

# Final Arbitral Award

Summary award to be immediately enforced and not subject to any means of recourse  
in line with Article 2/8 of the Conciliation and Arbitration Annex  
of the Unified Agreement for the Investment of Arab Capital in the Arab States

In accordance with

**the Unified Agreement for the Investment  
of Arab Capital in the Arab States**

Rendered in Cairo on 22/3/2013

In the Arbitral Proceeding between:

Mohamed Abdulmohsen Al-Kharafi & Sons Co.  
(Kuwaiti Company) represented by the Vice-President of the Board of  
Directors, Mr. Omar Mohamed Helmi Dessouki

Plaintiff

And

- 1- The Government of the State of Libya
- 2- The Ministry of Economy in the State of Libya
- 3- The General Authority for Investment Promotion and Privatization  
Affairs (formerly the General Authority for Investment and Ownership)
- 4- Ministry of Finance in Libya
- 5- The Libyan Investment Authority

Defendants

*(Defendants in solidum)*

The Court of Arbitration is composed of:

Dr. Abdel Hamid El-Ahdab: Chairman  
Dr. Ibrahim Fawzi: Arbitrator  
Justice Mohamed El-Kamoudi El-Hafi: Arbitrator

**The Plaintiff:**

**Mohamed Abdulmohsen Al-Kharafi & Sons Co.**

**Kuwaiti Company (represented by the Vice-President of the Board of Directors, Mr. Omar Mohamed Helmi Dessouki)**

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**The Defendants:**

- 1- The Government of the Republic of Libya Tripoli- Libya
  - 2- The Ministry of Economy in the Republic of Libya Tripoli- Libya
  - 3- The General Authority for Investment Promotion and Privatization Affairs (formerly the General Authority for Investment and Ownership) Tripoli- Libya
  - 4- Ministry of Finance in Libya Tripoli- Libya
  - 5- The Libyan Investment Authority Tripoli- Libya
- (Defendants in solidum)*

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**Type of arbitration:** Ad-hoc arbitration subject to the Unified Agreement for the Investment of Arab Capital in the Arab States.

**Period of arbitration:** Six months starting from September 14, 2012, extended with the approval of H.E. the Secretary General of the Arab League till 14/4/2013.

**Place of arbitration:** Cairo Regional Center for International Commercial Arbitration – Cairo – 1, El-Saleh Ayoub Street in Zamalek.

**Applicable Law:** Libyan Law and the Unified Agreement for the Investment of Arab Capital in the Arab States

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# PART ONE: THE FACTS

## Chapter One: Circumstances of the Dispute

1. On 7/6/2006, and by virtue of decision No. 135/2006, the Libyan Ministry of Tourism granted approval and license to the Plaintiff Company for the establishment of a major touristic investment project in Shabiyat Tajura (administrative district) in Tripoli – Libya.
2. On 8/6/2006, the Tourism Development Authority and the Plaintiff Company, Mohammed Abdulmohsen Al-Kharafi & Sons Co. for General Trading, Contracting, and Industrial Structures, signed a contract called “the lease of a land for the purpose of establishing a tourism investment project” (Contract No. 4) which encompassed the following arbitration clause: “Article (29): In the event of a dispute between the two parties arising from the interpretation or performance of the present contract during its validity period, such a dispute shall be settled amicably. Failing that, the dispute shall be referred to arbitration pursuant to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States adopted on Nawar (November) 26, 1980”. By virtue of said contract the Authority leased to the Plaintiff Company a plot of land located in shabiyat Tripoli and extending over an area of 240 000 square meters. The borders of the plot of land were specified in the contract which further provides for the contractual terms and conditions agreed upon by both parties.  
For several years, the two parties have exchanged correspondences on land taking over to initiate the execution of works thereon. Among these correspondences, there was a letter referring to the assaults against the workers of the Plaintiff Company by police officers, and assaults by those who claim that they own the plot of land. This letter was dated 22/12/2007 and was addressed by the Plaintiff Company to the Director of the Department for the Development of Touristic Areas. It stated the following: **"On 15/12/2007, and during the storage of building material, a group of individuals assaulted the workers of the contractor and forced them to stop the works and vacate the premises..."**
3. Following these events, the third Defendant requested the Plaintiff to stop the works. The letter addressed by the Plaintiff Company to the Secretary of the General Authority for Tourism and Traditional Industries and dated 31/12/2007, reads as follows: **"...Some individuals from the Club assaulted the contractor and forced him to stop the works..."**.

The letter further stated that the Tourism Development Authority requested the Plaintiff to stop project execution, indicating: **"...Consequently, five tourism police cars showed up and the works were stopped until a security force car arrived at the site. Afterwards, the Tourism Development Authority requested that we stop the works and remove our equipment from the site until the matter is permanently resolved..."**.

4. On 21/1/2009, the Director of the Department for the Development of Touristic Areas and head of the permanent working team at the General Authority for Tourism and Traditional Industries sent a letter to the Vice-President of the Board of Directors of the Plaintiff Company, in which he referred to the proposal submitted to the Plaintiff of choosing an alternative plot of land for project execution, while retaining the current plot of land pending the resolution of all impediments. The letter reads as follows: **"We have proposed that the company chooses an alternative plot of land for project execution, while retaining the current plot of land pending the resolution of all impediments. However, the Company refused the proposal and chose to wait for the resolution of the problems on the current site"**.
5. On 9/6/2010, the Libyan Minister of Industry, Economy and Trade issued Decision No. 203/2010 by virtue of which Decision No. 135/2006 was annulled, following the transfer of decision-making prerogatives on the approval of foreign investment projects to said Ministry.
6. On 27/3/2011, the Plaintiff submitted a request to H.E. the Secretary General of the Arab League to approve the start of the arbitral proceedings.
7. On 11/4/2011, Mr. Omar Mohamed Dessouki, the Vice-President of the Board of Directors of the Plaintiff Company, received the approval of the Secretary General of the Arab League to initiate the necessary arbitral proceedings based on the provisions stipulated in the Conciliation and Arbitration Annex of the Unified Agreement for the Investment of Arab Capital in the Arab States.
8. On 26/5/2011, the Plaintiff notified the Defendants, through the South-Tripoli Court bailiff, of the referral of the dispute to arbitration and the appointment of an arbitrator, and requested the appointment of a second arbitrator to represent the Defendants.
9. On 23/8/2012, the Plaintiff submitted to the Arbitral Tribunal a statement of claim, including a docket.

10. On 23/11/2012, the Defendants submitted to the Arbitral Tribunal the statement of defense, including a docket.

## **Chapter Two: The Arbitration Clause:**

The arbitration clause is included in the lease contract of the land plot, contract No. 4, concluded for the purpose of establishing a tourism investment project. Said contract was signed on 8/6/2006 between the Tourism Development Authority, herein represented by D. Ali Fares Ouaida, as Secretary of the People's Committee for Tourism Development Authority from one side, and Mohammed Abdulmohsen Al-Kharafi & Sons Co. for General Trading, Contracting, and Industrial Structures herein represented by Mr. Omar Mohamed Helmi Dessouki as the legal representative, on the other side. Article 29 of said contract stipulates the following:

***“In the event of a dispute between the two parties arising from the interpretation or performance of the provisions of the present contract during its validity period, such a dispute shall be settled amicably. Failing that, the dispute shall be referred to arbitration pursuant to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States adopted on Nawar (November) 26, 1980 A.D.”.***

## **Chapter Three: The Arbitral Proceedings:**

1. By virtue of the bailiff's notice dated 26/5/2011 addressed to the Secretary of the General People's Committee, the Secretary of the General People's Committee for Industry, Economy and Trade, the Secretary of the General People's Committee for Finance, and to the legal representative of the General Authority for Investment and Ownership, each acting in his own capacity, notified on 26/5/2011 by the Secretary of the Litigation Department in Tripoli and authorized signatory, Attorney Abdel Ghani An-Nasiri in his own capacity, the Plaintiff Company, Mohammed Abdulmohsen Al-Kharafi & Sons Co., appointed Dr. Ibrahim Fawzi, arbitrator, as member of the Arbitral Tribunal that will decide the request for arbitration.
2. On 30/5/2012 Arbitrator Dr. Ibrahim Fawzi received a letter from Justice Bashir el-Akari, Director of the Litigation Department in the Ministry of Justice in the

Libyan Transitional government whereby he informs him that the Libyan government, legally represented herein by the Litigation Department, has designated Mr. Mahmoud El-Kamoudi El-Hafi, Justice in the Libyan Supreme Court, as Arbitrator in the Arbitral Tribunal.

3. On 7 June, 2012, the General Assembly of the Supreme Court in the Transitional National Council in Libya issued decision No. 7 of 2012 authorising Mr. Mohamed el-Kamoudi el-Hafi, Justice in the Supreme Court, to act as arbitrator of the Libyan party in the arbitration case between the Libyan State and Al-Kharafi International Co.
4. On 13/6/2012, the two arbitrators agreed on selecting the third arbitrator, Dr. Abdel Hamid El-Ahdab, as president of the arbitral Tribunal. The latter decided the following:
  - 4-1. The Arbitration shall take place in Cairo. However, this shall not preclude holding hearings anywhere else.
  - 4-2. The rules of Arbitration of the Cairo Regional Centre for International Commercial Arbitration shall be applicable to the arbitral proceedings without being administered by Cairo Center, whereby the arbitration remains non-institutional or ad hoc arbitration.
  - 4-3. The Tribunal decided that the arbitrators' fees shall be equal to 400 thousand US dollars and added 40 thousand US dollars as expenses to be paid by both parties equally. If one of the parties defaults, the second party shall be immediately notified to pay on its behalf in order to carry on the arbitral proceedings. The arbitral award shall take the aforementioned into account.
  - 4-4. The first hearing shall be held at 11:00 am on Saturday 14/7/2012 in Cairo Regional Centre for International Commercial Arbitration.
  - 4-5. The first hearing shall determine the arbitral proceedings, dates of exchange of memoranda between the two parties, as well as the date of the oral hearing, taking into consideration the fact that the arbitration period is of six months that can only be extended by virtue of an approval from the Secretary General of the Arab League.
5. On 5/7/2012, procedural order No. 1 was issued, and provided that the Kuwaiti Plaintiff, Mohammed Abdulmohsen Al-Kharafi & Sons Co, has credited the bank

account opened for the purposes of the present arbitration under the name of the chairman Dr. Abdel Hamid El-Ahdab, the sum of USD 220,000 (two hundred and twenty thousand US dollars), and that the Libyan Defendant, the General Authority for Investment Promotion represented by the Litigation Department, has not paid within the time limit, and that the Arbitral Tribunal shall notify the Plaintiff thereof and shall require him to pay on behalf of the Libyan party within a period that ends on July 25, 2012, under penalty of staying the arbitral proceedings after the said date. Should the Libyan Defendant settle its dues, the Kuwaiti Plaintiff shall be reimbursed for what it had already paid; otherwise the Libyan Defendant shall bear the arbitration fees and costs. The Arbitral Tribunal also decided the following:

**5-1.** The 14 July 2012 first hearing shall be held on time with the presence of both parties. Representatives of each party shall bear a power of attorney allowing them to represent the parties. Each party shall also submit a list of the parties' requests to the Arbitral Tribunal with all the necessary documents of support thereto.

**5-2.** Should the Kuwaiti Plaintiff fail to pay by 25/7/2012, the arbitral proceedings decided upon in the July 14, 2012 hearing shall be stayed.

**5-3.** Should any of the parties refrain from attending the July 14, 2012 hearing, arbitration shall continue and shall not be affected by any such absence.

Article 47 of the arbitral proceedings of the Cairo Regional Center for International Commercial Arbitration (CRCICA) shall apply to the procedural order.

- 6.** On 11/7/2012, Counselor Bashir Ali EL-Akari, Head of the Litigation Department and Head of the Foreign Disputes Committee at the Litigation Department of the Ministry of Justice in the transitional government, informed the presiding arbitrator Dr. Abdel Hamid EL-Ahdab in writing that the Litigation Department in Libya appoints Justice Mahfouz Ahmad EL- Fokhi to attend the hearing of 14/7/2012 on behalf of the General Authority for Investment and Ownership.
- 7.** On 14/7/2012, the first hearing was held at eleven a.m. at the Cairo Regional Center for International Commercial Arbitration (CRCICA) and was attended by the attorney of the Mohamed Abdulmohsen Al-Kharafi & Sons Co, the Plaintiff Company, as well as the representative of the Litigation Department for the Defendants. The arbitrators declared their independence. The attendees



endorsed the terms of reference and the procedural time table submitted by the Arbitral Tribunal without any amendments thereto. The two parties signed the terms of reference and the procedural time table as an indication of their endorsement. The terms of reference provided that this arbitration is subject to the Unified Agreement for the Investment of Arab Capital in the Arab States, and that the Arbitral Tribunal had decided that the Cairo Regional Center for International Commercial Arbitration (CRCICA) arbitral proceedings shall govern this arbitration in accordance with the requirements proper thereto, especially the timelines, as the main rules governing this arbitration are the rules set forth in the arbitral proceedings of the Unified Agreement for the Investment of Arab Capital in the Arab States stipulating that the arbitral award shall be rendered within six months from the date of the first hearing held by the arbitral Tribunal, i.e. the July 14, 2012 hearing. The Arbitral Tribunal considered that the six months period shall commence as of the July 14, 2012 hearing and not of the date of notice.

The terms of reference also provided for the following:

**7-1.** The delay for exchange of memoranda between the two parties shall be of one month for each party, and the deadline for submitting the statement of claim shall be the 14<sup>th</sup> of September.

**7-2.** The Defendant, i.e. the General Authority for Investment Promotion, represented by the Litigation Department, shall communicate the statement of defense within a period ending on October 20, 2012.

**7-3.** The statement of defense shall reply to the particulars of the statement of claim, and contain a reference to all the documents and other evidence relied upon by the Plaintiff in the statement of claim.

**7-4.** Should they find a need thereto, the Defendants shall submit in their statement of defense a counterclaim, and may duly rely on a claim for the purpose of a set-off provided the Arbitral Tribunal has jurisdiction therein.

**7-5.** The Plaintiff shall submit a replication in response to the statement of defense within a period of fifteen days that ends on November ten.

**7-6.** The Defendants shall submit a rejoinder in response to the replication within a period of fifteen days that ends on the end of November.

**7-7.** The two parties shall submit during the hearing: the name, phone number, fax, e-mail and address of the representative that the arbitration Tribunal may contact.

**7-8.** The hearing shall be set on December 5, to hear witnesses and pleading arguments. Each party shall send to the arbitral Tribunal and the other party a list of their witnesses within a period ending on November 20.

**7-9.** Each party may submit their written arguments following the hearing within a period that ends on December 15.

**7-10.** The Arbitral Tribunal shall render the arbitral award within a period that ends on January 10, 2013.

**7-11.** Should the Plaintiff Mohamed Abdulmohsen Al-Kharafi & Sons Co. fail to pay the Defendant's part, the General Authority for Investment Promotion represented by the Litigation Department within a period that ends on July 25, 2012, arbitral proceedings shall be stayed, and all aforementioned dates reexamined. Should the Libyan Defendant settle his part after payment was made by the Kuwaiti Plaintiff on behalf of said Defendant, the paid amount shall be returned to the Plaintiff immediately.

