cannot claim that the parties in the earlier arbitrations are the same as the Parties to this proceeding.

297. The Claimants equally contest having committed an abuse of process by not disclosing the Prior SIAC Award to the Tribunal. They point out that the Tribunal "was fully aware" of the Prior SIAC Award: the Award was the subject of Respondent 3's Application for Joinder of 2 February 2018, the Claimants' jurisdictional objection to Respondent 3's intervention of 2 August 2018, and Respondent 3's Application for Early Dismissal of 5 October 2018 which attached the Prior SIAC Award. The Claimants' counsel had offered to recap the procedural history of the various arbitrations among the Parties to the Tribunal, but the Tribunal declined that offer stating that it was aware of the different proceedings.

298. Finally, the Claimants deny that their conduct in other cases can be considered as an abuse of process requiring the dismissal of their claims in the present arbitration. The Respondents have offered no authorities in support of their argument that an alleged procedural wrongdoing in another arbitration is grounds for dismissing the claims here. In any event, the Noble MOU on which the Respondents rely is not at issue in this arbitration. That document has not even been submitted to this Tribunal. In the circumstances, there can be no contention that the Claimants have misled the Tribunal or obstructed justice in any manner. For the same reasons, the Tribunal cannot disregard the Claimants' evidence or prefer the Respondents' evidence to that of the Claimants. Doing so would seriously prejudice the Claimants' due process rights and provide a ground for annulling the forthcoming award.

4. Analysis

299. Respondents 1 and 2's abuse of process allegations mirror the Respondents' preclusion arguments that have been addressed above. The Tribunal therefore does not deem it necessary to determine whether they also constitute an abuse of process. The same reasoning applies to Respondent 3's allegation that the Claimants are taking

a "second shot" at claiming exactly the same damages from GOL through Kelly Gass and San Marco.

300. The Tribunal cannot however sustain Respondent 3's submission that the Claimants breached their "duty of candor to the Tribunal" by not disclosing the Prior SIAC Award to the Tribunal in their Statement of Claim. Indeed, the Prior SIAC Award was mentioned in the Parties' submissions prior to the Statement of Claim, including by the Claimants in their 2 August 2018 objections to Respondent 3's intervention in this arbitration. In fact, the Claimants' objection to Respondent 3's Application for Early Dismissal of 5 October 2018 attached the Prior SIAC Award.

301. Neither can the Tribunal sustain Respondent 3's submission that this Tribunal should dismiss all claims because the Claimants had committed a "fraud on [other] tribunal[s]" relating to facts and events that arise out of the same Deed that is before this Tribunal. This Tribunal is to decide on the claims presented to it in this arbitration on the basis of the evidence on the record in this arbitration. A procedural wrongdoing in another arbitration cannot, of itself, be grounds for dismissing the claims in this arbitration, especially when, as here, the alleged procedural wrongdoing concerns a matter not before this Tribunal.

D. CONCLUSION ON PRELIMINARY OBJECTIONS

302. It follows from the foregoing that the doctrine of collateral estoppel bars all the claims in this arbitration except for the conversion claims. The Tribunal reviews these claims below.

VII. CONVERSION

A. The Claimants' Position

303. The Claimants submit that under New York law, "conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession."[199] Joint and several liability attaches to joint tort-feasors when they act in concert and commit conversion.

304. For the Claimants, San Marco and Kelly Gass converted Sanum's property by "draining" Sanum's bank accounts with Banque Pour Le Commerce Exterieur Lao

199 SoC, §177 relying on Exh. CLA-0127, C & B Enters. USA, LLC v. Koegel, 136 A.D.3d 957, 958, 26 N.Y.S.3d 185 (N.Y. App. Div. 2016).

Public ("BCEL") and JDB, drawing down the JDB Loan to pay GOL's legal bills, seizing Sanum's slot machines and taking US$ 1.56 million from the Casino's cage and vault.

305. The Claimants refute Respondent 1 and 2's argument that they have provided no evidence in support of their claims. They submit that neither Mr. Baldwin's nor Mr. Crawford's testimony has been denied by relevant individuals that had knowledge of the transactions in question. Besides, they contend that GOL "intentionally destroyed" evidence that the Claimants could have used to support their allegations.

