

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

PROCEDURAL ORDER NO. 13

Judge Ian Binnie, C.C., Q.C., President of the Tribunal
Professor Brigitte Stern, Arbitrator
Professor Bernard Hanotiau, Arbitrator

Secretary of the Tribunal
Catherine Kettlewell

Date: July 31, 2018

The Tribunal is in receipt of the Claimants' application by letter dated 18 July 2018 for leave to substitute Dr Thomas Zitt for Mr Steven Rittvo as the quantum expert to testify on behalf of the Claimants at the Singapore hearing scheduled for 3 to 7 September 2018. The Claimants propose that Mr Rittvo's Expert Reports dated July 2014, September 2014 and May 2015 remain as the basis for Dr Zitt's evidence. The Claimants explained that Dr Zitt is a professional colleague of Mr Rittvo (now retired) and personally worked on the Rittvo Reports. The justification for the proposed witness substitution is that earlier this month (July 2018) Mr Rittvo and his family were forced "to evacuate their home through intense smoke and flying embers" created by a "massive wildfire raging" in the area. The Rittvo home "sustained smoke and water damage" which requires "major clean-up and repairs" which "cannot be fully implemented until the fire is fully extinguished, which is estimated to take approximately 4-5 weeks". Further "the situation at Mr Rittvo's personal office is similar". The Claimants filed an e-mail from Mr Rittvo dated 11 July 2018 as evidence in support of the wildfire situation. The Claimants say that Mr Rittvo must be "personally involved in the clean-up and repair process" and in the circumstances, including the emotional stress, he "is simply incapable of preparing for and participating in the Merits Hearing as currently scheduled."

The Respondent, by letter dated 18 July 2018, "strongly" objects to the substitution of Dr Zitt on the basis that Dr Zitt would not be offering his own report, but merely defending reports signed by Mr Rittvo, who has "already testified in support of those opinions" on 14 April 2015 at a hearing before this ICSID Tribunal in a way which the Respondent considers to be "truthful and helpful to the Government". Moreover the "wildfire" justification is "false in all material facts as it impacts Mr Rittvo's ability to appear in Singapore and testify." According to the Respondent, supported by recent photographs taken by a professional photographer, "there was no damage to homes in Mr Rittvo's housing area – none". Further, the photos of Mr Rittvo's house "show undisturbed green grass, foliage and flowers". The firm's website indicates that Mr Rittvo is still practicing his profession. The Respondent states that it is entitled to examine Mr Rittvo as the author who signed the Rittvo reports and it would be "a denial of justice" to permit the Claimants to base their "billion-dollar" claim on Mr Rittvo's reports in the absence of Mr Rittvo. If Mr Rittvo does not appear his reports should be struck from the record.

The Claimants responded on 24 July 2018 affirming Mr Rittvo's justification and stated that the Government's photographs do not fairly portray the wildfire damage situation. Moreover, the Respondent's legal arguments overstate the onerous requirements placed on the Claimants to obtain a witness substitution.

The Claimants did not file an affidavit or signed witness statement from Mr Rittvo to clarify the "wildfire" situation but purport to cite from recent communications from him on the subject. In essence, both sides rely on competing assertions by their respective lawyers.

In the Tribunal's view the applicable legal principle is set out in Articles 5.5 and 8.1 of the IBA Rules of Evidence as well as in Section 15.10 of Procedural Order No. 1.¹ Mr Rittvo is on the list of Claimants' witnesses to be examined. Generally, if a party appointed expert whose appearance has been requested "fails *without a valid reason* to appear", the Arbitral Tribunal "*shall disregard*" that expert's reports "unless in exceptional circumstances the Arbitral Tribunal decides otherwise." The conflicting evidence regarding the "valid reason" provided by Mr Rittvo for non-appearance in his e-mail to Claimants' counsel dated 11 July 2018 needs to be resolved. If the Claimants are correct, the Government's photographic evidence is deceptive and misleading. If the Government's allegations are correct there is a credibility issue with Mr Rittvo, the expert author of the Claimants' quantum expert reports. The conflict in the evidence has arisen too late to be resolved in sufficient time before the commencement of the Singapore hearing. The Claimants have not, at this stage, established a factual basis for the substitution. But nor, in the face of conflicting evidence, has the Government established a basis for striking out the Rittvo reports.

In the circumstances the hearing in Singapore will proceed as scheduled on all issues except damages and quantum. If, as a result of the Singapore hearing, a damages and quantum phase is necessary, a further hearing will be convened limited to that issue, at which point Mr Rittvo's situation can be clarified.

ACCORDINGLY

1. The Claimants' application to substitute Dr Thomas Zitt for Mr Steven Rittvo is deferred *sine die*.
2. The Government's request to strike the Rittvo reports is equally deferred *sine die*.
3. The hearing scheduled for 3 to 7 September 2018, in Singapore will proceed on all issues except damages and quantum.
4. A further hearing limited to damages and quantum, if necessary, will be convened by the Tribunal at a later date after consultation with the Parties.

[Signed]

The Honourable Ian Binnie, C.C., Q.C., President
For the Arbitral Tribunal
Date: July 31, 2018

¹ Section 15.10 of Procedural Order No. 1 ("The Tribunal may disregard the testimony of a witness or expert called to testify at the hearing who fails to appear at the hearing without justified reasons.")