- 8.** On 25/7/2012, the Arbitral Tribunal issued the procedural order No. 3 that was sent to both parties providing that, in line with procedural order No. 1 and procedural order No. 2 including the minutes of the hearing held in Cairo on 14/7/2012, a payment of USD 220,000 (two hundred and twenty thousand US dollars) was made on 25/7/2012 to the bank account bearing the name of this arbitration by Mohamed Abdulmohsen Al-Kharafi & Sons Co., thereby settling all arbitrators' fees and. The arbitral proceedings shall therefore continue as per the minutes of the hearing held on 14/7/2012 that was signed by both parties and the arbitrators.
- 9.** On 24/9/2012, procedural order No. 4 was issued and provided that after the Plaintiff Mohamed Abdulmohsen Al-Kharafi & Sons Co. had amended the claim to increase the relief sought from USD 55 million to USD 1.144.930 billion, a review of the arbitration fees and costs shall be carried out in line with the amendment to the claim by increasing the relief sought. The Arbitral Tribunal, in its decision dated 13/6/2012, approved the arbitration costs and arbitrators' fees as stipulated in the Cairo Regional Center for International Commercial Arbitration (CRCICA). The Arbitral Tribunal approved the abovementioned claims amounting

to USD 55 million before the statement of claim was submitted, and had endorsed the arbitration fees amounting to USD 400,000 (four hundred thousand US dollars), and an extra USD 40,000 (forty thousand US dollars), knowing that the amount approved is an average amount. The Arbitral Tribunal, and upon approval of all three arbitrators, shall approve the average rate mentioned in the tables under annex to CRCICA Arbitration Rules; accordingly, the fees would amount to USD 1,200,000 (one million two hundred thousand US dollars) after the Plaintiff has amended the claim to increase the relief sought to one billion one hundred and forty four million and nine hundred thirty US dollars, to be paid equally by the two parties, knowing that they had previously paid USD 400,000 (four hundred thousand US dollars). The value of the set fees shall be calculated as follows:  $1,200,000 - 400,000 = \text{USD } 800,000$  (eight hundred thousand US dollars), and shall be paid within a period that ends on October 30, 2012. Should both parties fail to pay, the claim shall be limited to the relief sought claimed before the statement of claim was submitted, i.e. fifty five million US dollars. Should only one of the parties make a payment of USD 400,000 (four hundred thousand dollars) within the time limit and should the other party fail to pay, the paying party shall be required to pay USD 400,000 (four hundred thousand US dollars) within a period that ends on November 30, 2012. Payment shall be made by a transfer to BEMO bank, account No. 02058683601, arbitration account: Dr. Abdul Hamid El-Ahdab, Al Kharafi arbitration, Libya, i.e. the same bank to which the two previous transfers were made.

- 10.** On 24/9/2012, a misprint in procedural order No. 4 was corrected, the error being that the claim was amended to increase the amount sought to one billion one hundred forty four million nine hundred thirty thousand US Dollars, and that the ceiling for the arbitration costs and the arbitrators' fees mentioned in the tables under annex to CRCICA Arbitration Rules is of two million US Dollars.
- 11.** On 15/10/2012, procedural order No. 5 was issued by virtue of which the Arbitral Tribunal decided to amend procedural order No. 4 so that it provides that the two parties shall pay USD 800,000 to be added to the previously paid USD 400,000; the amount of USD 800,000 shall be paid in half within a time limit that does not exceed October 25, 2012 to the bank account held under the name of Dr. Abdul Hamid El-Ahdab, Al-Kharafi arbitration/Libya - LB9700930000058683601USD- Libya. The procedural order also provided that in the event one of the parties failed to pay his part within the set time limit, the other party shall be given until November 5, 2012 to pay on his behalf, and the amount paid shall be included in the final arbitral award. Should the amount of USD 800,000 be paid in its entirety, an arbitral hearing shall be held in the

presence of the Arbitral Tribunal, the parties and their representatives on Monday 12/11/2012 at ten a.m. in the Cairo Regional Center for International Commercial Arbitration (CRCICA). During this hearing, the parties and the Arbitral Tribunal shall agree on a new procedural timetable to replace the one set out in the 14/7/2012 hearing regarding the dates for submitting statements of claim, submissions, lists of witnesses, and for the hearing, witness statements, and the rendering of the arbitral award. The Arbitral Tribunal shall send, prior to the hearing of November 12, 2012 if held, a new procedural timetable that shall be discussed during this hearing. If the parties and arbitrators fail to agree over the new procedural timetable, the Arbitral Tribunal shall issue a procedural order setting new dates which shall include that the Arbitral Tribunal shall send the procedural order via e-mail, fax or express mail to the parties and their representatives. Should no objection be made to this procedural order, it shall be adopted as the basis for notifying parties of the proceedings, exchanging of memoranda and submissions by e-mail or fax, in line with article 2 of Chapter one (paragraph 2) of the Cairo Regional Center for International Commercial Arbitration (CRCICA) Arbitration Rules. This procedural order shall mention the text of the said article.

**12.** On 17/10/2012, upon the approval of the Arbitral Tribunal, and upon consulting both parties and their representatives, procedural order No. 6 was issued to replace the November 12, 2012 hearing with another to be held on November 17, 2012 at ten a.m. in the Cairo Regional Center for International Commercial Arbitration (CRCICA). During this hearing, a new procedural timetable shall be agreed upon for exchanging memoranda, for setting a new date for the hearing, witnesses' testimonies and for the date of rendering the arbitral award, in the event the two parties settled the arbitration costs.

**13.** On 25/10/2012, procedural order No. 7 was issued in line with procedural order No. 5, stating that the Plaintiff has paid the amount indicated in procedural order No. 5. Procedural order No. 6 also provided that should the Plaintiff pay on behalf of the Defendant prior to November 5, 2012, the arbitral hearing shall be held on 17/11/2012 to agree over the procedural timetable. Otherwise, the Arbitral Tribunal shall issue a decision thereon.

**14.** On 2/11/2012, procedural order No. 8 was issued, stating that the Arbitral Tribunal has verified that the Plaintiff has credited the arbitration account prior to November 5 on behalf of the Defendants with the sum of USD 400,000 (four hundred thousand US dollars) that will be factored into the arbitral award, and

that, in line with procedural orders No. 5 and 6, the November 17 hearing shall be held in its due date at ten a.m. at the Cairo Regional Center for International Commercial Arbitration (CRCICA), to agree over a new procedural timetable to communicate memoranda, to set a date for the hearing, witnesses' testimonies and the rendering of the arbitral award.

**15.** On 9/11/2012, procedural order No. 9 was issued and a draft "terms of reference" suggesting new procedural timetable to exchange memoranda, to set a date for the hearing and the rendering of the arbitral award annexed thereto. The procedural order called upon both parties and their representatives to agree over the dates that they see convenient and that the Arbitral Tribunal deems appropriate. In the event of failure to agree over the new procedural timetable, the Arbitral Tribunal shall issue a decision thereon at the end of the hearing.

**16.** On 17/11/2012, procedural order No. 10 was issued, and the Arbitral Tribunal appended thereto the terms of reference agreed upon in the November 17 hearing held in Cairo and ratified by the Arbitral Tribunal. This arbitration shall be governed by this terms of reference, and the Arbitral Tribunal is keen to confirm that what has been agreed upon during the hearing, i.e. the exchange of memoranda shall be carried out via e-mail pursuant to Article 2 Chapter one Paragraph 2 of the Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration (CRCICA). This was mentioned in procedural order No. 5 dated 15/10/2012. The Arbitral Tribunal requested every party who may receive a memorandum or a submission to inform the other party having received the e-mail.

The terms of reference appended to procedural order No. 10 dated 17/11/2012 included the minutes of the hearing held in Cairo on 17/11/2012 which encompassed that the Chairman said that this arbitration is subject to the Unified Agreement for the Investment of Arab Capital in the Arab States, that the period of arbitration is of six months, and that the extension of this period is not an easy task as it requires the approval of the Secretary General of the Arab League. The minutes also included that the Arbitral Tribunal, upon discussions with both parties to the dispute, decided the following:

- 1-** Memoranda shall be exchanged via e-mail as previously agreed.
- 2-** The Defendants shall submit the statement of defense within a period ending on 24/11/2012.
- 3-** The Plaintiff shall submit a replication within a period ending on 7/1/2013.

- 4- The Defendants shall submit a rejoinder in reply within a period ending on 7/2/2013.
- 5- The Plaintiff shall submit a final submission within a period ending on 21/2/2013.
- 6- The Defendants shall submit a final submission within a period ending on 6/3/2013.
- 7- Each party shall submit a list of all the witnesses and their testimonies within a period ending on 27/2/2013.
- 8- The hearing and witnesses' testimonies shall be held on Saturday 9/3/2013, and may be extended for another day at the discretion of the Arbitral Tribunal.
- 9- Both parties shall present arguments in writing that do not include any new particulars within a period ending on 13/3/2013.

The members of the Arbitral Tribunal, Dr. Abdul Hamid El-Ahdab, Dr. Ibrahim Fawzi and Justice Mohammad El-Hafi signed the minutes that included the agreed upon dates. The minutes were also signed by the two parties represented by Mr. Rajab Bashir El-Bakhnug, Dr. Nasser Ghanim El-Zaid, Dr Omar Dsouki and Mr Saad Salem for the Plaintiff, and Dr Hisham Sadek, Dr. Hafiza El-Haddad and Mr. Mahfouz EL-Fokhi for the Defendants.

17. On 4/1/2013, procedural order No. (11) was issued, whereby the Arbitral Tribunal decided that the submissions were received via e-mail by the arbitrators and the parties to the dispute. It further stated that the Plaintiff expressed its position and response in view of dissipating any ambiguity in the three submissions presented by Dr. Sharkawi, Dr. Wali, Dr. Zaid and Counsel El-Bakhnug. The Plaintiff also submitted to the Arbitral Tribunal the Legal Opinion of Judge Burhan Amrallah for examination.
18. On 4/1/2013, procedural order No. (12) was issued whereby it was provided that following the increase by the Plaintiff of its relief sought to the sum of USD 2,055,530,000, the Arbitral Tribunal, and after reviewing the table of arbitration costs and arbitrators' fees stipulated in the Cairo Regional Center for International Commercial Arbitration and adopted by the Arbitral Tribunal, found that the difference in arbitration costs between what the Plaintiff previously requested in its statement of claim and its current request in its replication dated 3/1/2013 is USD 700,000. The Arbitral Tribunal binds both parties to disburse the sum. Article 47 of the Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration stipulated in its first paragraph that the parties shall deposit at the Center the determined administrative and arbitrators' fees before the commencement of the arbitral proceedings. The Arbitral Tribunal

applied this rule when the Plaintiff increased the relief sought in its statement of claim to USD 1,144,930,000, while knowing that said paragraph also stated towards its end "...unless otherwise decided by the Arbitral Tribunal". Therefore, it is within the competence of the Tribunal to determine the deposit of the arbitrators' fees, not prior to the commencement of the arbitral proceedings but at an advanced stage of the arbitration, especially that paragraph (2) of article (47) of the Arbitration Rules of the Cairo Center granted the Arbitral Tribunal the freedom to violate the rule of payment prior to the commencement of the proceedings. The Arbitral Tribunal, within its competence and as stipulated by the Statute of the Unified Agreement for the Investment of Arab Capital in the Arab States and paragraph (1) of article (47) of the Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration, may determine the payment of arbitrators' fees on the basis of the new requests submitted during the course of the arbitration. The Arbitral Tribunal already sent a request to His Excellency the Secretary General of the Arab League to extend the arbitration period when the Plaintiff increased its relief sought to USD 1,144,930 and decided to stay the arbitral proceedings pending the disbursement of the arbitration costs and arbitrators' fees on the basis of this new relief sought. His Excellency the Secretary General of the Arab League approved the request of the Arbitral Tribunal and extended the arbitration period to 14/4/2013. The Arbitral Tribunal may no longer submit a request for extension again, given that the provisions of article (9) of the Conciliation and Arbitration Annex of the Unified Agreement for the Investment of Arab Capital in the Arab States, expressly provide that the Secretary General may extend the period only once. Therefore, the Arbitral Tribunal has decided to move forward with the arbitral proceedings on the basis of the relief sought by the Plaintiff in the sum of USD 2,055,530,000 and entrusted both parties to equally pay the arbitration costs and arbitrators' fees until March 4, 2013. In case of non-disbursement, the arbitration case shall proceed until the rendering of the final arbitral award on the basis of the value of the relief sought mentioned in the statement of claim in the sum of USD 1,144,930,000. Procedural order No. (12) provided that the arbitral proceedings, deadlines and procedural dates signed by both parties on November 17 and approved by the Arbitral Tribunal shall remain unamended.

- 19.** On 4/1/2013, procedural order No. (13) was issued, whereby the Arbitral Tribunal entrusted the Plaintiff Company with the task of informing the Libyan Ministry of Finance of all the case papers, exhibits and any other submissions issued by the Plaintiff as of the date of issuance of this procedural order, following the request of the Plaintiff to join the Ministry of Finance as a party.

- 20.** On 7/1/2013, procedural order No. (14) was issued, whereby the Arbitral Tribunal noted that the submission of some of the parties were sent to the Cairo Regional Center for International Commercial Arbitration. The Arbitral Tribunal further noted and ascertained that the present arbitration is an ad-hoc arbitration subject to the Unified Agreement for the Investment of Arab Capital in the Arab States, whereby article (6) therein stipulates that the Arbitral Tribunal "shall determine its own procedure" and therefore requests that, as of the issuance of this procedural order, all correspondences, under any form, shall be addressed to the Arbitral Tribunal, while designating the members of the Tribunal and applying the procedures relating to the proceedings in accordance with the decisions of the arbitrators, without being linked to any arbitration institution or center applying these procedures.
- 21.** On 16/1/2013, procedural order No. (15) was issued, whereby the Arbitral Tribunal approved in form the joinder of the Libyan Ministry of Finance to the present arbitral proceedings, given that such joinder preserves its right of defense and due process, following the receipt by the Arbitral Tribunal from attorney Rajab El-Bakhnug, the authorized representative of the Plaintiff Company, of a copy of a document issued by the South-Tripoli Court of First Instance containing the joinder of a party to an arbitration case and that the Ministry of Finance shall be notified of all the exhibits pertaining to the arbitration case as well as the dates of the hearings.
- 22.** On 15/2/2013, procedural order No. (16) was issued, whereby it was noted that the Plaintiff, Mohamed Abdulmohsen Al-Kharafi & Sons Co., paid its share of the arbitration costs and arbitrators' fees in accordance with the requirements of procedural order No. (12), and in the sum of three hundred and fifty thousand US dollars. It further noted that if the Defendant fail to pay their equal share of the costs and fees in accordance with the requirements of procedural order No. (12), the Arbitral Tribunal shall entrust the Plaintiff to pay the balance of three hundred and fifty thousand US dollars until March 4, 2013, to be factored into the arbitral award. If the Plaintiff fails to pay this sum on behalf of the Defendants by the specified date, the sum of three hundred and fifty thousand US dollars disbursed by the Plaintiff shall be returned and the claim shall proceed on the basis of the value of the relief sought mentioned in the statement of claim.
- 23.** On 20/2/2013, procedural order No. (17) was issued following the receipt by the members of the Arbitral Tribunal of the submissions presented by the representatives of the Plaintiff by the date of issuance of this order, whereby a



request was made to add the Libyan Investment Authority to the Defendants' list. By virtue of this order, the Arbitral Tribunal entrusted the Plaintiff with the task of informing the Libyan Investment Authority of all the arbitral documents as well as all that was issued and shall be issued by the Plaintiff as of the date of issuance of this order.

**24.** By virtue of procedural order No. (18), the Arbitral Tribunal informed both parties to the dispute that the Plaintiff paid, prior to March 4, 2013, the sum of three hundred and fifty thousand US dollars in accordance with procedural order No. (16). Therefore, the value of the dispute now stands at USD 2,055,530,000, two billion fifty five million five hundred and thirty thousand US dollars.