306. The Claimants also object to the allegation that they do not own the slot machines. For them, the original invoice is not determinative of the actual owner of the slot machines. Sanum was the owner of the slot machines when Respondents 1 and 2 removed them from the slot clubs. The Claimants explain their position as under:

> "Sanum purchased and paid for various pieces of equipment, including slot machines, which were initially imported to Laos under Savan Vegas' gaming license, and were thus placed on Savan Vegas' books. Such expenditures therefore increased the amount Savan Vegas owed to Sanum under the credit facilities Sanum extended to Savan Vegas (the "Sanum Loan"). After arriving at Savan Vegas, some of this equipment was transferred to Sanum's Slot Clubs and other businesses not owned by Savan Vegas, at which point the equipment was removed from Savan Vegas' books and placed on Sanum's books. At the same time, the cost of the transferred equipment was credited to Savan Vegas, reducing the amount it owed to Sanum under the Sanum Loan. SM&KG are thus liable to Claimants for the conversion of Sanum's slot machines."[200]

B. Respondent 1 and 2's Position

307. Respondents 1 and 2 dispute the Claimants' assertions that Respondent 1 is liable for the draining Sanum's bank accounts with BCEL and JDB. The BCEL account was allegedly frozen in 2012, three years before San Marco and Kelly Gass entered the picture. As for JDB, there is no evidence of the Respondents' involvement in any of the transactions in question. With regard to GOL allegedly draining the JDB account to pay outstanding costs awards, the Claimants have not even established why this allegedly constitutes wrongful conduct. San Marco and Kelly Gass are simply not "joint tortfeasors" who acted "concurrently or in concert" with GOL.

308. In connection with the alleged seizure of Sanum's slot machines, the Respondents reply that the machines belonged to SVCC, not Sanum. The machines were moved to safe storage to preserve SVCC's ownership. Moreover, the "seizure" of the slot machines was carried out by Savan Lao, not San Marco or Kelly Gass. The conversion

200 Reply, §64.

claim is thus "wholly misplaced" as San Marco and Kelly Gass were not involved. Finally, Mr. Crawford's statement that the slot machines were "purchased and paid for" by Sanum does not assist the Claimants. Even under the assumption that the statement is correct, it is clear that Sanum gave SVCC a loan, but that it was SVCC, not Sanum, that bought the slot machines.

309. Finally, in relation to the Claimants' third argument according to which San Marco and Kelly Gass converted their property by using monies borrowed from JDB by SVCC to pay GOL's legal bills, the Respondents invoke collateral estoppel as set out above.

C. Respondent 3's Position

310. Respondent 3 has taken no different position from the one of Respondents 1 and 2 just summarized. It emphasizes that "[c]onsent and taking pursuant to legal process or valid court order, are both recognized justifications in conversion, as are public and private necessity […] the right of distraint and many others."[201]

D. Analysis

311. The Claimants raise five conversion claims, which are considered in the following sections.

1. BCEL Account

312. The Claimants contend that "[c]ollectively, Gass and San Marco acted in concert with GOL to drain a total of $384,723.76 from Sanum's BCEL and JDB accounts".[202] Through Mr. Baldwin, they allege that GOL drained the BCEL account of US$ 135,375.76 in November 2015 and deposited the monies to "accounts under Gass' control".

201 R3 SoD, §102 fn. 103.

202 SoC, §179.

313. The Tribunal cannot grant this claim for several reasons. First, the Claimants' own evidence suggests that GOL (not Kelly Gass or San Marco) froze the BCEL account in 2012,[203] three years before San Marco and Kelly Gass became involved in the Casino. Second, the Claimants have offered no cogent evidence in support of their allegations. The letter of 11 November 2015 on which the Claimants rely is a letter from the Claimants' own counsel to Respondent 3.[204] In any event, that letter does not support the Claimants' case that Respondents 1 and 2 were in control of the BCEL monies. It merely asks GOL to state whether the funds have been withdrawn from the account:

> "1. Sanum Bank Accounts. By letter dated 23 May 2015, we advised the Minister of Planning and Investment that Sanum's bank accounts remained frozen in spite of a 10 July 2014 Directive by the Center for Controlling the Enforcement of Court Decisions
>
> purporting to cancel the order that initially froze the accounts. By letter dated 30 May 2015, you confirmed that the bank accounts had been unfrozen. Recently, a Sanum representative attempted to withdraw funds from the company's account at BCEL; the Sanum representative was told that the funds had been withdrawn by a representative of Savan Vegas.
>
> Please confirm whether it is in fact the case that Savan Vegas has withdrawn funds from Sanum's account at BCEL. If this information is erroneous, please confirm that Sanum's accounts in Laos remain unfrozen and that Sanum is free to withdraw the balances in these accounts. We ask that you please provide this information no later than 18 November 2015."[205]

314. The Claimants have provided no other evidence, and for the reasons mentioned above, the Tribunal cannot draw adverse inferences as requested by the Claimants.

315. In the circumstances, the Tribunal dismisses the claim concerning the BCEL monies.

2. JDB Account

316. In their second conversion claim, the Claimants argue that San Marco and Kelly Gass caused at least US$ 249,348 to be removed from Sanum's JDB bank account.

317. Here again, on the basis of the evidence presented to it, the Tribunal cannot agree. The only relevant evidence which the Claimants tender in support is a letter of February 2016 from Mr. James Kochel, the Chief Financial Officer of SVCC. In that letter, Mr. Kochel writes that he has been instructed to pay certain invoices pursuant to a ruling

203 SoC, §84 relying on Exh. C-307.

204 Exh. C-370.

205 Exh. C-370 (emphasis added).

by an arbitration panel.[206] This letter is insufficient for the Tribunal to conclude that there was something improper in the withdrawals made from the JDB account. Further, at the time Mr. Kochel was an employee of SVCC and the Claimants have not shown that he was acting on San Marco or Kelly Gass' behalf when he asked a SVCC employee to withdraw monies from the JDB account. In the circumstances, the Tribunal dismisses this claim.

3. Drawdown of the JDB Loan

318. This matter has been addressed above (§§165 et. seq.). The doctrine of collateral estoppel bars the Claimants from raising this claim in the proceedings.

4. Slot Machines

319. This conversion claim amounts to US$ 178,046.00 and arises out of Respondent 1 and 2's alleged seizure of Sanum's slot machines.[207]

320. On the record, it is not clear whether Sanum owned the slot machines in question. The Claimants point to a letter of 19 July 2016, in which the COO of San Marco, Mr. Travis Miller, wrote to ST Group that the slot machines in the Ferry Terminal and Lao Bao slot clubs "were purchased and paid for by Savan Vegas and Casino Co. Ltd [SVCC], not Sanum." He went on state that "to preserve ownership and to safeguard the slot machines while the slot clubs are closed, SVLT [i.e. Savan Vegas Lao Ltd] will remove them to safe storage on the SVLT property."[208] While it is true that the Claimants' witness Clay Crawford testified that Sanum owned the slot machines,[209] the documents on which he relied do not establish ownership as they merely note that "slots were moved from SV to Sanum"[210] and "Slot machine transferred to Sanum"[211]. Furthermore, Mr. Crawford recognized that the slot machines had been imported under SVCC's license and placed on SVCC's books, not Sanum's. He went on to say that, when

206 Exh. C-261 ("As per our discussion, as of Jan 31 Ferry Terminal has an A/P to Sanum of approx.. 260k. The arbitration panel has that Sanum owes the GoL certain fees in association with the arbitration. Because of this, I have been instructed to pay legal and acct fees from the Ferry Terminal account.").

