



School of International Arbitration

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International Arbitration Case Law

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MALICORP LIMITED V. THE ARAB REPUBLIC OF EGYPT (ICSID CASE NO. ARB/08/18) AWARD

Case Report by Florencia Delia Lebensohn**
Edited by Prof. Srilal Perera***

An award in the matter of an arbitration proceeding before a tribunal constituted in accordance with the bilateral investment treaty between the United Kingdom of Great Britain and Northern Ireland and the Republic of Egypt signed 11 June 1975 and the ICSID Convention and Arbitration Rules.

Tribunal:	Prof. Pierre Tercier (President), Prof. Luiz O. Baptista and Maitre Pierre-Yves Tschanz.
Claimant's counsel:	Maître Christian Bremond, Maître Sylvie Morel, Maître Yassin Tagelding Yassin, Maître Jean-Pierre Coutard, BREMOND, VAÏSSE, RAMBERT & ASSOCIES.
Defendant's counsel:	Maître Thomas H. Webster, Maître Asser Harb and H.E. Sedky Kholousky and Mr. Ahmed Saad, Egyptian State Lawsuit Authority.

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Digest

1. Facts of the Case

This decision was issued in the dispute between Malicorp Limited (“Malicorp” or “Claimant”), a company organized and incorporated in the United Kingdom and the Republic of Egypt (“the Republic”, “Egypt” or “Respondent”) with respect to the violation of the Bilateral Investment Treaty between the United Kingdom of Great Britain and Northern Ireland and Egypt (the “BIT”). The investment dispute arises out of the alleged wrongful termination by the Respondent of the concession contract described below.

In 1999, the Egyptian Directorate General of Civil Aviation launched a call for tenders for the building of the Ras Sudr Airport on the basis of a “Build, Operate, Transfer” type of concession contract. In the following weeks, Malicorp allegedly took various measures to reply to the call for tenders, amended its Memorandum and Articles of Association increasing the share capital to 100 million pounds sterling and submitted a bid, accompanied by a first demand guarantee for a million Egyptian pounds. In 2000, the Respondent informed Malicorp by letter that its bid had been selected as being the best.

One month later, Malicorp’s board decided to cancel the resolution to increase the share capital to 100 million pounds sterling and to replace it by a value of 1,000 pounds. In November 2000, Malicorp and the Republic entered into the final concession contract for the construction, management, operation and transfer of the Ras Sudr International Airport (the “Contract”). The Contract provided that the concessionaire would set up a company limited by shares, under Egyptian law and the incorporation documents were to be submitted to the Republic no later than 90 days after the execution of the Contract. In December 2000, the Respondent sent Malicorp the first notice as to non-performance under the contract, in particular the obligation to provide a bank guarantee, and in January 2001, it repeated this message as the establishment of an Egyptian company and the bank guarantee had not been accomplished. In February 2001, the 90-day limit given to Malicorp to set up the company expired. Several disagreements as to the setting up of the company followed. In August 2001, the Respondent notified Malicorp of the termination of the Contract. The parties disagreed as to the reasons for the termination of the Contract. According to the Claimant it was terminated for

national security reasons which in turn, gave it the right to claim compensation for damages caused by unfair treatment and the expropriation of the investment under the BIT. On the contrary the Respondent countered that ICSID had no jurisdiction to entertain the claim and further that the Contract was terminated for contravention of provisions included in the Contract such as: production of false documents, non-fulfillment of the obligation to set up an Egyptian company, and failure to provide the necessary guarantees and to properly perform the concession contract.

Apart from bringing the case before the ICSID Tribunal, it is important to note that the Claimant instituted arbitration proceedings before the Cairo Regional Center for International Commercial Arbitration (“CRCICA”). In those proceedings, the Arbitral Tribunal issued an arbitral award deciding that (i) the arbitration agreement in the contract was binding on Egypt; (ii) the Republic had been the victim of a fundamental error in signing the contract; and (iii) the Respondent was to reimburse Malicorp for costs, invoices and the salaries of its employees. The Respondent made an application to set aside the CRCICA arbitral award and the Claimant initiated enforcement proceedings in France. In parallel, there were also criminal proceedings instituted against individuals connected with Malicorp.