**25.** On 27/2/2013, procedural order No. (19) was issued, whereby it was provided that the Arbitral Tribunal has been notified on that date of a copy of the notification sent to the Libyan Investment Authority on 26/2/2013, through the member of the Litigation Department, attorney Mahfouz El-Fokhi, entrusted with notification and receipt given that he was joined to the case. The Arbitral Tribunal, in its attempt to ensure the right of the Libyan Investment Authority to defend its position and maintain equality between all parties and their right to due process, has decided to grant the Authority a deadline extending till March 7, 2013 to submit its statement of defense to the request to join it as a Defendant, whereas the Plaintiff shall have the right to respond on March 8, 2013. A hearing shall be held during which witnesses will testify about the joinder of the Libyan Investment Authority to the arbitral proceedings on March 10, 2013 following the end of the hearing that shall be held and during which witnesses will testify about the main issue in accordance with procedural order No. (10). The hearing of March 10, 2013 shall be dedicated to the aforementioned issue and the witnesses' statements shall be heard in the event there are witnesses designated by one or both parties. Both parties shall submit on March 14 their written arguments limited to the subject of the hearing and dedicated to the issue of joining the Libyan Investment Authority to the case. The written arguments shall not include any new evidence outside the framework of the hearing.

**26.** Following procedural order No. (10) and procedural order No. (19), procedural order No. (20) dated 5/3/2013 noted that on Saturday March 9, 2013, a hearing shall be held during which witnesses will testify, to be extended until Sunday March 10, 2013, at 10 a.m. at the Cairo Regional Center for International Commercial Arbitration to examine the merits of the dispute. The second independent hearing to be held on Sunday at 3h30 p.m. shall examine the

request of the Plaintiff to join the Libyan Investment Authority to the arbitral proceedings and listen to the witnesses' statements and arguments of the attorneys.

- 27.** Procedural order No. (20) has determined the schedule of the hearing to be held on Saturday March 9, 2013. It shall commence at 10 o'clock in the morning with the hearing of witnesses, mainly: expert Habib el-Masri, an expert from Ernst & Young, an expert from the firm of Ahmad Ghatour, an expert from the firm of Khaled el-Ghannam, and engineer Salah el-din Mohamed Malek. The attorneys for the Plaintiff and the Defendants shall then have the opportunity to address their questions to the witnesses. The Arbitral Tribunal shall also have the right to address their questions to the witnesses at any stage. Afterwards, the attorneys for the Plaintiff and Defendants shall present their argument respectively. The hearing of Sunday March 10, 2013 shall be held at 3h30 and shall examine the request to join the Libyan Investment Authority to the arbitral proceedings. The witnesses, if any, shall be heard and the attorneys for the Plaintiff and the Defendants shall present their arguments respectively. Both parties shall then submit their arguments on the main issue and on the request to join the Libyan Investment Authority as a party which shall include no new argument, by no later than 13/3/2013.
- 28.** On 5/3/2013, procedural order No. (21) was issued, based on a request from Dr. Fathi Wali sent to the Arbitral Tribunal on that same date whereby a proposal was made to amend the deadlines set forth in procedural order No. (20), by virtue of which the Arbitral Tribunal has decided to extend the deadline for submission, following the hearing, to March 16, 2013. The afternoon hearing of March 9 and 10 shall commence at 5h30 and proceed till 10 o'clock in the evening. The schedule of the two hearings to be held on Saturday March 9 and Sunday March 10 shall remain as it was set forth in procedural order No. (20). The proposal of Dr. Fathi Wali shall be submitted in the first hearing of Saturday March 9 for discussion between the Plaintiff and the Defendants to reach an agreement on any amendments thereto. If no consensus was found between all attorneys, the schedule of the dates set forth in procedural order No. (20) shall remain the same.
- 29.** On 12/3/2012, procedural order No. (22) was issued whereby the Arbitral Tribunal has decided to conclude the proceedings and entrust the Counsels for the Plaintiff and the Defendants with the task of submitting a written statement via email of the argument they presented in the hearings of March 9 and 10 without making any addition by no later than March 17 of this year, following the

pleading of the Counsels for both parties, the statements of the three witnesses of the Plaintiff and the reading of the provisions of Article 31 of the Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration adopted by the Arbitral Tribunal for this dispute. The Tribunal shall also ask if any of the parties have any further evidence or witnesses they would like to produce. Otherwise, the Arbitral Tribunal shall decide to close the proceedings.

- 30.** On 10/3/2013, the expert witnesses have attended the hearing, mainly Habib Khalil El-Masri, Khaled Abu El-Faraj Ahmad Fahim El-Ghannam and Salah El-din Mohamed Malek. All witnesses were questioned by the attorneys for the Plaintiff and the Defendant and they all ascertained the veracity of the content of their report. It was also determined through the testimony of the witnesses that the value of the lost profit ranged between USD 1,744,242,52 and USD 2,550,600,000, whereas experts Habib El-Masri and Khaled Abu El-Faraj Ahmad Fahim El-Ghannam testified, in response to a question by the Arbitral Tribunal, that the damages resulting from lost opportunities which are real and certain constitute lost profits, further stating that the compensation value in each report represent the minimum profits that could have been achieved under the current circumstances in Libya.
- 31.** The minutes of the hearings held on March 9 and 10, 2013 were drawn up and signed by the members of the Arbitral Tribunal Dr. Abdel Hamid El-Ahdab, Dr. Ibrahim Fawzi, Judge Mohamed El-Hafi, and Khaled Othman, the secretary of the Arbitral Tribunal. It was also signed by attendants for the Plaintiff Company, mainly Dr. Fathi Wali, Dr. Mahmoud Samir El-Sharkawi, Dr. Rajab Bashir El-Bakhnug, Dr. Nasser El-Zaid, Dr. Mohamed El-Kalyoubi, Dr. Omar El-Dessouki, and Mr. Saad Salem, and attendants for the Defendants, mainly Dr. Hisham Sadek, Dr. Hafiza El-Haddad, Mr. Mahfouz El-Fokhi, Mr. Mustapha El-Fitouri Ahmad El-Soueih, Mr. Youssef Mohamed El-Ahrash, Mr. Abdel Majid El-Shtiwi and Mr. Abdallah El-Tebouli, following the submission of argument by the Counsels for the Plaintiff and the Defendants in front of the Arbitral Tribunal.
- 32.** On 16/3/2013, procedural order No. (23) was issued, whereby the Arbitral Tribunal decided to close the proceedings, following the conclusion of the arguments and declared that the arbitrators shall deliberate for purposes of making an arbitral award.

33. On the evening of March 17, 2013, and following the issuance of procedural order No. (23), an argument was sent by the Plaintiff's attorney.
34. On 18/3/2013, procedural order No. (24) was issued whereby the Arbitral Tribunal decided to reject the submission presented by the Plaintiff's attorney on 17/3/2013 and refrain from introducing it in the deliberations for the purpose of making an arbitral award.

**The Arbitral Tribunal noted and ascertained that all the submissions pertaining to the present arbitration, whether submitted by the Defendants or the Plaintiff, were received within the dates set and agreed upon by the parties to the present arbitral dispute.**

## **PART TWO: POSITIONS OF THE TWO PARTIES:**

### **Chapter One: Facts alleged by the Plaintiff:**

1. On 8/12/2005, the Plaintiff sent a letter to the Secretary of the People's Committee for Tourism Development Authority in which the Plaintiff requested preliminary approval for the establishment of a touristic project in Andalusi street, Tajura city, in the hope of receiving approval to initiate work upon the completion of administrative procedures and taking over of the project land.
2. On 8/12/2005, the Plaintiff received through the Vice President of its Board of Directors an invitation from the Secretary of the People's Committee for Tourism Development to discuss the establishment of the project.
3. On 7/6/2006, decision No. 135 of 1374 a.P. (2006 A.D.) was issued, granting investment approval to Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trading, Contracting, and Industrial Structures represented by Mr. Omar Mohamed Helmi Dessouki; address/ Abbas El-Akkad St. – Cairo – Arab Republic of Egypt; for the execution of a tourism investment project (a five-star tourist hotel, a service commercial center, hotel apartments, restaurants, and recreational areas). The decision also included:

- 3.1.** The rented location in Tajura, (Sidi al Andalusi), Shabiyat (administrative district) Tripoli.
  - 3.2.** Project surface area of 24 hectares.
  - 3.3.** Investment value of USD \$130,000,000 (one hundred and thirty million US dollars).
  - 3.4.** Project execution period of seven and a half years.
  - 3.5.** Investment period of ninety years.
  - 3.6.** Approval is granted in accordance with the terms and conditions stipulated in Law No. (5) of 1426 a.P. (1997 A.D.) on the promotion of foreign capital investment and its executive regulations, and Law No. (7) of 1372 a.P. (2004 A.D.) regarding Tourism and its executive regulations.
  - 3.7.** The Tourism Development Authority shall register the project in the investment registry and carry out the necessary procedures in this regard.
  - 3.8.** 0.1% of the investment value shall be deposited in the Authority's account in consideration of reviewing project drawings, designs and technical studies, execution follow-up and promotion in local and international forums.
  - 3.9.** Abrogating decision No. (33) of 1374 a.P. (2006 A.D.) on the approval of investment for the execution of a tourism investment project.
  - 3.10.** Decision No. (135) of 2006 also stipulated that it shall come into force on the date of its issuance and that competent authorities shall be entrusted with its implementation.
- 4.** On 14/6/2006, the Secretary of the People's Committee for Tourism Development Authority sent a letter to the Vice-President of the Board of Directors of the Plaintiff Company to which was enclosed the text of decision No. 135 of 1374 a.P. (2006 A.D.) on the approval of investment for the execution of the tourism investment project, subject of the lease contract signed by the lessor and the lessee (the Plaintiff Company) on 18/6/2006.
- 5.** On 18/6/2006, the Plaintiff Company and the People's Committee for Tourism Development Authority signed the lease of the land, extending over an area of 240 000 square meters, on which the touristic project is to be established. The lease contract shall remain in force for a period of ninety-nine years, as of the date of taking over of the land in question.
  - 5.1.** The lessor – the Tourism Development Authority – acknowledged that the land is the property of the Libyan State and that the signatory of the

contract is legally entitled to privatize, sign the lease, and establish that there are no in-kind rights whatsoever thereon.

- 5.2.** The lessor undertook to hand over to the Plaintiff Company a plot of land free of occupancies and persons, or legal and physical impediments which may prevent the initiation of project execution or operation during the usufruct period and upon signing of the contract.
- 5.3.** The lessor (General People's Committee for Tourism) undertook to permit the lessee (the Plaintiff Company) to take possession of the land for the purpose of executing the project by virtue of decision No. 135 of 1374 a.P. issued by the Secretary of the General People's Committee for Tourism.
- 5.4.** The lessee (the Plaintiff Company) acknowledged that it has carried out a thorough due diligence examination of the land and has accepted to conclude a contract thereon.
- 5.5.** It was stipulated in the contract that the land usufruct value shall be of 720,000 Libyan Dinars, to be paid annually during the contract validity period to the Treasury of the lessor at the beginning of every financial year.
- 5.6.** The lease contract provides for the right of the lessor to send a notice to the lessee (the Plaintiff Company) in the event of a delay in the payment of the usufruct value. If the lessee fails to make the payment prior to the end of the specified period, and within thirty days following the date of notice, the lessor may grant the lessee a similar period. If no payment was made after the given deadline, the lease shall be terminated without prior warning or notice and the lessor shall have the right to clear the land through administrative means.
- 5.7.** The lessor undertook to provide, prior to the handover of the land and at its own expense, access in order to ensure the right of passage to the lessee, its vehicles and employees in accordance with tourism specifications and undertook to provide electricity, phone, water, and sanitation services up to the borders of the plot of land within a period of six months following the signature date of the contract.
- 5.8.** The lessee company shall prepare project designs and maps, determine related specifications, material and quantities, and take into account scientific and engineering rules in accordance with the project timetable adopted by the lessor. The lessee shall commit to delivering a copy of the design and execution documents to the lessor for review within a period of one month following the date of receipt. If no observations were made during the specified period, said documents shall be deemed final.
- 5.9.** The lease contract stipulates in article (22) that the project execution period shall be seven and a half years starting from the receipt date of the

necessary building permits in accordance with the timetable adopted by the lessor.

- 5.10.** The lessee undertook to prepare the plot of land, demolish existing buildings and remove the rubble to public landfill sites at its own expense, following the taking over of the plot of land free of occupancies, persons and impediments, whether legal or physical, which may prevent the initiation of project execution or operation.
- 5.11.** The lease stipulated the right of the lessee to conclude agreements and contracts with third parties to execute or operate the works of the project, provided that said agreements do not include any obligations on the part of the lessor and that the lessee remains responsible for any damage to the lessor caused by a third party.
- 5.12.** The lessee undertook to preserve the safety and security of the site and notify the competent security authorities of any disturbance by virtue of the lease.
- 5.13.** The lease stipulated that the investment project shall enjoy the exemptions and privileges stipulated in Law No. (5) of 1426 a.P. on the promotion of foreign capital investment and its executive regulations, and Law No. (7) of 1372 a.P. regarding Tourism and its executive regulations.
- 5.14.** Article (23) of the lease contract stipulates that the lessee shall be entitled to make any additions or amendments to project-related activities, with the approval of the lessor.
- 5.15.** Article (24) of the lease contract stipulates that the lessor shall be entitled to terminate the lease if the lessee does not initiate project execution within three months following the date of receipt of project execution permits, unless the lessee submits a written justification acceptable to the lessor.
- 5.16.** The lease contract stipulated that the lessee shall hand over the project fully executed at the end of the lease contract without having the right to claim any funds or compensation in exchange for any cost incurred during project execution and preparation stages.
- 5.17.** The lessor undertook to respect the rights of the lessee and third parties ensured by the Law, including studies, drawings and technical specifications.
- 5.18.** The lessor and the lessee undertook not to establish any in-kind rights whatsoever on the plot of land during the contract validity period, unless within the limits of its provisions. The lessor also undertook to warrant against legal disturbances, by third parties, of enjoyment of the site.

6. On 22/6/2006, the Plaintiff Company, represented by Mr. Omar Dessouki, the Vice-President of the Board of Directors, sent a letter to Mr. Ali Fares Ouaida, the Secretary of the People's Committee for Tourism Development Authority, in which it was stated that the Company transferred the amount of USD \$130,000, one hundred and thirty thousand U.S. Dollars, as stipulated in article (3) of decision No. 135 of 2006 dated 7/6/2006. The Plaintiff Company also attached thereto a copy of the money transfer receipt.
7. On 9/7/2006, the Plaintiff sent a letter to Mr. Ali Fares Ouaida, the Secretary of the People's Committee for Tourism Development Authority, in which it requested an appropriate date for the taking over of the plot of land, subject of the lease contract concluded on 8/6/2006.
8. On 29/7/2006, the Plaintiff, represented by Mr. Omar Dessouki, the Vice-President of the Board of Directors, sent a letter to Mr. Ali Fares Ouaida, the Secretary of the People's Committee for Tourism Development Authority, in which it requested a suitable date to send the proposed committee to take over the plot of land free of occupancies and impediments to put in place a project timetable and an appropriate action plan for project execution.
9. On 13/9/2006, the Plaintiff asked Mr. Ali Fares, the Secretary of the People's Committee for Tourism Development Authority, to resume official procedures to hand over the land and stated that Engineer Saad Salem shall be its authorized representative for the purpose of taking over the land to initiate project execution.
10. On 1/11/2006, the Plaintiff Company, represented by Mr. Omar Dessouki, the Vice-President of the Board of Directors, requested Mr. Ali Fares Ouaida, the Secretary of the People's Committee for Tourism Development Authority, to be provided with the specified date to hand over the land on which the tourism investment project shall be established, in accordance with article (5) of the lease contract, indicating that it fulfilled its full obligations and is preparing soil studies, project engineering designs and execution timetable, at the earliest convenience as per his request.
11. On 20/2/2007, the minutes of handing over and taking over of a touristic investment site were drawn up in the presence of the site delivery committee at the Tourism Development Authority, and Engineer Saad Ahmad Salem, the designated representative of the Plaintiff Company authorized to sign on its behalf. The minutes indicated that the two parties examined the site and



specified the borders, i.e. the beach on the northern side, the highway on the southern side, public property on the eastern side and public property on the western side. The committee was represented by members Engineer Ali Ramadan El-Doukali, Engineer Hassan Bashir Kaddoura, and Engineer Khadouja Mukhtar Boro. The minutes were signed by the Head of the committee Mukhtar Mohamed El-Dawass for the Defendants and Engineer Saad Ahmad Salem for the Plaintiff and were adopted by the Secretary of the Administration Committee of the Tourism Development Authority.