207 Claimants' Opening Presentation, p.9.

208 Exh. C-110.

209 Crawford WS I, §§41 et. seq.

210 Exh. C-340.

211 Exh. C-332.

Sanum provided funds to pay for the slot machines, this "increased the amount [SVCC] owed to Sanum under the credit facilities Sanum extended to Savan Vegas".[212]

321. In the circumstances, the Tribunal cannot give credit to unrebutted contemporaneous evidence. Further and in any event, even if Sanum owned the slot machines, it remains that the slot machines were allegedly seized in July 2016,[213] by which time the sale of the Casino had concluded and San Marco's mandate had ceased. The Claimants have not established that Respondents 1 or 2 were responsible for the seizure. While it may well be that they continued to be paid under the Management Contract until August 2016,[214] this fact does not in and of itself establish that they were responsible for seizing the slot machines. The payments could well have been for past services, and the Claimants have not established to the contrary.

5. Cage and vault cash

322. This claim has been addressed above (§§199 et. seq.). The doctrine of collateral estoppel bars the Claimants from raising this issue in this arbitration.

323. It follows from the preceding discussion that the conversion claims must be dismissed.

212 Crawford WS II, §§5 et. seq.

213 Claimants' Opening Presentation, p.68 "San Marco instead removed Sanum's slot machines to Savan Vegas in July 2016".

214 Claimants' Opening Presentation, p.9 relying on Searby ER Schedules JS-1.a.

VIII. COSTS

A. The Claimants' Position

324. The Claimants submit that if they prevail in this arbitration, they should be awarded their costs in the arbitration amounting to USD 2,646,315.67 detailed as under:[215]

SECOND AMENDED SCHEDULE A –
ATTORNEYS' FEES, EXPENSES, AND ARBITRATION COSTS

DESCRIPTION	(US$)	Early Dismissal (US$)	Fix Separate Costs (US$)	Security for Costs (US$)
Attorneys' Fees				
Stinson LLP	$1,896,247.50	$123,424.71	$16,036.42	$34,575.41
Wong Partnership	$17,757.25	$0.00	$0.00	$0.00
Viengsavanh Phanthaly	$4,104.17	$0.00	$0.00	$0.00
TOTAL FEES	$1,918,108.92	$123,424.71	$16,036.42	$34,575.41
Expenses				
Expert Witness and Professional Expenses				
GGH (Kim & Maconiber)	$167,119.10	$0.00	$0.00	$0.00
FTI (Seafby)	$23,545.78	$0.00	$0.00	$0.00
Compass Lexecon (Kalt & Henson)	$3,742.77	$0.00	$0.00	$0.00
GMA (Bryson)	$1,800.00	$0.00	$0.00	$0.00
Total Expert Witness and Professional Expenses	$196,207.65	$0.00	$0.00	$0.00
Virtual Hearing Management (Arbitration Place)	$11,944.50	$0.00	$0.00	$0.00
Court Reporting and Transcription Services (Worldwide Reporting, LLP)	$10,150.00	$0.00	$0.00	$0.00
Virtual Hearing Participation Technology and Hardware Costs	$11,700.00	$0.00	$0.00	$0.00
Legal Research Expenses	$20,361.20	$7.40	$35.00	$35.00
Duplicating / Presentation Support Expenses	$2,298.53	$0.00	$0.00	$0.00
Express Delivery/Messenger Expenses	$1,963.15	$90.65	$50.00	$0.00
Translation Expenses	$710.00	$0.00	$0.00	$0.00
Tribunal Secretary Fees (converted to USD at 1 S$ = 0.7565 US$ as of June 1, 2021)	$46,334.83	$0.00	$0.00	$0.00
TOTAL EXPENSES	$301,669.86	$98.05	$85.00	$35.00
Arbitration Costs (Advances to SIAC)	$426,536.89			
CLAIMANTS' TOTAL FEES, EXPENSES & COSTS	$2,646,315.67	$123,522.76	$16,121.42	$34,610.41

325. They further contend that even if they do not prevail in this arbitration, the Respondents should nevertheless be ordered to pay the Claimants' arbitration costs, because the Respondents "prevented Claimants from pursuing their free Delaware court litigation by seeking arbitration pursuant to an agreement that implicitly required them to pay their cost deposits by virtue of citing SIAC rules as governing."[216] Not only would the Claimants have avoided SIAC fees had the Respondents not "fraudulently" insisted on

215 Claimants' last updated cost statement of 7 June 2021.

216 Claimants' Cost Statement, §3.

arbitration, but also they would have avoided the expenses of a virtual hearing because the Delaware action would have ended before pandemic-related disruption. For the same reasons, the Claimants contend that the Respondents should be precluded from seeking their arbitration costs.