2. *Legal Issues Discussed in the Decision*

(a) *Jurisdiction of the Arbitral Tribunal (¶¶ 99-105)*

The Arbitral Tribunal asserted that its jurisdiction, according to the relevant provision in the BIT and article 25 of the ICSID Convention, is subject to a certain number of conditions which had to be considered: (i) consent of the contracting State, (ii) consent of the investor, (iii) nationality of the investor, (iv) legal dispute, (v) relating to an investment, (vi) in the territory of the contracting State, and (vii) alleged violation of the treaty.

The Tribunal pointed to two issues in particular that needed to be considered in these proceedings.

- a) Whether the Tribunal had jurisdiction to consider a purely contractual action which may not be eligible for the special protection under the BIT.

The Tribunal determined that the contract purports to be a purely civil law contract that contains an arbitration clause, which was the basis for the Claimant to take action before the CRCICA. The claims in both proceedings are the same and even the counsel for the Claimant has expressed that the compensation that might be obtained as a result of the CRCICA proceedings could be deducted from these proceedings as well.

- b) Whether the CRCICA award prevented these proceedings from continuing because of the principle of res judicata.

In the Tribunal's view, the commercial arbitration proceedings were completed by the award of the CRCICA Arbitral Tribunal, which was deemed final by the Claimant since it succeeded in the claim, did not appeal the award and undertook the necessary enforcement steps in at least one country. In this respect, the Tribunal held that the authority of res judicata prevents a party from reintroducing an action when there is a decision rendered by a competent authority concerning the same claims and based on the same factual and legal basis.

Moreover, the Tribunal decided that investment treaties do not necessarily cover purely contractual claims when the same parties have agreed on another jurisdictional clause. In this sense the Tribunal held that "it is not possible to resort to the special methods provided for by treaty if the commercial route, be it arbitration or the local courts, enables all submissions and arguments to be exhausted. It is hard to see how an investment treaty would be breached by the mere fact of a breach of contract, as long as the control mechanisms put in place by the contract are functioning normally."¹ In this respect, it was said that investment arbitration did not provide a substitute for parties refraining from ordinary proceedings nor a means of appeal in case of unsatisfactory results. In the event of breach of contract as the basis for the jurisdiction of an investment tribunal, that breach should amount to a violation of the treaty, unable to be resolved by the ordinary agreed procedure under the Contract.

However, the Tribunal held that by agreeing to an umbrella clause in the BIT before the dispute arises, the parties to a BIT may agree that all disputes relating to an investment that an investor has against the host country can

¹ Award ¶103.

be submitted to the tribunal. The parties cannot first initiate a contractual proceeding only to turn to a special proceeding in case it is not satisfactory, as it seems to be in this case. Therefore, “by virtue of the principle whereby a party may not contradict itself, and the authority of *res judicata*, the Claimant cannot at the same time both invoke a breach of the Contract on the basis of the Agreement and seek enforcement of the commercial award on the basis of the arbitration clause.”² This conclusion would be different if the investor sued the host state on grounds other than the breach of contract, which was not the case in the present dispute.

The Tribunal acknowledged that even if this issue would have been of serious dispute in this case it refrained from analyzing it mostly because the Respondent has not advanced this objection. Thus, the Tribunal concluded that the only issue to be examined was whether the dispute involved an investment dispute, and specifically the objection based on the principle of good faith.

(b) Definition of Investment (¶¶ 106-114)

In the opinion of the Tribunal, the notion of investment must be understood from the perspective of the objectives delineated in the BIT and the ICSID Convention. The relevant BIT sought to promote investments by creating conditions to encourage foreign investors to contribute and provide services in the host country and to protect the fruits of such contributions and services. There must be active economic contributions that have passively generated the economic assets that the conventions are designed to protect. The ICSID Convention does not define the term “investment” in order to give Tribunals the maximum scope to review whether an investment had been made.

In relation to an investment, in this case, both aspects exist: the Contract could have generated significant returns for the Claimant, and the Respondent prematurely ended the Contract. Even if the relations between the parties to the Contract ended without the Claimant having made substantial contributions, in the Tribunal’s view, there is nothing that prevents the conclusion that the long-term commitment of a party to perform services amounts to a contribution. In this

² Award ¶103.

sense “the expropriation concerns the expectations from a contract which, although signed, had not yet been performed in any way but which contained a basic commitment”.³ From this perspective the conditions for an investment to exist are met, since the Claimant is alleging a deprivation of a concession given by law or by contract.