- 12.** On 27/2/2007, a project registry extract was issued under number 11/2007 indicating that the name of the project is Sidi al Andalusi Tourism Complex, the location of the project is in Sidi al Andalusi – Tajura – shabiyat Tripoli (administrative district) –, the name and surname of the legal representative is Omar Mohamed Dessouki, the date of submitting the application is 12/2/2007, the project approval decision number is 135 dated 7/6/2006, the license number granted to establish investment business has not been issued yet, further indicating that the investment costs are USD \$130,000,000, the financing sources are 38.47% self-financing, 46.15% loans, 15.39% other sources. The extract also specified that the project beneficiary is Mohamed Abdulmohsen Al-Kharafi Co. for General Trading and Contracting of Kuwaiti nationality, its contribution value is USD \$130 million, while its contribution percentage is of 100%, referring also to the fact that the project is exempt of investment contract stamp duty, while stipulating that the exemption validity period is unspecified. Moreover, the extract also mentioned that incoming in-kind shares of capital formation are USD \$70 million in buildings and constructions, USD \$10 million in equipment and material, USD \$800 thousand in various transportation means, USD \$10 million in furniture and supplies, USD \$10 million in intellectual property rights, USD \$22 million in general capital (raw materials), and the overall in-kind shares are USD \$130 million. The extract was issued based on a request by the project owner for use within the limits of the law, and the data stated therein reflects the reality of the project up to the issuance date.
- 13.** On 22/4/2007, the Plaintiff Company, represented by Engineer Saad Salem, sent a letter to the Secretary of the Tourism Authority, to which was attached the minutes of handing over and taking over of the border points signed on 20/4/2007. In this letter, the Plaintiff Company requested the removal of all occupancies, persons, and all legal and physical impediments to ensure the handing over and taking possession of the land to initiate project execution. A copy of the letter was sent to the Secretary of the General Authority for

Investment Promotion. The former received this letter on 23/4/2007 and the latter received this letter on 24/4/2007.

- 14.** On 15/5/2007, the Plaintiff Company, represented by Mr. Omar Dessouki, the Vice-President of the Board of Directors, sent another letter to the Secretary of the General Authority for Investment Promotion, in which it referred to its letter dated 22/4/2007 and stated that the land remains occupied by containers, pipes and equipment belonging to the General Company for Building and Construction guarded by a group of individuals and a small cafeteria building. The Plaintiff Company also requested that all necessary measures be taken to ensure that the site is free of impediments to initiate project execution without delay. This letter was received on that exact date and a copy was sent to the Secretary of the Tourism Authority.
- 15.** On 1/7/2007, Mr. Ammar El-Mabruk, the Secretary of the General Authority for Tourism and Traditional Industries sent a letter to the Vice-President of the Board of Directors of the Plaintiff Company, referring to the meeting held with him with regard to approval for investing in the project without entering into a national partnership with the Plaintiff Company, provided that the latter completes hotel construction to complete stage one of the project, in preparation of its opening on the occasion of the 40<sup>th</sup> anniversary of the Revolution in 2009 A.D. The Secretary of the General Authority for Tourism and Traditional Industries also requested a reply at the earliest convenience and a pledge that the hotel shall be built by the specified date, along with a detailed timetable for project execution stages and asked that project designs be submitted for approval. Mr. Ammar El-Mabruk added that all problems impeding the completion of the project by the specified date shall be resolved.
- 16.** On 11/7/2007, Dr. Ali Fares Ouaida, the Director of the Department for the Development of Touristic Areas, sent a letter to the Director of the Plaintiff Company, Mohammed Abdulmohsen Al-Kharafi & Sons Co., in which he requested final project plans and designs on A3 size paper and a 3D project CD.
- 17.** On 22/7/2007, the Plaintiff Company inquired with the Department of Real Estate Registry about the nature of the plot of land and requested the registration of its land usufruct right and the issuance of a real estate certificate attesting said usufruct right. The employee at the Department of Real Estate Registration in Tajura indicated that it exists on the site planning No. 796 registered in the name of the Libyan State - file No. 16813, specifying further that

a contract of sale of a usufruct right was deposited thereon on behalf of Umma Bank and that said property is currently registered in the name of Umma Bank.

- 18.** On 28/7/2007, the Plaintiff Company requested the Director of the Department for the Development of Touristic Areas to be provided with the specified date to take over the land for the purpose of finalizing the project timetable, given that it is closely related to the date of handing over the plot of land free of occupancies and impediments by virtue of the contract.
  
- 19.** On 1/8/2007, the Plaintiff Company, represented by Mr. Omar Dessouki, the Vice-President of the Board of Directors, requested the Secretary of the General Authority for Tourism and Traditional Industries to:
  - 19.1.** Provide proof that the land is owned by the Libyan State and is free of mortgages or occupancies of any kind in compliance with decision No. 135 of 2006.
  - 19.2.** Handover the site free of impediments during the month of August.
  - 19.3.** Provide the company with the necessary approvals and permits for the execution of project works within a period of one week following the date of submittal of said approvals and permits.
  - 19.4.** Adopt project plans by the competent authorities within a period of one week following the submittal of said plans.
  - 19.5.** Provide the company with the necessary approval for the import of equipment and material necessary for project execution upon the submittal of the necessary applications forms.
  - 19.6.** Issue work and residency permits for the technical, financial, and administrative cadres and all necessary labor for the execution of the project upon submittal of application forms.
  - 19.7.** Issue approvals for import and necessary documentary credits and money transfers for the execution of the project works within a period of five working days as of the date of application of these forms through commercial banks and the Central Bank of Libya.
  - 19.8.** Facilitate and acquire all customs exemptions and procedures in a way that does not lead to the suspension of the works.
  - 19.9.** Fully cooperate with security forces, as well as with the tourism police force and municipal guards, to assist in expediting project execution without delay.
  - 19.10.** Approve in principle the management of the hotel through a global hotel management company.

The Plaintiff Company also stated that the Authority's cooperation shall provide incentives and motivations for the achievement of the project on time, adding that a timetable was being prepared based on the main points, given that a consolidation of efforts of all relevant official authorities may assist in achieving the intended goal. Said letter was received on 1/8/2007.

- 20.** On 1/8/2007, the Secretary of the Administrative Committee at the Public Property Authority sent a letter to the General Manager of the Umma Bank, in which he stated that the Secretary General of the General People's Committee entrusted the Public Property Authority with the task of carrying out necessary procedures to annul the decision allocating the plot of land to the Umma Bank located at Sidi al Andalusi and al-Manara in Tajura and provide an alternative plot of land to the Bank or return the amount paid in exchange for the land, and requested the Bank to refer to him in order to discuss the necessary settlement.
- 21.** On 7/8/2007, Mr. Ammar el-Mabruk El-Taif, the Secretary of the General Authority for Tourism and Traditional Industries and the Head of the Authority sent a reply to the Vice-President of the Board of Directors of Mohammed Abdulmohsen Al-Kharafi & Sons Company, stating the following:
  - 21.1.** The Company shall be provided with whatever may be needed to prove ownership of the land, along with a usufruct right certificate for the project.
  - 21.2.** Handover of the site free of any impediment can be settled and the Company may contact the Authority to determine the impediments on the site, to be later resolved and cleared.
  - 21.3.** Approvals shall be sent to the Company upon their submittal.
  - 21.4.** Issuance of the residency and work permits submitted by the Company through the Committee specifically established to expedite all procedures relevant to the projects that shall be launched on the occasion of the 40<sup>th</sup> anniversary of Al-Fateh Revolution.
  - 21.5.** Hotel management by global companies is considered an internal affair concerning the company and the remaining points shall be resolved through Law No. (5) on the promotion of foreign capital investment, and Law No. (7) regarding Tourism Investment.
- 22.** On 22/8/2007, Engineer Hashem Mohamed Eel-Zawi, the Assistant Secretary of the Authority for Investment Promotion, replied to the request submitted by the

Plaintiff Company for a permit to erect a temporary fence around the allotted investment site in Tajura, stating that there was no objection to the erection of the fence, pending the completion of the remaining procedures.

- 23.** On 28/8/2007, the General Company for Building and Construction received a letter from the Plaintiff Company in which it requested the transfer of all its belongings located at the project site and that the Plaintiff Company wished to erect a fence around the land upon the removal of said belongings, stating that the Plaintiff Company has contracted this plot of land for the establishment of a touristic project in Tajura in compliance with contract No. (4) of 2006 concluded with the Tourism Development Authority at the General People's Committee for Tourism, entitled the Sidi al Andalusi Tourism Complex.
- 24.** On 2/9/2007, Mr. Ali Fares Ouaida, the Director of the Department for the Development of Touristic Areas, received a letter from the Plaintiff Company, Mohamed Abdulmohsen Al-Kharafi & Sons Co., represented by Engineer Saad Salem, including the timetable specifying the project execution course up to the handover date on the occasion of the anniversary of the Revolution. The letter also stipulated that the timetable is closely linked to the handover of the project land free of all occupancies.
- 25.** On 11/9/2007, a real estate certificate for State property was issued on behalf of Mohamed Abdulmohsen Al-Kharafi & Sons Co. for Trading and Contracting, by virtue of which the Department of Real Estate Registration and Documentation in Tajura testified that the real estate is a plot of land owned by the Libyan people extending over an area of twenty four (24) hectares in the Center of Tajura, map No. 796, bordering the Mediterranean Sea on the north, public property on the east, Shat road on the south, and the Tourist Village on the west. It further indicates that the lease contract extends over a period of ninety years and is issued by the Kariya Milad Kathoury Office for the drawing up of contracts on behalf of Mohamed Abdulmohsen Al-Kharafi & Sons Co. for Trading and Contracting. It also stipulated that the property was registered in the temporary Socialist Real Estate Registry in folder No. 1 page 24.
- 26.** On 17/9/2007, the Director of the Department for the Development of Touristic Areas and head of the permanent working team requested that the General Manager of the General Company for Building and Construction cooperate fully and clear the site swiftly of all occupancies to enable the Plaintiff Investor Company to initiate project execution on time, given that there is specified timetable for project execution, and that the presence of some persons, storages,

supplies and belongings hinders the initiation of project execution. The Director of the Department for the Development of Touristic Areas referred in a letter sent to the General Company for Building and Construction to the letter addressed by the Plaintiff Company in which it requested that the General Company removes its belongings located at the site for the purpose of erecting a fence around the land. Said letter was received by the General Company for Building and Construction on 28/8/2007.

- 27.** On 30/9/2007, the General Authority for Tourism and Traditional Industries sent a request to the Plaintiff Company to submit architectural drawings of the Andalusi Village project in Tajura for study, based on the approvals regarding the introduction of the project among the proposed projects to be launched on the occasion of the 40<sup>th</sup> anniversary of the Revolution on 9/9/2009, in accordance with the structure specified by the technical committee, to be submitted in triplicate form, on A1 size paper, along with three hard copies of the comprehensive technical report on A3 size paper, and on a CD in three copies.
- 28.** On 8/10/2007, Dr. Ali Fares Ouaida, the Director of the Department for the Development of Touristic Areas requested that the President of the Board of Directors of the Plaintiff Company and the project consultant personally attend the exhibit for tourism investment projects on 4/11/2007, and requested that the Plaintiff Company expeditiously draws up all the necessary various designs, on a minimum size of 0.7 × 1 meter, submits the designs compiled on A3 size paper in triplicate form and on a CD in three copies, and prepares three-dimensional configuration of the project master plan, provided that the plans are final, approved of, and the investor is able to prepare a visual presentation of said project.
- 29.** On 24/10/2007, the Director of the Department for the Development of Touristic Areas received three copies and three CDs detailing the designs.
- 30.** On 30/10/2007, Engineer Saad Salem from the Plaintiff Company sent a letter to Dr. Ali Fares Ouaida, the Director of the Department for the Development of Touristic Areas, in which he informed him that during the execution of the works on the fence around the project land, some individuals prevented the contractor from proceeding on the basis of their ownership of the land, stating that works have been stopped and that this problem has caused a delay in the execution of the works. Therefore, he requested that all necessary steps be made towards radically resolving the problem and ensuring that no future confrontation takes place.

- 31.** On 1/11/2007, Engineer Saad Salem from the Plaintiff Company sent a letter to the Director of the Department for the Development of Touristic Areas in which he informed him that the fence was found to be destroyed on the morning of that day and that a police report was filed.
- 32.** On 12/11/2007, the Director of the Department for the Development of Touristic Areas and head of the permanent working team requested that the Vice-President of the Board of Directors of the Plaintiff Al-Kharafi Company submits the final project designs immediately to the technical committee for review and adoption, in triplicate form, size 3 and on a CD in 3 copies, as follows:
  - 32.1.** Project's technical report
  - 32.2.** Project's master plan
  - 32.3.** Project's horizontal projections
  - 32.4.** Project's architectural façade
  - 32.5.** Project's structural sections
  - 32.6.** Project's general perspectives.
- 33.** On 12/11/2007, Engineer Saad Salem from the Plaintiff Company sent a letter to the Director of the Department for the Development of Touristic Areas to inform him that municipal guards in Tajura rejected the permit granted to the Company by the General Authority for Investment Promotion for the erection of a temporary fence, and that the sign placed on the project land in the name of Tahrir Club in Tajura for maritime sports, diving and cricket field which claims possession and ownership of the project land, was not yet removed. He further stated that for these reasons, the temporary fence was not completed with the view of initiating project execution, which may adversely affect the project timetable.
- 34.** On 12/11/2007, Mr. Ammar El-Mabruk, the Secretary of the General Authority for Tourism and Traditional Industries sent a letter to the Assistant Secretary of Technical Affairs and the Office for the Implementation of Housing Projects and Facilities, in which he requested a swift clearance of the site assigned for the touristic project of the Kuwaiti Al-Kharafi Company, given that the project execution period is determined by an execution timetable, and that storages and supplies belonging to the Office for the Implementation of Housing Projects and Facilities hinder the work progress of the tourism investment project, which could in turn damage the interests of the investor.

- 35.** On 18/11/2007, the Director of the Department for the Development of Touristic Areas sent a letter to the Director of the Municipal Guard Office in Tripoli, in which he indicated that the fence on the site was attacked and destroyed, and that some individuals put up a sign claiming that the land was assigned for the construction of their sports club, stating further that this is hindering the work of the Investor Company, and that it is necessary to remove the sign and send police patrols to prevent such illicit interruptions.
- 36.** On 22/11/2007, the Plaintiff Company sent a letter to Mr. Ammar el-Mabruk El-Taif, the Secretary of the General Authority for Tourism and Traditional Industries, in which it referred to previous correspondences on the removal of occupancies, person, legal and physical impediments from the site. It also referred to the minutes of handing over and taking over of the site border points drawn up on 20/2/2007. It also informed him that the land was still occupied by containers, pipes, equipment belonging to the General Company for Building and Construction and guarded by a group of individuals, as well as a small building consisting of a cafeteria under the name of Nakhle coffee shop owned by Ibrahim Abdel Salam Abu Zahir and Abdel Raouff Ahmad Akrim who claim that they hold a twenty-five year contract of usufruct concluded with Al Tahrir Sports and Cultural Club in Tajura. Furthermore, the Plaintiff Company stated that some citizens claimed ownership of parts of that land, indicating that according to the abovementioned, it failed to initiate execution of the project works despite finishing the preliminary designs. The Plaintiff Company also expressed its hopes for an intervention to enable it to take over the site free of impediments to initiate project execution without delay, given that no positive procedures were carried out to remove said occupancies and impediments.
- 37.** On 5/12/2007, the Plaintiff Company received a letter from the Secretary of the General Authority for Tourism and Traditional Industries in which the latter praised the distinguished participation of the Plaintiff Company in the 2009 Al-Fateh Exhibit for Tourism Investment Projects, a fact which contributed to the success of the Exhibit and received acclaim from officials and visitors alike who prized its valuable efforts in this regard.
- 38.** On 22/12/2007, the Vice-President of the Plaintiff Company sent a letter to the Director of the Department for the Development of Touristic Areas, in which he informed him that during the erection of the fence and the storage of building material, a group of individuals attacked the contractor's workers, and forced



them to stop the works and vacate the premises under the pretense that the land is owned by the Tahrir Club in Tajura. He also informed him that the Plaintiff Company hoped that the Department entrusts security forces with the task of protecting workers from violations to enable them to continue their work and make sure that the handing over timetable is not adversely affected.