326. Still further, the Claimants argue that no costs award should be made in favor of Respondent 3 because it chose to insert itself into the arbitration, when no claims had been brought against it. Respondent 3 did not make any counterclaims either. For the Claimants, "GOL should not be permitted to intervene only to substantially increase the costs of these proceedings, and then further request that Claimants pay GOL's costs, attorneys' fees and expenses incurred in driving up the costs of these proceedings."[217] In addition, the Respondents' refusal to timely pay their share of the arbitration costs should weigh against granting them their costs.

327. Moreover, the Claimants submit that, irrespective of the outcome of the arbitration, the Respondents' costs should not be awarded because the Respondents made several frivolous applications that increased the cost of the arbitration, including their applications for early dismissal, fixing separate costs, and for security for costs (the "Non-Merits Disputes"). The Claimants prevailed on each of these Disputes. In the circumstances, the Claimants insist that if the Respondents were to prevail on the merits, the Tribunal should "(a) order Respondents to pay all of the SIAC arbitration and virtual hearing costs; (b) deny Respondents any recovery of the SIAC arbitration or virtual hearing costs; (c) deny all costs and fees to the intervening GOL; (d) order Respondents to pay arbitration costs and attorneys' fees and expenses that Claimants incurred in prevailing on the Non-Merits Disputes; and (e) deny Respondents any costs award relating to the Non-Merits Disputes […]."[218]

328. The Claimants oppose the Respondents' inclusion of USD 177,221.64 in unpaid SIAC costs in the latter's cost submissions as those costs were not actually incurred by the Respondents. It would be inappropriate – so say the Claimants – to direct them to pay amounts that the Respondents themselves have not paid and were not obligated to pay.

329. The Claimants equally oppose the Respondents' inclusion of USD 791,833.62 in attorneys' fees and expenses in the latter's cost submissions. They point out that the fee arrangement disclosed by Respondent 3 (see below) is not a contingency arrangement, according to which Respondent 3 would owe a percentage as fees to its

217 Claimants' Cost Statement, §4.

218 Claimants' Cost Statement, §6.

lawyers if the Respondents were successful in the arbitration. Rather, the arrangement suggests that, even if the Respondents were successful in this arbitration, GOL would still be liable for the fees and expenses claimed. Indeed, for the Claimants, Respondent 3's counsel "would be unable to recover any over-cap fees unless and until GOL brought an entirely separate lawsuit against entirely separate parties in an entirely separate forum, obtained an alter ego or other such veil-piercing finding, and then collected money from the separate party/parties, not GOL."[219] There is thus no way in which GOL would become liable for and incur any over-cap fees, making them unrecoverable here. The Claimants further note that Respondent 3 has not disclosed the amount it paid or is obligated to pay its own counsel, other than the fees to Respondents 1 and 2's counsel. Respondent 3 has thus offered no proof of the fees and expenses it actually incurred in this arbitration, "making recovery of any amount of GOL fees and expenses unsupportable and inappropriate".[220]

330. The Claimants also oppose the Respondents' inclusion of USD 50,645.92 towards fees generated as a result of the Delaware court action initiated by the Claimants to reinstate the proceedings they had brought in that court against Respondents 1 and 2 (the "Delaware Reinstatement Action"), as they have nothing to do with the present arbitration. The Respondents are wrong in suggesting that by commencing the Delaware Reinstatement Action, the Claimants breached the arbitration agreement in the Deed. No court or tribunal has made any finding to this effect. On the contrary, the Respondents breached the arbitration agreement by refusing to pay their share of the arbitration costs. Nevertheless, if the Tribunal was minded to award the costs associated with the Delaware Reinstatement Action, the Claimants should be entitled to recover an additional USD 37,860.00 towards their own costs incurred in that proceeding.