Therefore, the Tribunal held that the commitment by Malicorp to constitute major contributions in the future represents the investment and the protection extends to deprivation of the revenues that the investor had a right to expect with respect to contributions that it had not made but to which it was contractually committed to make.

(c) *The Breach to the Principle of Good Faith (¶¶ 115-119)*

The Tribunal proceeded to determine whether it still had jurisdiction in the case where the protection sought by the investor was contrary to the notion of good faith, since according to the Respondent, the Contract was entered into on the basis of forgery.

The Tribunal held that the safeguarding of good faith is one of the fundamental principles of international law and investment law, which has a complementary function allowing for lacunae in the applicable laws to be covered and for obscurities of the law to be clarified. According to the Tribunal, this complementary function can be exercised when the protection is being requested in circumstances that violate the principle of good faith or when the protection is in connection with an investment that was being made in violation of this principle.

The Tribunal recalled that these issues have historically been analyzed from the standpoint of both jurisdiction and the merits and acknowledged the theoretical and practical consequences of adopting one criteria or the other.

In this case, the Tribunal recognized that there were arguments for analyzing the issue of validity of the investment at the merits stage, such as the principle of autonomy of the arbitration agreement, which allows the Tribunal to decide a case on the merits, even if the main Contract was entered into as a result of

³ Award ¶111.

misrepresentation and corruption, provided that these defects do not affect the consent to arbitrate itself.

However, the Tribunal considered that, since in this case the parties disagreed as to whether the Contract was entered into as a result of fraud, misrepresentation or mistake and the facts were closely interwoven; it was preferable to deal with these questions simultaneously and not to divide the decision into jurisdictional and merits issues.

3. *Decision*

(a) *The Tribunal has Jurisdiction to Rule on the Claims of the Claimant (¶¶ 121-142)*

The Claimant alleged a violation of the provisions of the BIT according fair and equitable treatment (Article 2 of the BIT) and protection against expropriation by claiming that the Respondent took measures amounting to expropriation when rescinding unilaterally the Contract without compensation (Article 5 of the BIT) and for reasons related to public security. The Claimant posits the view that these two Articles were breached concurrently. On the contrary, the Respondent considered that it was entitled to such action without being deemed in breach of its obligations under the BIT or amounting to an expropriation.

The Tribunal held that for the Claimant to rely on both provisions, it must establish that it was subject to a measure different from expropriation. In this case, in the Tribunal's view, this condition was not met because the Claimant based its claim entirely on the termination of the Contract without explaining why it was also victim of unfair or inequitable treatment.

The Tribunal then proceeded to analyze whether the Respondent had the right to terminate the Contract under Egyptian civil law (since this was the applicable law of the Contract) and found that the knowledge whether a company is an empty shell or has enough resources as allegedly represented by the Claimant is fundamental and that any error in that respect justified questioning the validity of the Contract. The Tribunal concluded that the main reason given by the Respondent in the letter of rescission of the Contract (that the signing of the Contract was due to misrepresentation by the submission of inaccurate documents

related to the Claimant's financial capacities) was well-founded, gave rise to the Respondent's right to withdraw from the Contract and cannot be considered as a form of expropriation under international law.

Even if the answer to this question was enough for the Tribunal to rule on the merits of the case, it went on to analyze whether Malicorp failed, after the execution of the Contract, to comply with the obligations it had agreed upon. The Tribunal held that even if the mere conclusion of a Contract can amount to an investment, there must be a realistic prospect of performance. Since the conditions surrounding the performance of the Contract in this case were controversial, there were justifiable reasons for the Respondent to terminate the Contract. Therefore, the termination being justified, it could not be understood that there has been an expropriation and the Tribunal rejected the claims submitted by the Claimant requesting compensation based on expropriation of its contractual rights.

(b) The Determination and Allocation of the Costs and Expenses of the Arbitration

The Tribunal held, based on its broad discretion and on the fact that the Respondent's objection to jurisdiction was rejected, and the claim of the Claimant being dismissed on the merits, that (i) each party bears one half of the costs of the arbitration proceeding, including fees and expenses of the members of the Tribunal and of ICSID and (ii) each party bears its own costs and legal fees and expenses of their representation.