- 39.** On 31/12/2007, the Vice-President of the Plaintiff Company sent a letter to the Secretary of the General Authority for Tourism and Traditional Industries, informing him that the Company charged the contractor on 22/10/2007 with the task of erecting the fence around the land and that municipal guards stopped the works. Furthermore, he stated that two people from the Security Forces arrived at the site and requested that both the contractor and the Engineer head to the Security Forces headquarters, although they were informed that all documents were found to be correct and in order. Accordingly, works were stopped due to the fact that these accidents were recurrent following the destruction of the fence and the erection of a fence from cement and bricks. Furthermore, attacks on the contractor and workers, forcing them to stop the works, are one issue that remained unresolved.

Following the interventions of the Tourism Development Authority in coordination with the tourism police, the Company commissioned the contractor again on 27/12/2007 to store material and hire workers to initiate execution of the works under the supervision of the tourism police. However, on 29/12/2007, municipal guards stopped the works, and seized the equipment and workers under the pretense that urban planning did not approve the project. After the Tourism Development Authority ordered the company to pursue the work, and following the return of the contractor to proceed with the project execution, five municipal guard cars showed up, followed by five tourism police cars. Consequently, the works were stopped until a security car arrived at the site. Afterwards, the Tourism Development Authority requested the Plaintiff Company to stop the work and remove its equipment from the site until the matter is permanently resolved. On 30/12/2007, the Plaintiff Company discovered that the fence was destroyed yet again. Therefore, an intervention was needed, given that all these factors were adversely affecting the project execution timetable and handing over date.

- 40.** On 13/2/2008, Mr. Ammar el-Mabruk El-Taif, the Secretary of the General Authority for Tourism and Traditional Industries sent a letter to the People's Leadership Coordinator in Tajura, in which he requested the opinion of the People's Leadership in Tajura to make the proper decision towards investors with whom investment contracts were concluded and to whom land usufruct

certificates were issued, such as the tourism Andalus project for the Kuwaiti Al-Kharafi Company, referring to the meeting held with the Coordinator concerning touristic projects executed on Tajura beaches, based on the decision of the People's Leadership Coordinator in Tajura of refraining from establishing such projects in the region located on the coast between Andalus village to the west and Harrouj village to the east.

- 41.** On 19/2/2008, Dr. Ali Fares Ouaida, the Director of the Department for the Development of Touristic Areas, asked the Vice President of the Board of Directors of Mohamed Abdulmohsen Al-Kharafi & Sons Co. to participate in the presentation of the tourism company's project designs, in such a way to promote these projects in terms of investment, operational and marketing aspects. That request was reiterated on 7/10/2008.
- 42.** On 14/5/2008, Mr. Ezz El-Din Barakat, the Director of the Technical Administration of MAK Holding Company for tourism and hotels sent a letter to the Secretary of the People's Committee for Tourism, to which he attached the mechanical, construction and architectural preliminary drawings along with the project's technical report. In his letter, the Director referred to the endeavors carried out for the execution of the project. He also indicated that the Company contracted the Holiday Inn International Company for hotel and hotel apartment management. Also, the Company contracted another distinguished company for project design to provide execution supervision and design services, as well as Hill International Company for execution work management. Contractors were also qualified for the execution of works. This letter was delivered on 15/5/2008.
- 43.** On 15/9/2008, Mr. Ezz El-Din Barakat, the Director of the Technical Administration of MAK Holding Company for tourism and hotels sent a letter to the Secretary of the People's Committee for Tourism, in which he referred to his correspondence delivered on 15/5/2008, reiterating its content and requesting assistance to the contractor entrusted with the project execution to overcome impediments still present at the site and delaying the project execution timetable. The impediments included a workshop for the highway contractor placed inside the project land, along with an open sewer line that crosses the project land, carrying untreated sewage to the sea. This letter was received on 15/9/2008.
- 44.** On 23/9/2008, the Director of the Technical Administration of MAK Holding Company for tourism and hotels sent a letter to the Secretary of the People's Committee for Tourism, reasserting for the third time the need for assistance to

initiate project execution, in the hope of achieving it on time, reiterating what was mentioned earlier about impediments on the site, and referring to article (5) of the lease contract concluded between the Tourism Development Authority and Mohamed Abdulmohsen Al-Kharafi & Sons Co. for Trading and Contracting, which stipulates: (The first party shall be required to hand over the plot of land free of occupancies and persons to the second party, guaranteeing that there are no physical or legal impediments preventing the initiation of project execution or operation during the usufruct period). This letter was delivered on 23/9/2008.

- 45.** On 21/1/2009, the Director of the Department for the Development of Touristic Areas and head of the permanent working team sent a letter to the Vice President of the Board of Directors of Mohamed Abdulmohsen Al-Kharafi & Sons Company, in which he referred to the reasons mentioned by the latter that hindered the initiation of project execution to be launched on the occasion of the 40<sup>th</sup> anniversary of the Revolution on 9/9/2009. Given these reasons, a suggestion was made to choose an alternative site for project execution, provided that the Company retains this site pending the resolution of all impediments. He further stated that if the Company refuses to choose an alternative site and prefers to wait for the resolution of the problems on the current site, and given that this decision is left to the Company, then the problems impeding the initiation of project execution shall be resolved, indicating that he was well aware of the importance of respecting the timetable and the reasons for the delay.
- 46.** On 11/7/2009, Vice President of the Board of Directors of Mohamed Abdulmohsen Al-Kharafi & Sons Company sent a letter to Dr. Mahmoud Ahmad El-Foutaissy, the Secretary of the Administration Committee of the General Authority for Investment and Ownership, in which he mentioned that the Company gained the trust of official authorities in the Great Libyan Jamahiriya to initiate the tourism investment activity by virtue of Investment Law No. 5 of 1997 and Law No. 7 of 1372 a.P. Furthermore, he stated that the Plaintiff Company concluded a contract with the General People's Committee for Tourism – Tourism Development Authority on 8/6/2006 to acquire a plot of land extending over an area of twenty four (24) hectares in Tajura in Tripoli. The land was registered and a real estate certificate was issued on behalf of the Company in exchange for the establishment of a major touristic project composed of a five-star hotel of 450 rooms, a commercial mall, in addition to 84 hotel apartments in accordance with the contract concluded with the Tourism Development Authority. He further stated that the Company immediately prepared economic feasibility studies and project technical designs in cooperation with the Tourism Development

Authority. These designs were delivered and approved with the knowledge of the Authority on 24/10/2007. It was agreed that the hotel management company would be Holiday Inn which also participated in preparing the designs. The Company also contracted the company which shall carry out project building management and subcontractors. As a result, the Company incurred huge amounts of money and was surprised to find at the beginning of the project execution that the site was not free of occupancies and impediments. Accordingly, it notified all competent authorities that it was unable to take over the site and therefore was unable to meet the handing over date. It submitted an application to delay the project handover date, pending the resolution of problems and impediments on the project land. The Company was at the time awaiting assistance in resolving these problems to resume project works. A copy of this letter was sent to the Secretary of the General People's Committee, the Secretary of the General Authority for Tourism and Traditional Industries, the Secretary of the General People's Committee for Industry, Economy and Trade, the Director of the Department of the General Authority for Investment and Ownership, the Director of the Office for Committee Affairs, and the Director of the Legal Office.

- 47.** On 1/9/2009, Engineer Saad Salem from the Mohamed Abdulmohsen Al-Kharafi & Sons Company sent a letter to the Director of the Department for Real Estate Affairs at the General Authority for Investment and Ownership, informing him that to date, no positive steps were made to remove the occupancies and impediments on the site preventing the initiation of project execution. This letter was delivered on 3/9/2009.
- 48.** On 22/10/2009, Mr. Omar Dessouki, the President of the Board of Directors of Mohamed Abdulmohsen Al-Kharafi & Sons Company, sent a letter to Dr. Mahmoud Ahmad El-Foutaissy, the Secretary of the Administration Committee of the General Authority for Investment and Ownership, in which he referred to the letter sent on 11/7/2009 and its content, indicating that to date, the land has not yet been cleared of impediments, thus preventing the taking over of the land in compliance with Article (5) of the contract concluded with the Tourism Development Authority at the General People's Committee for Tourism on 8/6/2006. He therefore requested that all necessary procedures are made to remove the impediments and hand over the land, referring to costs incurred by the Company for the project designs and testing, and the losses incurred from the delay, which adversely affects the Company and project execution, and prevents it from profiting from its services and deprives all concerned parties from the return on their investment. This letter was delivered on 22/10/2009.

- 49.** On 9/1/2010, Engineer Saad Salem from the Mohamed Abdulmohsen Al-Kharafi Company asked the Secretary of the Administration Committee of the General Authority for Investment and Ownership to alert the competent authorities to stop the violations arising from some individuals who began to erect a fence around the land, subject of the contract concluded with the Tourism Development Authority at the General People's Committee for Tourism on 8/6/2006, and the provisions of article (5) therein stipulating the taking over of the land free of impediments. He also mentioned that when the Company began building the fence around the land, the works were stopped despite the fact that the Company received the proper approval from the competent authorities. A copy of this letter was sent on 10/1/2010 to the Secretary of the General People's Committee for Industry, Economy and Trade, and the Secretary of the General Authority for Tourism and Traditional Industries.
- 50.** On 9/1/2010, Mohamed Abdulmohsen Al-Kharafi & Sons Company asked Professor Abdel Raouff Bashir El-Najjar, attorney at law, to file a police report at the police station in Tajura to verify a fact regarding the public property consisting of a plot of land extending over an area of twenty four (24) hectares in Tajura, subject of map No. 796, and authentication file No. 16813, bordering the Mediterranean Sea on the north, public property on the east, Shat road on the south, and the Tourist Village on the west where it owns a usufruct right, by virtue of the lease contract. The police report was filed on grounds that this real estate is to date occupied by a group of individuals and the Company is unable to utilize it in accordance with what was mentioned in the contract. Professor Abdel Raouff Bashir El-Najjar replied by saying that a police report was filed in this regard in the Tajura police station on 10/1/2010.
- 51.** On 2/2/2010, Dr. Jamal El-Nouweissry El-Lamoushi, the Secretary of the Administration Committee of the General Authority for Investment and Ownership sent a letter to Mr. Omar Mohamed Dessouki, the Vice-President of the Board of Directors of Mohamed Abdulmohsen Al-Kharafi & Sons Company, in which he referred to decision No. 135 of 1374 a.P. (2006 A.D.) issued by the General People's Committee for Tourism regarding the approval for the execution of the Sidi al Andalusi Tourism Complex project in Tajura, Tripoli. He also referred to contract No. 4 of 2006 A.D. on the usufruct of said site concluded formerly with the Tourism Development Authority and requested that the Company coordinates with the Authority for the effective taking over of the site and submits all architectural drawings and designs for discussion and approval by

the competent authorities. He also asked him to transfer a part of the investment project capital within a period of 30 days as of the receipt of the letter.

- 52.** On 15/2/2010, Mohamed Abdulmohsen Al-Kharafi & Sons Company sent a reply to Dr. Jamal El-Lamoushi, the Secretary of the General Authority for Investment and Ownership dated 2/2/2010 (Nawar 1378 a.P.), to which it attached drawings containing electrical, mechanical, construction and architectural drawings of the Sidi al Andalusi Tourism Complex project in Tajura. It also mentioned that the set of drawings were submitted in triplicate form to the General People's Committee for Tourism on May 14, 2008. Given that no observations were made on the designs, the Company requested that said designs be approved, indicating that the attachments to its letter were the set of architectural drawings, construction drawings, electro-mechanical drawings, fire-resistant drawings, and a CD containing all project-related details. This letter was delivered on 16/2/2010.
- 53.** On 11/3/2010, Engineer Saad Salem from the Mohamed Abdulmohsen Al-Kharafi & Sons Company sent a letter to Dr. Jamal El-Lamoushi, the Secretary of the Administration Committee of the General Authority for Investment and Ownership in reply to his letter dated 20/2/2010 on the Sidi al Andalusi Tourism Complex, in which he indicated that all necessary steps were taken by the Company to comply with the request of coordination with the competent Authority on handover procedures, and suggested two dates, 10 and 11/3/2010, for handing over and taking over, given that this process requires the presence of legal and administrative representatives as well as engineering consultants from the Company. The Company requested the specification and proposal of the appropriate date, given that the Authority has not yet replied to the proposal mentioned in its letter dated 3/3/2010. The letter dated 11/3/2010 was delivered on 11/3/2010 and a copy of this letter was sent to the Secretary of the General People's Committee for Industry, Economy and Trade, the Governor of the Central Bank in Libya and the Director of the Investment Authority.
- 54.** On 19/4/2010, Engineer Saad Salem from the Mohamed Abdulmohsen Al-Kharafi & Sons Co. sent a letter to Dr. Jamal El-Lamoushi, the Secretary of the Administration Committee of the General Authority for Investment and Ownership, in which he requested a meeting with him, referring to his letter dated 11/3/2010.
- 55.** On 9/6/2010, Dr. Jamal El-Nouweissry El-Lamoushi, the Secretary of the Administration Committee of the General Authority for Investment and Ownership sent a letter to Mohamed Abdulmohsen Al-Kharafi & Sons Co. for

General Trading, Contracting, and Industrial Structures, to which he attached the Decision of the General People's Committee for Industry, Economy and Trade No. 203 of 1378 a.P. (2010 A.D.) issued on 10/5/2010 by virtue of which Decision of the General People's Committee for Tourism No. 135 of 2006 regarding the authorization for the execution of a tourism investment project (a five-star tourist hotel, a service commercial center, hotel apartments, restaurants, and recreational areas) was annulled, and requested the Company to end all the procedures adopted for the initiation of project execution. A copy of the letter was sent to the Secretary of the General People's Committee, the Secretary of the Secretary of the General People's Committee for Industry, Economy and Trade, the Governor of the Central Bank in Libya, the Secretary of the Administration Committee of the Department of Real Estate Registration and Documentation and the Department of Real Estate Affairs, the Director of the Office for Legal Affairs and the Director of the Office for Committee Affairs.

56. The Decision of the General People's Committee for Industry, Economy and Trade No. 203 of 1378 a.P. (2010 A.D.), in its first article, stipulated the following: **"Approval on the investment granted to Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trading, Contracting and Industrial Structures by virtue of Decision No. 135 of 1374 a.P. (2006 A.D.) referred to in the decision preamble as the tourism investment project execution, shall be cancelled"**.

Article (2) of said decision also stipulated that the "General Authority for Investment and Ownership shall carry out all necessary legal procedures to cancel the project registration from the Investment Registry and apply the provisions of the previous article". Furthermore, article (3) of said decision stipulated that "the decision shall come into force as of its issuance date, and all competent authorities must implement its provisions". The decision was issued on 10/5/2010 as mentioned on the bottom of the decision page.