B. Respondent 1 and 2's Position

331. Respondent 1 and 2 note that pursuant to Clause 8 of the Management Agreement, Respondent 3 has indemnified them in respect of their fees and expenses incurred in this arbitration. Thus, should the Respondents prevail, Respondent 3 should recover the following amounts from the Claimants:[221]

a.	Legal Fees	S$ 964,393.02 (US$725,107.53)

219 Claimants' Cost Statement Reply, §20

220 Claimants' Cost Statement Reply, §6.

221 Respondent 1 and 2's last updated cost statement of 7 June 2021.

b.	Disbursements	S$ 4,733.31 (US$ 3,558.88)
	Total	S$ 969,126.33 US$ 728,666.41

332. These costs, so say Respondents 1 and 2, are reasonable and proportionate given the quantum of the claims of USD 162 million, which was later capped at USD 42 million. Respondent 3 is entitled to recover them as they are the "direct result" of the Claimants' "baseless and abusive relitigation" in which the Respondents were forced to incur significant costs responding to issues that have already been decided in prior proceedings.

333. Respondents 1 and 2 deny the Claimants' position that the former should be asked to bear the costs of the former's unsuccessful applications, including their application for early dismissal. They note that under Singapore procedural rules and principles, an unsuccessful summary judgment application would usually result in an order for costs to be "in the cause", with the result that the costs of the application would be borne by the unsuccessful party in the main action.

C. Respondent 3's Position

334. On its part, Respondent 3 seeks the following costs:[222]

Total Counsel Legal Fees	**$763,934.50**
Total Counsel Expenses	**$27,899.12**
Total Fees SIAC	**$418,990.95**
Total Fees Arbitral Secretary	**$46,052.63 (S$ 61,250)**
Arbitration Place	**$7,500**
Court Reporter Fees and Transcripts	**$10,150**
Total due to GOL R3	**$1,275,082.2**

335. It states that it has a fee arrangement with its counsel, which it describes in the following terms: "[p]ursuant to Respondent's engagement letter with Mr. Branson, Respondents were not required to pay all legal fees to Mr. Branson, Womble Bond Dickinson, Anthony King and LS Horizon. Respondent continued to incur legal fees above the cap,

222 R3's Cost Statement, pp.2-3, as updated by Respondent 1 and 2's communications of 7 December 2020 and 7 June 2021.

and if awarded and collected by piercing the corporate veils, the Government has agreed to pay Mr. Branson's, Womble's, Mr. King's and LS Horizon's, unpaid fees and expenses. This arrangement does not apply to Drew & Napier's legal fees and out-of-pocket expenses or disbursements, as the Government has indemnified San Marco and Ms. Gass and is obligated to pay those fees and expenses in full."[223]

336. Respondent 3 opposes the Claimants' contention that the former is not entitled to claim the fees and expenses it incurred as a result of the Delaware Reinstatement Action. It contends that "[i]t was essential for the Government to pay for the defense of Respondents 1-2 in that Delaware proceeding to preserve this Tribunal's jurisdiction of this case and to preserve the right of the three Respondents to have this dispute resolved by arbitration".[224] The sums expended in the Delaware proceedings were thus "ancillary to and directly connected to the preservation of this arbitration action".[225] In the circumstances, it contends that "[b]ecause Claimants' pursuit of the second Delaware action was a breach of the agreement to arbitrate, and was a patent attempt to thwart this Tribunal's jurisdiction, this Tribunal has the power and authority to award the costs Claimants' [sic] compelled the Government to expend in that defense to preserve its right to continue this arbitration."[226]

337. All the Respondents oppose the Claimants' submission that Respondent 3 is not entitled to claim its costs in the arbitration due to its status as intervener. They point out that, as the indemnifier of Respondents 1 and 2, GOL had a "significant interest" in joining this arbitration. Further, as these proceedings are part of a "the long-running war waged by the Claimants against GOL for years", GOL's intervention was essential to give the Tribunal the "full picture" of the Claimants' conduct, including that the claims in this arbitration related to and were subsumed by prior disputes between the Claimants and GOL. Under applicable Singapore procedural law, a successful party properly added to a proceeding is entitled to its costs. Even under New York law, an intervener is entitled to costs where the intervention does not change the character of the proceedings.