57. On 17/6/2010, Mr. Omar Dessouki, the Vice-President of the Board of Directors and authorized representative of the Plaintiff Company sent a letter to the Secretary of the General People's Committee for Industry, Economy and Trade, in which he stated that the Company was astonished with the decision issued by the General People's Committee for Industry, Economy and Trade No. 230 of 2010, abrogating decision No. 135 of 2006, without providing any cause or justifications for the issuance of such a decision at a time when the Company was discussing the handover of the site to initiate project execution with the General Authority for Investment and Ownership. He further stated that the Company did not take over the land from the beginning of the contracting period and was faced with police orders to stop working on the site. Furthermore, the Company

had found materials and facilities belonging to third parties on the site and discovered that the land was owned by other companies and banks, making it impossible for the Company to take over the land despite the fact that it owns the proper real estate certificate which gives it priority and precedence over third parties to take possession of the project land. He went on to say that the Company had corresponded with several competent authorities, asking them for assistance in clearing and handing over the land to enable it to initiate project execution and prevent any further delay, in which it stated that it had prepared the necessary designs and the economic feasibility study and had contracted Holiday Inn Company for hotel management to manage the project. Furthermore, the Company had sent all these documents to the General Authority for Investment and Ownership for approval and issuance of permits, had settled the percentage predetermined for the project in accordance with article (3) of decision No. 135 of 1374 a.P. and had provided all necessary assurances that it shall not fail to execute the project following the administrative expenses, losses and costs it had incurred. Mr. Dessouki stated further that the Company had opened accounts in Libyan banks and transferred the amount of USD \$130,000, i.e. 1% of the investment value, adding that the project cannot have an estimated cost without the land. Mr. Dessouki also asserted that the Company had spent millions of dollars out of its foreign accounts and had agreed to join hands with any public or private Libyan partner when the Investment Authority so requested. The Company had also accepted to work with any company suggested by the Authority, which demonstrated its willingness to execute the project either solely or jointly with third parties. Furthermore, Mr. Dessouki indicated that the Company had complied with all legal formalities, determined to proceed and initiate project execution, stating that the past reasons for delay were still existent and were not caused by the Company, which remains to this day the definite aggrieved party. Moreover, Mr. Dessouki had asked that the Authority reconsiders the matter, annuls Decision No. 203 of 2010, and removes all the obstacles from the land, in preparation of the handing over of the land free of obstacles and legal impediments, stating that the Company shall accept any responsibility for any delay on its part if the annulment was based thereon, but such a delay was inexistent. Mr. Dessouki concluded by saying that he requested a meeting to discuss the reasons behind the issuance of the decision and asserted the Company's willingness to submit all necessary documents supporting its case in order to recover the land and initiate project execution. This letter was delivered on 20/6/2010. A copy was sent to the Secretary of the Administration Committee of the General Authority for Investment and Ownership, the Governor of the Central Bank in Libya, the Secretary of the Administration Committee of the Department of Real Estate



Registration and Documentation and the Department of Real Estate Affairs, the Director of the Office for Legal Affairs and the Director of the Office for Committee Affairs.

- 58.** On 8/7/2010, the Plaintiff Company sent a letter to the Secretary of the Privatization and Investment Board informing the latter of not having received an answer to its abovementioned letters and that no justification of the decision to withdraw the project has been made to it. The Plaintiff Company said that it has consequently found itself obliged to move from the phase of cooperation and joint investment to a phase of disputes and conflict, but that it trusts the Libyan Laws in this regard. The letter was delivered on 8/7/2010. A copy was sent to the Secretary of the General People's Committee, the Governor of the Central Bank in Libya, the Secretary of the Committee of the Department of Real Estate Registration and Documentation and the Department of Real Estate Affairs, the Director of the Office for Legal Affairs and the Director of the Office for Committee Affairs.
- 59.** On 4/8/2010 Attorney Rajab Bashir El-Bakhnug, representing the Plaintiff Company, sent a letter to the Secretary of the Committee of the General Authority for Investment and Ownership soliciting a response to the company's letters sent on 17/6, 29/6, and 8/7/2010, in which the Company had sought to know the grounds on which the annulment stands. In the letter, the Company attributes the delay to the Authority, a fact that can be proved by the dozens of letters expressing the Company's complaints and claims concerning the handover of the project land in order to start the execution of the project. The letter was delivered on 5/8/2010.
- 60.** On 13/8/2010, Dr. Jamal El-Nouweissry El-Lamoushi, the Secretary of the Administration Committee of the General Authority for Investment and Ownership sent a letter to the Vice-President of the Board of Directors of the Plaintiff Company by virtue of which he informs the latter that the General Authority for Investment and Ownership has spared no effort and has provided all the possible assistance and support for the Company to execute the project, that the project execution authorization decision granted to the Company was issued in conformity with the conditions and requirements of Law No. (5) of 1997 and its executive regulations including the obligation to execute within a specific timeframe, and that the Authority had warned the Company of the need to execute its commitments under penalty of law. The Authority's letter also mentioned that the project site is one of the best sites in Tripoli allocated to the Company based on trust in the latter's capacity to execute this vital project, but

that it is unacceptable that a 24-hectare-land located at the heart of Tripoli remains unused for four years. The letter affirms that the cancellation of the project license does not imply a rupture in ties, and that the Authority is ready to provide the necessary assistance to the Company for the execution of any investment project that the latter sees appropriate in the Great Libyan Jamahiriya.

- 61.** On 17/8/2010, Attorney Rajab Bashir El-Bakhnug representing the Plaintiff Company replied in a letter to Dr. Jamal El-Nouweissry El-Lamoushi, the Secretary of the Administration Committee of the General Authority for Investment and Ownership, whereby he affirms that the cancellation of the project has resulted in significant damage and financial loss to the company, which shall be borne by the party committing a violation of the law that governs the project and guarantees the right to compensation. The letter also mentioned that the Company had been unable to execute the project because the land was not handed over; knowing that the handing over of the project site is the first obligation of the General Authority for Investment and Ownership vis-à-vis the Company which shall, in turn, initiate the project execution. Therefore, the Authority's failure, to date, to fulfill its obligation to hand over the land, is the reason of the delay and the cause of the damage and loss incurred by the Company whose right to compensation is guaranteed by the Libyan Law. El-Bakhnug added that since the Authority's letter dated 13/7/2010 A.D. failed to provide any legal or reasonable justification allowing the General Authority for Investment and Ownership to cancel the project, he recalls his request to the Authority to present the legal grounds of cancelling the project awarded to the Company while emphasizing that the delay in execution does not incur any liability on behalf of the Company but lays the full legal liability on the General Authority for Investment and Ownership alone.
- 62.** On 13/9/2010, Attorney Rajab Bashir El-Bakhnug representing the Plaintiff Company addressed a notice, through the bailiff, in which he mentioned that Mohamed Abdulmohsen Al-Kharafi & Sons Company has lodged a request to approve the establishment of a tourism investment project (a hotel, a commercial center, apartments, restaurants, and recreational areas) in Tripoli as per Law No. (5) of 1997, and Law No. (7) of 2004. The Company had also submitted the necessary studies, and Decision No. (135) of 2006 had been issued. On 8/6/2006, the Company signed a land lease contract with the Tourism Development Authority and paid the ensuing fees, most important of which was 1% of the project value. Consequently, a real estate certificate of the 24 hectares project site was issued with a ninety-year validity. The Company prepared the

studies, drawings, and designs, sent them to the Department for the Development of Touristic Areas, and tried several times to take over the land, but third parties were occupying the site, and the municipal guard prohibited the Company from erecting a fence thereon. Correspondence in regards to the issue continued from 15/5/2007 until May 2010 without the land being evacuated nor handed over to the Company. The Company was later surprised by the issuance of Decision No. (203) by the General People's Committee for Industry, Economy, and Trade cancelling the project without any justification thereof, while the General Authority for Investment and Ownership was violating the law by failing to perform its legal obligations as per the contract and the Law, including the obligation to hand over the project land free of occupancies and persons, and provide support to the Company during the erection of the fence and execution of the project. The letter also mentioned that the Company had already notified the General Authority for Investment and Ownership to decide, within a period of thirty days, either to annul Decision No. (203) of 2010 issued by the General People's Committee for Industry, Economy, and Trade, and handover the project land free of persons and occupancies and provide support for the Company during the project execution, or to pay the Company a compensation of five million US dollars that only partly covers the losses incurred so far in project related expenses, and that the Company says is ready to corroborate with conclusive documents. In both cases, the Company accepts to cancel the project and terminate the contractual relationship between the two parties. Nevertheless, if the Authority does not approve any of the two options, the Plaintiff Company, Mohamed Abdulmohsen Al-Kharafi & Sons Co. preserves its right to resort to arbitration as per the Contract and agreement with the General People's Committee for Tourism, as it also preserves its right to claim a compensation of 5.4 million and four hundred thousand US dollars covering the total of lost expenses, another fifty million US dollars covering part of its lost profits during the project life span- a right guaranteed and warranted by the Libyan Laws-, and a reasonable amount in compensation of moral damages incurred by the Company- being an international specialized Company with high reputation in terms of executing international commitments towards its clients-, as well as a compensation of all the expenses related to attorneys and arbitral proceedings, which shall take effect upon the lapse of the said thirty-day period until the final settlement of accounts between the two parties. The notice was delivered on 13/9/2012.

- 63.** On 11/10/2010, Dr. Jamal El-Nouweissry El-Lamoushi, the Secretary of the Administration Committee of the General Authority for Investment and Ownership sent a letter to the Vice-President of the Board of Directors of the

Plaintiff Company acknowledging receipt of notice through bailiff on 28/9/1378 a.P./2010 A.D. by virtue of which the latter requested either the annulment of Decision (203) of 2010 or compensation. The Secretary further stated that the Authority has spared no effort and overcome all difficulties for the Company to execute the project in due time and suggested several solutions in this regard. He added that the cancellation decision does not intend to eliminate the Company's role in the Libyan investment sector but was necessary in the framework of applying the applicable laws, and that, in view of the Company's good reputation, the Authority assures once again its willingness to assist the Company in finding a location where it could establish a project that it deems appropriate. In the letter, the Authority suggested to hold a joint expert meeting tasked to find a common ground for cooperation and benefit from the Company's investment potential in the Great Libyan Jamahiriya. According to the Authority, the suggested meeting would also serve as a platform to discuss the repercussions of Decision No. (203) of 2010 A.D. in a direct manner so as to find solutions that promote joint and mutually advantageous collaboration and investment, stressing that the Authority is keen on eliminating all obstacles and problems preventing the Company and other investors in the Great Libyan Jamahiriya from executing, managing, and operating their projects in a timely, beneficial, and profitable manner, hence achieving the goals of the Law on Investment Promotion in the Great Libyan Jamahiriya. A copy of the letter was sent to the Director General of the Inter-Arab Investment Guarantee Corporation (IAIGC).

- 64.** On 29/10/2010, Attorney Rajab Bashir El-Bakhnug representing the Plaintiff Company replied to the letter of the Secretary of the Administration Committee of the General Authority for Investment and Ownership dated 11/10/2011 assuring that the Plaintiff Company had already prepared the studies, drawings, and designs and therefore insists on the location agreed upon in the contract and regrets that the Authority has failed, as implied in the letter, to hand over the said site. El-Bakhnug recalled his previous letter of 17/8/2010 and his notice of 13/9/2010 communicated through the bailiff and the Litigation Department. He also attached to the letter the bank statements revealing the Company's spending on the projects amounting to USD 5,746,000 (five million seven hundred and forty six million US dollars), and finally expressed his wish to hold a meeting within one week as of the letter date in order to discuss the issue and reach an amicable solution.
  
- 65.** On 12/1/2011, the Plaintiff Company sent a letter to Dr. Jamal El-Nouweissry el-Lamoushi, the Secretary of the Administration Committee of the General Authority for Investment and Ownership, thereby confirming that it had

delivered all project-related documents to a team of counsels with the intention of initiating arbitral proceedings. Nevertheless, prior to initiating the arbitral proceedings, the Company reiterates its sincere wish to work and invest in the Great Libyan Jamahiriya, and insists on the execution of the same project on the same land as all the studies and drawings were prepared accordingly upon the legal conclusion of the contract for investment on the said land. The letter also mentioned that the Company was- and still is- not wishing to dispute or initiate legal action against the Authority, and that it certainly does not seek enrichment at the expense of the latter; However, it insists to protect the funds of shareholders and execute the project related commitments to third parties, hoping that the Authority would review the decision and looking forward to being called again to start the project execution of the same land and site prior to initiating the arbitral proceedings, so as to stop and cancel the arbitration. The Company finally wished to consider its request as a matter of utmost importance and urgency. The said letter was delivered on 13/1/2011.

66. On 26/3/2011, the Vice-President of the Board of Directors of the Plaintiff Company addressed a letter to H.E. the Secretary General of the League of Arab States informing the latter that Mohamed Abdulmohsen Al-Kharafi & Sons Company L.L.C (a Kuwaiti Company) had, by virtue of Decision No. (135) of 2006, concluded a contract with the General People's Committee for Tourism representing the Great Socialist Libyan Jamahiriya, to invest in touristic activities. The said contract No. (4) was signed on 8/6/2006 under Investment Law No. (5) of 1997 and Law No. (7) of 2004 upon the Company's fulfillment of all administrative, financial, and legal requirements necessary for the completion of the contract. However, on 10/5/2010, the Company was surprised to know that the General People's Committee for Industry, Economy, and Trade has issued Decision No. (203) of 2010 cancelling and withdrawing the said project. The Company failed to reach any amicable solution for the issue: the unjust decision has inflicted it with an enormous loss, not to mention the moral damages, while the Libyan authorities were unable to present any justification of the cancellation. Nevertheless, since agreements and contracts are subject to the Unified Agreement for the Investment of Arab Capital in the Arab States issued on 26 November 1980, and since Article 29 of the contract with Libyan authorities provides for the referral of disputes arising between the two parties to arbitration- unless a mutually satisfying amicable solution is reached- the Company decided to initiate arbitral proceedings against the Great Socialist People's Libyan Jamahiriya and the concerned authorities and departments affiliated thereto, and to appoint, as arbitrator from its side, Dr. Ibrahim Fawzi, former Egyptian Minister of Industry, who accepted the appointment.