338. All the Respondents also object to the Claimants' argument that the Respondents are not entitled to recover the arbitration costs that Respondent 3 had not yet paid SIAC and the legal fees owing to Respondent 3's counsel. The latter incurred legal fees and

223 Respondent 3's Cost Statement, fn. 1.

224 Respondent 3's communication of 9 October 2020, p.3.

225 Respondent 3's communication of 9 October 2020, p.3.

226 Respondent 3's communication of 9 October 2020, p.3.

expenses above the cap agreed with Respondent 3, which would be required to pay those fees if it was able to obtain and/or collect costs from the Claimants. It is thus incorrect for the Claimants to say that Respondent 3 has not incurred the legal costs; Respondent 3 is under an obligation to pay its counsel should the Tribunal award costs in its favor. The Respondents further note that the Claimants have repeatedly argued that, when presented with contingency fee arrangements in the context of decisions on cost allocation, international tribunals have awarded costs to the prevailing party to reflect fees incurred by the party's legal team at their normal hourly rates, not on the basis of the terms of the contingency agreement.

D. Analysis

339. It is common ground between the Parties that the Tribunal has a broad discretion to order the Parties to pay and apportion costs, including the arbitration costs and the Parties' legal and other costs. In this respect, the SIAC Rules 35 and 37 provide in pertinent parts:

> "35 Costs of the Arbitration
>
> 35.1 Unless otherwise agreed by the parties, the Tribunal shall specify in the Award the total amount of the costs of the arbitration. Unless otherwise agreed by the parties, the Tribunal shall determine in the Award the apportionment of the costs of the arbitration among the parties.
>
> 35.2 The term "costs of the arbitration" includes:
>
> a. the Tribunal's fees and expenses and the Emergency Arbitrator's fees and expenses, where applicable;
>
> b. SIAC's administration fees and expenses;
>
> […]
>
> 37 Party's Legal and Other Costs
>
> The Tribunal shall have the authority to order in its Award that all or a part of the legal or other costs of a party be paid by another party."

340. It is also common ground that the Tribunal should, in principle allocate costs based on the principle that costs follow the event. That said, it is not disputed that, in allocating costs, the Tribunal may consider other relevant circumstances, such as the Parties' procedural conduct and the reasonableness of the amount of their respective costs.

Neither is it disputed that the Tribunal can allocate costs as it deems fit after considering the Parties "relative success" on an "issue-by-issue" basis.[227]

341. In terms of arbitration costs, the Claimants have paid USD 426,536.89, while the Respondents have paid USD 418,990.95. The costs of arbitration amount to SGD 945,746.44 as set out in the following table:

Tribunal's Fees & Expenses	**Amount [SGD]**
Gabrielle Kaufmann-Kohler	
Fees	348, 757.24
Expenses	3,408.10
Sub-total	352,165.34
Louis B. Kimmelman	
Fees	261, 567.94
Expenses	2,169.87
Sub-total	263,737.81
Edna Sussman	
Fees	261, 567.94
Sub-total	261, 567.94
TOTAL ARBITRATORS' FEES AND EXPENSES	877,471.09
SIAC Fees & Expenses	
Administration Fee	67,135.35
SIAC Expenses and Incidentals	1,140.00
TOTAL SIAC ADMINISTRATION FEES & EXPENSES	68,275.35
TOTAL COSTS OF ARBITRATION	945,746.44

342. In terms of the Parties' costs, neither Party has objected to the reasonableness of its opponent's costs. The Tribunal too finds the Parties' costs reasonable given the scale and complexity of the case.

227 Exh. CLA-0268, J. Waincymer, Part III: The Award, Chapter 15: Costs in Arbitration in Procedure and Evidence in International Arbitration (2012), §§ 15.7.1 and 15.8.

343. The Respondents have prevailed in this case. Applying the "costs follow the event" rule generally applied in SIAC arbitrations,[228] it would mean that the Claimants should bear all of the Respondents' costs.