- 67.** On 11/4/2011, the Director of the Office for Legal Affairs addressed a statement to the Vice-President of the Board of Directors of the Plaintiff Company (in Libya), signed for him by Hassan Abdel Latif, minister plenipotentiary at the Secretariat of the League of Arab States, informing the Plaintiff Company thereby that, after presenting the case to H.E the Secretary General and informing him of the Company's decision to initiate arbitral proceedings against the Great Socialist Arab Libyan Jamahiriya and its affiliated authorities and departments as per the contract concluded with the Company, H.E. approved that the Company initiates the necessary arbitral proceedings based on the provisions stipulated in the Conciliation and Arbitration Annex of the Unified Agreement for the Investment of Arab Capital in the Arab States.
- 68.** On 26/5/2011, the Plaintiff Company has sent a notice, through a special bailiff of the South-Tripoli Court of First Instance, to the Secretary of the General People's Committee, the Secretary of the General People's Committee for Industry, Economy, and Trade, the Secretary of the General People's Committee for Finance, and the legal representative of the General Authority for Investment and Ownership, each acting in his own capacity, and all represented by the Litigation Department at the Court Complex, El Sidi Street, Tripoli. The notice mentioned that the Company had already approached the General People's Committee for Tourism in the Great Libyan Jamahiriya seeking its approval to invest in a touristic project in Tripoli pursuant to Law No. (5) of 1997 and Law No. (7) of 2004, and that pursuant to Decision No. 135/2006 issued by the Secretary of the General People's Committee for Tourism on 7/6/2006, the Company signed the contract for land lease from the Tourism Development Authority on 8/6/2006, and settled all related fees, and tried several times to take over the land after having prepared all the studies and designs that are necessary for the project execution and initiated correspondence with all concerned parties to take over the site. But the Company was surprised, on 6/6/2010, by the General People's Committee for Industry, Economy, and Trade's Decision No. (203) of 2010 cancelling the entire project without any justification. Consequently, the Company sent letters to the legal representative of the General Authority for Investment and Ownership acting in his own capacity, on 17/6/2010 and 29/6/2010 and 8/7/2010 requesting to schedule a meeting to discuss the case, then sent other letters on 4/8/2010 and 17/8/2010 seeking the legal justification of the project cancellation. However the General Authority for Investment and Ownership replied only once to the correspondences of the company by a letter dated 13/7/2010 communicating general information about the project without mentioning any legal grounds justifying the project cancellation. Similarly, the

letter mentioned that the delay is due to the shortcoming and unhelpfulness caused formerly by the Tourism Development Authority, and currently by the General Authority for Investment and Ownership that has breached the law and failed to fulfill its legal responsibilities as per the contract and the Law, including the handover of the leased land free of occupancies and persons, and supporting the Company throughout the process of building fences and executing the project. The Plaintiff Company also stated in its notice that the perusal of project related documents and correspondence proves that the delay was caused formerly by the Tourism Development Authority and currently by the General Authority for Investment and Ownership and that no shortcoming or contravention originated from the side of the Company that is still eager, willing, determined, and motivated to execute the project in the best way possible, and the shortest time frame practicable, for the benefit of both parties. The notice highlighted the fact that all efforts exerted to reach an amicable solution have failed but the Company's rights are protected by the Libyan Law No. (5) of 1997 and Law No. (7) of 2004, as well as the Civil Libyan Law and the Unified Agreement for the Investment of Arab Capital in the Arab States, that is binding to the Great Socialist People's Arab Libyan Jamahiriya being a signatory thereof. The Plaintiff Company also confirmed that it had notified the official Libyan authorities of the arbitration whether administratively or financially involved, appointed Dr. Ibrahim Fawzi to be a member of the arbitral Tribunal that will decide the arbitration pursuant to the provisions of the Law and the abovementioned Unified Agreement, and requested the parties to be notified to appoint their own arbitrators within a period of thirty days as of the date of receipt of the notice, otherwise the League of Arab States shall make the said appointment on their behalf pursuant to the provisions of the Law and of the Unified Agreement for the Investment of Arab Capital in the Arab States. Once the Arbitral Tribunal is complete, the Company shall submit the dispute thereto and claim the compensation of all its losses and material and moral damages incurred by the illicit cancellation of its tourist investment project in Libya, and the lost benefits of the anticipated life span and investment duration of the project. The bailiff delivered copies of the notice sent by the attorney of the Plaintiff Company Mohamed Abdulmohsen Al-Kharafi & Sons for General Trading and Contracting, and Industrial Structures, along with a copy of the notice on the decision to resort to arbitration and request to appoint an arbitrator, through Mr. Abdul Ghani Al Nasiri- in his capacity as Secretary of Administration at the Tripoli Litigation Department- who is authorized to represent the four parties to be notified in their own capacities, and to sign the acknowledgement of receipt on their behalf, which he did. The said notice sent by the Plaintiff Company along with the request to resort to arbitration and to appoint an arbitrator consists of

five pages. The bailiff has notified the parties of the need to activate the agreed upon arbitration and appoint an arbitrator as per the Law and the Unified Agreement for the Investment of Arab Capital in the Arab States. Attorney Rajab Bashir El-Bakhnug signed for the Plaintiff Company and the notice was delivered on 26/5/2006.

## **Chapter Two: Statements of the Plaintiff:**

### **1- On the Liability of the Defendants:**

The Plaintiff Company stated that following the promulgation of Law No. (5) of 1997 on the Promotion of Foreign Capital Investment in Libya, it decided to submit a request to invest in a major touristic project in Libya. Accordingly, a contract was signed by and between the Plaintiff Company as foreign investor, and the Libyan State represented by the Ministry of Tourism in its capacity of the administrative authority competent in Libya to look into tourism investment requests and issue the necessary approvals and licenses thereof. Thus, by the contract signed on 8/6/2006, the Tourism Development Authority, being one of the departments of the Libyan Ministry of Tourism at the time, leased a 24-hectare state-owned land located on the seaside area of Tajura in Tripoli and categorized for tourist projects, for a period of ninety years starting from the date of taking over of the land.

The Plaintiff Company added that the Tourism Development Authority undertook to hand over the land free of occupancies, and that the contract sets forth an obligation to pay the annual rent in advance, provided that the first year rent is paid within thirty days as of the date of taking over of the land. It further mentioned that the Tourism Development Authority also undertook to provide passageways, electricity, telephone, water, and sanitation within a period not exceeding six months as of the date of signature of the contract, and not to establish any in-kind rights on the land throughout the contract validity. The Plaintiff Company undertook to pay the rent in due time, to prepare the project designs and submit them to the Tourism Development Authority, not to waive its right to lease to third parties, and to complete the project within a period of seven years and a half starting from the date of issuance of the building permit. Both parties agreed that the investment project shall enjoy the exemptions and privileges set forth in Law No. (5) of 1997 and provisions of Law No. (7) of 2004 on Tourism. Moreover, the two parties to the contract agreed to act in accordance with Law No. (5) of 1997, Law No. (7) of 2004, and other relevant Libyan Laws when the contract fails to cover the situation at hand, and that any dispute arising from the interpretation or



performance of the contract shall be solved amicably, or otherwise referred to arbitration as per the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States of 26/11/1980, given that the said Agreement is binding to the Libyan State in matters related to Arab Investments.

The Plaintiff Company also said that the Libyan Minister of Tourism issued Decision No. (135) of 2006 after it had submitted the necessary studies and documents and received approval on the investment in a tourist project consisting of a tourist hotel, a commercial center, residential apartments, restaurants, and recreational areas in the region of Tajura, Sidi Al Andalusi in Tripoli, at a total value of 130 million USD and for a period of ninety years, as per the provisions of Law No. (5) of 1997 on the Promotion of Foreign Capital Investments and Law No. (7) of 2004. The Company also mentioned that it had paid 130 thousand USD to the Tourism Development Authority against the latter's perusal of drawings and designs, and that the project was registered under No. 11/2006 in the Investment Registry pursuant to which a real estate certificate was issued from the Department of Real Estate Registration and Documentation on 11/9/2007 proving that the 24-hectare land is owned by the Libyan State and has been leased to the Plaintiff Company for a period of ninety years. However, the Plaintiff Company has been claiming since 29/7/2006 and until 9/6/2010 the handing over of the land free of occupancies and persons in order to start the project execution, while the Defendants have been neglecting, failing, and subsequently refraining from fulfilling their commitment to hand over the land. The third Defendant who was unable to hand over the land revealed in some of its letters that the land was actually sold to the Umma Bank. The sale was later confirmed by the Department of Real Estate Registry, and conclusively proved the ill intention of the Defendants.

The Plaintiff Company attempted to save what could be saved after the delimitation of the borders of the land by trying to erect an external fence to protect the land but encountered legal disturbances, by third parties, of enjoyment of the site. The third Defendant, being called upon by the Company to intervene and stop such disturbance, failed to fulfill its obligation to provide guarantee against any disturbance of quiet possession by a third party pursuant to the contract and the Libyan Civil Law.

To top it all, the Defendants added to their contractual liability by cancelling the approval granted to the Plaintiff Company by virtue of Decision No (135) of 2006, whereby the said Company was notified of Decision No (203) of 2010 issued by the Minister of Industry and Trade cancelling the former approval decision. The Defendants refused to review the cancellation decision and rejected all amicable solutions to the prejudice and damages incurred by the Plaintiff Company by reason of the cancellation.

All of the abovementioned events have incurred contractual liability on the Defendants who, without any legal ground whatsoever from the applicable Libyan Law agreed upon by both parties or any other law in the world, refused to satisfy their commitments vis-à-vis the Plaintiff Company set forth in the lease contract and the Civil Law, and breached the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States.

The Plaintiff Company added that all elements of contractual liability are available from the side of the Defendants and that, as is internationally known, the elements of the contractual liability are three: the contractual fault, the damages resulting therefrom, and the causal relationship between the contractual fault and the resulting damages. Based on the above, it has narrated the history of the relationship between the two disputing parties for the arbitral Tribunal to consider it when assessing the damages. The Company identifies that the contractual fault of the Defendants consists in entirely breaching the terms of the lease contract concluded on 8/6/2006 by failing to handover the leased land- knowing that the said land handing over is a major obligation of the third Defendant- and failing to warrant against any disturbances, by third party, of the enjoyment of the site, and failing to satisfy any of their contractual obligations, hence also violating Decision No (135) of 2006 issued by the Ministry of Tourism in Libya by the tourism-investment-related powers then granted thereto by virtue of Law No. (7) of 2004. The said Decision actually constitutes the contract that has granted to the Plaintiff Company the right to establish a touristic investment project and enjoy the ownership and investment of the said project for a period of ninety years along with the privileges set forth in Law No. (5) of 1997 on the Promotion of Foreign Capital Investments. Furthermore, the Defendants have intentionally refrained from handing over the land thereby breaching their obligations, and violated the provisions of Articles 570 and 573 of the Civil Libyan Law by failing to warrant against legal disturbances, by third parties, of enjoyment of the site, i.e. Umma Bank claiming ownership of the land. The Defendants also failed to guarantee the Company against legal disturbance by third parties including the General Company for Building and Construction who claimed right of lease of the land, the Tajura Club, or the Owner of the coffee shop equally claiming right of lease of the same land for 25 years. Such legal disturbance simultaneously constitutes a physical disturbance of quiet enjoyment by the Defendants having granted the said rights, and given the fact that the land is owned by the State and managed by the Ministry of Tourism for being categorized as a tourist project, by virtue of the Minister of Tourism Decision No (202) of 2005. However, the Tourism Development Authority is the Authority empowered to lease the said land to tourist investments by virtue of the Libyan Council of Ministers Decision No. (87) of 2006. The Plaintiff Company added that the abovementioned disturbances occurred during the lease period

without any intervention from the part of the Defendants, which resulted in the inability of the Plaintiff Company to make profit from the leased property. The Defendants also violated the terms of the lease contract and blatantly breached the provisions of the Libyan Civil Law, particularly Articles 147, 209, 563,570, and 573 thereof. On 10/5/2010 the General Authority for Investment and Promotion instructed the Minister of Industry, Economy, and Trade to issue Decision No (203) of 2010, cancelling the approval and license previously granted to the Plaintiff Company to conduct touristic investment projects in Libya. The said Decision consequently cancelled the registration of the project in the Investment Registry, negating thereby the legal existence of the Plaintiff Company in Libya and repulsing it therefrom. The Company believes that such a decision should have been prevented by the Ministry of Economy and confirms that, despite everything, it has paid the amount of 130 thousand US dollars to the third Defendant in fulfillment of its only obligation provided for in Article 3 of the annulled decision.

The Plaintiff Company added that the Defendants' failure to justify the cancellation constitutes an illegal act violating Article 147 of the Libyan Civil Law according to which: the contract is the law of the parties and shall be performed as indicated in its provisions and in goodwill, and a contract is not limited to its provisions but also draws on other requirements in conformity with the law, practice, and justice due to the nature of commitment as per article 148. The Defendant's illegal act violates Articles 1 (paragraph 1), 6 (paragraphs 1, 4, 6), and 15 of Law No. (5) of 1997 and Article 2 (paragraph 7) of Law No. (7) of 2004 on Tourism.

The Plaintiff Company emphasized that the said illegal act, which has caused great damages thereto, constitutes a violation of Articles 2 and 9/1 and 10/a, b, and d of the Unified Agreement for the Investment of Arab Capital in the Arab States issued on 26/11/1980. The said Agreement was ratified by Kuwait on 1/4/1982, and Libya on 4/5/1982, and the Plaintiff Company is 100% Kuwaiti, registered in Commercial Register of Kuwait under No. 53472. The contractual fault committed by the Defendants lies in the fact that the third Defendant, who is directly involved, has signed in acknowledgement of receipt of letters and documents that it had issued against the Company, while Article 40 of the Unified Agreement considers that the papers, documents, and certificates issued by the competent authorities in any State Party shall serve as sufficient evidence for invoking the rights and affirming the obligations arising from the Agreement and that the papers issued by affiliated authorities, be it the Ministry of Tourism or the Ministry of Economy, shall be considered as official and authentic as per Articles 377 and 378 of the Libyan Law. By being negligent and careless, the Defendants, namely the General Authority for Investment and Ownership and the Ministry of Economy in Libya caused financial damages to the Plaintiff Company and prejudiced the Libyan State and its Administration by their illegal act that violates the ends and essence of the

Investment Law as established by the Legislator and the Libyan People, and reinforced in Article 3 of the new Libyan Law No. (9) of 2010 on the Promotion of Investment that also provides for greater guarantees and protection of the foreign investor in its Articles 23 and 24. In the light of the above, the two mentioned Defendants have prejudiced the investment and are both aware of the fact that their faulty act has caused enormous material and moral damages to the Libyan State.

## **2. On the Fault and Damages:**

The Plaintiff Company continued by describing the damages incurred and stating the elements of the contractual liability due on the part of the Defendants. According to the Plaintiff Company, the damages started on the day following the conclusion of the contract on 8/6/2006, which binds the Defendants to pay compensation pursuant to article 166 of the Libyan Civil Code which provides that: “any fault that causes damage to another person render its perpetrator liable to payment of compensation in respect thereof”. The damages are both material and moral, and the second and third Defendants have caused them by their intentional contractual fault as they refrained from fulfilling their obligation of handing over the project land and enabling the Company from executing the investment project and benefiting therefrom for a period of ninety years, in addition to having terminated the lease contract and the approval of investment, despite being whole, valid, and free of irregularities. Such fault obliges the faulty party to compensate the Plaintiff Company for direct damages, foreseeable and unforeseeable, noting that the Defendants’ fault is considered as fraud, and their liability as tort, in view of the serious fault committed. Therefore, the Plaintiff Company is entitled to claim compensation of unforeseeable damages from the Defendants, as the lost opportunity of profit from the investment extends to ninety years minus seven and a half years of execution. The Company’s deprivation of its profits is possible and expected, and Article 224/1 of the Libyan Civil Code provides that “Compensation shall cover the loss incurred by the creditor as well as his lost profit provided that this is a natural consequence of the non-fulfillment of the obligation or the delay in its fulfillment”.

The Plaintiff Company added that it can claim the lost profits throughout the contract duration at the annual high profit margin that directly results from the efficiency of the Company and the situation of the market which will be prospering in Libya, deprived of foreign investments for the past fifty years. The Plaintiff Company said it cannot but approve the report of the German Company RODDLE MIDDLE EAST specialized in accounting and project management, who, after examination of all sides of the project, concluded that the Plaintiff Company’s lost

profits during the contract duration are estimated at one billion and eighty nine million US dollars (USD 1,089,000,000). The Plaintiff Company enclosed a copy of the report including a breakdown of the mentioned amount based on the relevant internationally acknowledged calculation methods. It added that compensation is due for a pending requirement that constitutes at the same time a tort, and that the Company is not claiming compensation for both liabilities, but has joined them to obtain one compensation that reflects the characteristics of the two liabilities.

The Plaintiff Company further mentioned that the moral damages injure the non-financial interests of the aggrieved party, and the Libyan and French laws allow the compensation of moral and material damages equally. By the same token, several scholars allow the claim of such compensation to give the aggrieved party a substitute to their moral damages and hence, the Courts and Arbitral Tribunals determine the sufficient amount of compensation. In light of the above, the Plaintiff Company pointed out that it is one of the leading international companies in the field of investment and contracting, and earning this project in Libya has added to its moral credit in the international financial and business market. However, the moral damages have undermined the Company's trustworthiness and credibility gained by earning this investment project, noting that the value of the Company's international moral and commercial component is estimated at one million USD. A report on the matter was also submitted.