344. The Claimants insist, however, on a departure from this rule, arguing that irrespective of the outcome of the arbitration, the Respondents should be ordered to pay the Claimants' costs as the former compelled the Claimants to pursue a SIAC arbitration. The Tribunal does not agree. The Claimants initiated this arbitration after the Delaware District Court held that Respondents 1 and 2 could enforce the arbitration clause found in the Deed[229] and dismissed the Claimants' action before that Court. Therefore, the Tribunal cannot sustain the Claimants' arguments in this respect.

345. The Claimants also argue that a costs award should not be made in favor of Respondent 3 as it chose to intervene in the arbitration, when no claims had been brought against it. Here again, the Tribunal does not agree. Under Singapore law, which applies as the law of the seat of this arbitration, a successful intervening party is entitled to its costs.[230] GOL's intervention was reasonable not only because it indemnified Respondents 1 and 2 for any damages and costs awarded against them, but also because issues of collateral estoppel were critically important and GOL was a party to the Prior SIAC Arbitration. Besides, given the numerous disputes between the Claimants and GOL, the Tribunal found it useful to have counsel familiar with all proceedings between them. There was no duplication either as the Respondents' counsel coordinated their submissions and presentations.

346. The Claimants point out that the Non-Merits Disputes raised by the Respondents were all rejected. As a result, they seek their own costs incurred in defending these disputes as well as a reduction in the costs if any were to be awarded to the Respondents. The Tribunal recalls that it did not find any of these Disputes frivolous or otherwise disruptive of the proceedings. On the contrary, all Parties conducted the proceedings in an efficient and professional manner. Therefore, the Tribunal does not consider that it would be appropriate to direct the Respondents to bear all the costs of these Disputes.

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228 Exh. CLA-0267, ICC Commission Report, Decisions on Costs in International Arbitration, ICC Disp. Res. Bulletin 2015(2), p.42 ("SIAC […] confirmed that the general rule followed by SIAC arbitrators in arbitrations administered by SIAC under its Arbitration Rules was that costs would follow the event. Only around 10% of the awards examined deviated from this principle.").

229 Exh. C-001 ("The court finds that [the Claimants] are required to arbitrate this dispute pursuant to the arbitration clause in [the Deed] executed by [the Claimants] and [GOL].").

230 See cases cited in the Respondents' Joint Cost Statement Reply, §§4 et. seq.

In addition, the Claimants do not dispute that, under applicable Singapore law, costs of interim applications are usually borne by the party unsuccessful in the main action.[231] That said, it remains that the Claimants succeeded in at least some of these Non-Merits Disputes, which the Tribunal found unsubstantiated. The Tribunal has thus borne this factor in mind while allocating the Parties' costs below.

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.[232] 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:

- 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;

231 See R1&R2 Cost Statement, §8 relying on Exh. RLA1&2-037, Singapore Civil Procedure, Vol 1 (Sweet & Maxwell, 2019), p. 191, 14/7/3.

232 R3's Costs Statement, fn 1 ("Respondent continued to incur legal fees above the cap, and if awarded and collected by piercing the corporate veils, the Government has agreed to pay Mr. Branson's, Womble's, Mr. King's and LS Horizon's, unpaid fees and expenses".).

- 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.

349. The SIAC Secretariat will provide the Parties with a statement of the case account in due course and refund any remainder of the cost advances to each side in equal shares.

IX. OPERATIVE PART

350. For the reasons set forth above, the Tribunal:

i. Dismisses the claims in their entirety;

ii. Declares that the Claimants shall bear the arbitration costs, which amount in total to SGD 945,746.44 and orders the Claimants to thus pay to Respondent 3 USD 348,770.00;

iii. Orders the Claimants to pay:

a. USD 437,200.00 to Respondents 1 and 2 representing approximately 60% of the legal costs and disbursements of these Respondents;

b. USD 513,655.00 to Respondent 3 representing approximately 60% of the legal costs and disbursements of Respondent 3.

iv. Declares that the Claimants shall bear their own legal costs;

v. Dismisses all other requests for relief.

Seat of the arbitration: Singapore

Date: 11 August 2021

Edna Sussman
Arbitrator

Louis B. Kimmelman
Arbitrator

Prof. Gabrielle Kaufmann-Kohler
Presiding Arbitrator