### **3. On the Causal Relationship:**

The Plaintiff Company stated that the relationship between the contractual fault and the damages resulting therefrom is a given and cannot be proved wrong. Said relation has been established by the mere failure of the Defendants to carry out their contractual obligations, namely, the failure to handover the leased land free of impediments to the Company upon the contract signature, as provided for by article 563 of the Libyan Civil law. The causal relationship has also been confirmed by the issuance of Decision No. (203) of 2010 cancelling the investment approval and license granted to the Company three years earlier, while the Defendants did not attempt to handover the leased land. The said delictual faults constitute alone the direct cause of direct and indirect damages incurred by the Plaintiff Company hereby claiming compensation.

### **Chapter Three: Requests of the Plaintiff Company:**

The Plaintiff Company requested that a decision be issued in its favor against the Libyan State, and the General Authority for Investment and Ownership that is the authority

competent to manage foreign investments in Libya, and the Libyan Ministry of Economy, jointly, considering that the second and third Defendants are executive departments affiliated to the Libyan Government. The said decision is requested to be final and binding, amounting to one billion one hundred and forty four million and nine hundred and thirty thousand US dollars (USD 1,144,930.00) detailed as follows:

1. An amount of six millions five hundred and thirty nine thousand Libyan Dinars (LYD 6,539,000) or the equivalent of five million and thirty thousand US dollars (USD 5,030,000) depending on the exchange rate determined by the Central Bank of Libya at the date of the memorandum, in compensation of the value of losses and expenses incurred by the office of the Plaintiff Company starting the date of its inauguration in Libya pursuant to Decision No. (135) of 2006 until the date of its closure. A report prepared by an external auditor was submitted in this regard.
2. An amount of one billion and eighty nine million US dollars (USD 1,089,000,000) in compensation of lost profits after due consideration of the operation and management of the project for ninety years as per the report of the specialized German company RODLLE MIDDLE EAST.
3. An amount of fifty million US dollars (USD 50,000,000) in compensation of moral damages to the Company's reputation in the financial and business market inside Kuwait and internationally. The Company hereby mentions that the amount is merely symbolic.
4. An amount of USD 420,000 to cover the arbitration expenses.
5. An amount of USD 500,000 to cover the estimated fees that the Company owes to its attorneys from the beginning of the dispute until the rendering of the final arbitral award.

## **Chapter Four: Facts alleged by the Defendants:**

The Defendants exposed the following facts:

1. On 7/6/2006, the Secretary of the General People's Committee for Tourism issued decision No. (135) of 1374 a.P. (2006 A.D.) agreeing to grant investment approval to Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trading, Contracting, and Industrial Structures for the execution of a tourism investment project (a five-star tourist hotel, a service commercial center, hotel apartments, restaurants, and recreational areas over 24 hectares in Tajura city, (Sidi al Andalusi), Shabiyat (administrative district) Tripoli).
2. The investment value of the project was determined at USD \$130,000,000 (one hundred and thirty million US dollars) and the duration of the project 7 and a half years. The investment period is 90 years.

3. The terms and conditions of the project are those stipulated in Law No. (5) of 1426 a.P. (1997 A.D.) on the promotion of foreign capital investment and its executive regulations, and Law No. (7) of 1372 a.P. (2004 A.D.) regarding Tourism and its executive regulations.
4. On 8/6/2006, the Tourism Development Authority (First Party) and Mohamed Abdulmohsen Al-Kharafi & Sons Co. (Second Party) signed a contract for the lease of a land for the purpose of establishing the tourism investment project.
5. The land, subject of the contract, is a state-owned land, and the Tourism Development Authority is entrusted with the allocation of lands within the Touristic Development areas and sign their lease contracts in accordance with the General People's Committee's Decision N. o (87) of 1374 AH (2006 AD) in view of promoting tourism services in the region where the land, subject of the contract, is located.
6. The Secretary of the General People's Committee for Tourism had issued Decision No. 202 of 1373 AH (2005 AD) giving the land, subject of the contract, a touristic nature.
7. Article Two of the contract stipulated that the area is 240,000 m<sup>2</sup>. It is delimited by the beach on the northern side, public property on the western side, the highway on the southern side, public property on the eastern side.
8. Article Two of the contract stipulated that the investment period of the land is ninety years, as of the date of taking over of the land in question.
9. The land usufruct value shall be of 720,000 Libyan Dinars, to be paid annually during the contract validity period to the Treasury of the lessor.
10. Article (14) of the contract stipulates that the contract shall not be waived, totally or partially, to other parties, unless upon written approval, otherwise the contract shall be considered null without any need whatsoever for taking any judicial procedure, notwithstanding the right to ask for damages.
11. Article (15) of the contract stipulates that the project shall be executed under the supervision of the third Defendant in line with the technical specifications of the contract, the maps, the nature of work and the professional standards,

whereas the Plaintiff shall commit to using materials, equipment and tools of good quality, and providing technical staff having experience in execution, management and operation.

- 12.** Article (16) of the contracts stipulates that the Plaintiff shall be bound by the technical observations and reports made by the First Party of the contract and related to the adopted designs for the investment project.
- 13.** Article (24) stipulates that the first party to the contract has the right to terminate it in case the Second Party does not initiate the project execution within three months following the date of receipt of project execution permits, unless the Second Party submits a written justification acceptable to the First Party.
- 14.** Article (30) of the contract stipulates that unless otherwise stipulated in this contract, the contract shall be governed by Law No. (5) of 1426 a.P. (1997 A.D.) and Law No. (7) of 1372 a.P. (2004 A.D.).
- 15.** Article (29) stipulates that: "In the event of a dispute between the two parties arising from the interpretation or the performance of the provisions of this contract while in force, the dispute shall be solved amicably; failing that,, the dispute shall be referred to arbitration in accordance with the provisions stipulated in the Unified Agreement for the Investment of Arab Capital in the Arab States issued on November 26, 1980.
- 16.** On 20/2/2007, the minutes of handing over and taking over minutes of a touristic investment site were signed, including:
  - 16.1** Information on the investment site: The Andalusí investment site, area 24 hectares, contract No. 4, dated 8/6/2006.
  - 16.2** Party which took over the site: Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trading, Contracting, and Industrial Structures.
  - 16.3** The First Party and the investment site delivery committee at the Tourism Development Authority. The Second Party is a designated representative of the Plaintiff Company authorized to sign on its behalf.
  - 16.4** The two parties examined the site and specified the borders, i.e. the beach on the northern side, the highway on the southern side, public property on the eastern side and public property on the western side.
- 17.** The Tourism Development Authority (the third Defendant) gave the Plaintiff Company an extract of the Tourism Investment Registry.



- 18.** On 27/11/2007, the Department of Real Estate Registration and Documentation under the General People's Committee of Justice in the Arab Popular Libyan Jamahiriya issued a real estate certificate on state-owned lands, showing that the described land is owned by the Libyan state and that it is occupied by Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trading, Contracting and Industrial Structures (The Plaintiff) by virtue of a ninety-year lease contract.
- 19.** The First Party of the contract, i.e. the Tourism Development Authority that has been called the General Authority for Tourism and Traditional Industries by virtue of a Decision No. 87 of 1375 a.P. (2007 A.D.), started to detect slowness in the performance of obligations. The Authority sent to the Plaintiff Company on 1/7/2007 a letter asking it to present a detailed timetable of the project execution stages as well as the required designs of the project for approval, the more so as the Plaintiff had undertook to ensure completion on the 40<sup>th</sup> anniversary of the Revolution on 9/9/2009.
- 20.** Moreover, the Director of the Department for the Development of Touristic Areas at the General Authority for Tourism and Traditional Industries sent on 11/7/2007 a letter to the Plaintiff Company asking it to provide the celebrations supervising committee with the project plans and designs in A3 format and a three-dimension CD on the project.
- 21.** The Plaintiff Company having not responded, the Director of the Department for the Development of Touristic Areas and the Director of the permanent working team at the General Authority for Tourism and Traditional Industries sent a letter referring therein to the meeting that took place on 11/9/2007 and reiterated his request about receiving the drawings before 14/11/2007 and speeding up the elaboration of the different designs of the project. He sent another letter on 12/11/2007 asking to have the final designs of the project to submit them to the Committee for review and approval, and to start immediately the execution.
- 22.** The Plaintiff Company remained busy with the temporary problem of the fence on the project site, claiming that the lack of completion of the fence affects the project timetable, a project which final designs have not been adopted. What is worth noting here is the letter dated 30/10/2007 in which the Plaintiff Company alleged that an event would take place on 31/10/2007.
- 23.** Two years after the contract was signed and the Plaintiff Company took over the land, subject of the contract, the head of technical management at the Plaintiff Company sent on 14/5/2008 a letter to the Head of the People's Committee for

Tourism, informing him that he had the pleasure to submit the drawings including the preliminary architectural, construction, mechanical and electrical designs along with the project's technical report.

**24.** What has been achieved towards the project execution:

**24.1.** The Company contracted the Holiday Inn International Company for hotel and hotel apartment management.

**24.2.** It also contracted another distinguished company for project design to provide execution supervision and design services.

**24.3.** It contracted Hill International Company for project execution work management.

**24.4.** Candidate contractors were qualified for the execution of works. The most experienced and most competent were selected to execute the project as per the defined timetable.

**25.** On 11/9/2008, the Secretary of the General Authority for Investment Promotion sent a letter to the Plaintiff Company informing it therein that, based on Decision No. (135) of 1374 a.P. (2006 A.D.), and in conformity with Article 29 of the executive regulation of Law No. (5) of 1426 a.P. (1997 A.D.) on the Promotion of Foreign Capital, the most important reasons for liquidating the investment project are:

**25.1.** The specific period of the investment project has expired and the investor did not submit a request to extend the period, or the extension was not approved.

**25.2.** The project is unlikely to continue its activity, and in case a final position of the investment project has not been presented, the Authority will have to take all necessary legal procedures.

**26.** On 8/1/2009, instead of answering the letter of the General Authority for Investment Promotion dated 11/9/2008, the Plaintiff Company wrote to the Department for the Development of Touristic Areas asking to be exempted of the project handover on time.

**27.** Less than two weeks later, the Director of the Department for the Development of Touristic Areas and the Director of the permanent working team at the General Authority for Tourism and Traditional Industries sent on 21/1/2009 a letter to the Plaintiff Company, referring therein to the suggestion made to choose an alternative site for project execution, provided that the Company retains this site pending the resolution of all impediments. Yet the Plaintiff Company rejected the alternative and preferred to keep the site.

- 28.** On 4/7/2009, the Secretary of the Administration Committee of the General Authority for Investment and Ownership sent a letter to the Plaintiff Company asking it to present the executive position of the project and the actual achievement rate, along with the needed timetable to complete the execution process.
- 29.** On 11/7/2009, the Plaintiff Company sent a letter to the Secretary of the Administration Committee of the General Authority for Investment and Ownership, in which it concluded that it had reached a position where it cannot meet the requirement of timely handover and that it had officially submitted a request to postpone the handover of the project .
- 30.** On 2/2/2010, the Secretary of the Administration Committee of the General Authority for Investment and Ownership sent a letter to the Plaintiff Company in which he asked the company to submit all the designs and drawings to be discussed and adopted by the competent authorities, and to transfer a part of the capital of the investment project within a period of 30 days.
- 31.** On 24/2/2010, the Plaintiff Company replied to the correspondence dated 2/2/2010, saying it has delivered the project drawings and designs and that it was still waiting for the visa of Mr. Omar Mohamed Dessouki, Vice-President of the Board of Directors of the Plaintiff Company, to open up an account and supervise the handover of the site, which may lead to a delay which is not under its control.
- 32.** The Plaintiff Company did nothing to transfer a part of the capital amounting to USD 130,000,000. Its answer to such a request came late in its letter dated 17/6/2010, while commenting on Decision No. 203 of 2010. Said decision canceled the approval given for the project. In Paragraph Seventh of this letter, the company said it opened up accounts in Libyan banks and informed the General Authority for Investment and Ownership about it. Could it then transfer 10% of the investment value totaling \$13m on these accounts while the project land was still not handed over, and while the project could not even have an estimated cost with no land, knowing that the Company had spent millions of dollars out of its foreign accounts?
- 33.** On 19/4/2010, the Administration Committee of the General Authority for investment and ownership (the 3<sup>rd</sup> Defendant) recommended to annul the investment approval decision granted to the Plaintiff Company.

- 34.** On 26/4/2010, the Secretary of the Administration Committee of the Department of Real Estate Registration and Documentation sent a letter to the Secretary of the Administration Committee of the General Authority for Investment and Ownership (the 3<sup>rd</sup> Defendant), in which he asked him to take all legal procedures to terminate the lease contract signed with the company as the company did not start the agreed upon project execution throughout four years.
- 35.** Upon the recommendation of the Administration Committee of the General Authority for Investment and Ownership (the 3<sup>rd</sup> Defendant) to cancel the investment approval, the General People's Committee for Industry, Economy and Trade issued on 10/5/2010 Decision No. (203) of 1378 a.P. (2010 A.D.) cancelling the approval granted by virtue of Decision No. (135) of 1374 a.P. (2006 A.D.).
- 36.** On 3/6/2010, the Secretary of the General Authority for investment and Ownership sent a notice to the Plaintiff Company asking it to take all necessary procedures to put an end to the formalities related to the initiation of the project execution.
- 37.** On 7/6/2010, Decision No. (213) of 1378 a.P. (2010 A.D.) decreed to give back the ownership of the land to the Libyan State, and to cancel all acts on the real estate plot, registered formerly in the name of the Promotion and Tourism Investment Department, at Tajura Shabiyat (administrative district) Tripoli (Sidi el Andalusi village), and stating that it is owned by the Libyan State.
- 38.** On 17/6/2010, the Plaintiff Company sent a letter to the Third Defendant in which it requested a meeting to discuss the reasons behind the issuance of the decision cancelling the investment approval. It acknowledged in the letter that it did not transfer the amount equaling 10% of the investment value and that the project cannot even have an estimated cost.
- 39.** On 13/7/2010, the Secretary of the Administrative Committee of the Third Defendant sent a letter to the Plaintiff Company in which he explained the reasons behind the decision to cancel the project, on top of which the lack of project execution and the fact that four years have passed since the site was allocated and that it was impossible to keep a 24-hectare land in the heart of Tripoli unexploited.

- 40.** On 3/8/2010, the Plaintiff Company entrusted its counsel Rajab El-Bakhnug with the mission of communicating and corresponding with the 3<sup>rd</sup> Defendant. In case those contacts fail, it will resort to arbitration.
- 41.** On 5/8/2010, the Company's counsel sent a letter to the 3<sup>rd</sup> Defendant, concluding with the hope they could cooperate and reach a fast amicable solution.
- 42.** On 11/8/2010, the Director of the Office for Legal Affairs acting for the 3<sup>rd</sup> Defendant answered back, clarifying to the Plaintiff Company's counsel that the letters of the Plaintiff Company were answered on 23/7/2010.
- 43.** On 8/8/2010, the Plaintiff Company's counsel asked the Third Defendant to list the legal grounds they based themselves on to cancel the project, despite the fact that those reasons were exposed in the third Defendant's letter on 13/7/2010.
- 44.** On 13/9/2010, the Plaintiff Company notified the third Defendant through a bailiff to choose within thirty days one of the following:
  - 44.1.** Annul Decision No. 203/2010, clear the project site of all persons and impediments, hand over the project land and protect it so that it undertakes to execute the project. It then undertakes to immediately start execution as soon as the above is implemented.
  - 44.2.** Or pay a compensation of USD 5,000,000 (Five million US dollars), knowing that this amount is only a part of the losses incurred by the Plaintiff Company.
  - 44.3.** By implementing one of these two options, the Company agrees to cancel the project and to fully end the contractual relation between the two parties.
  - 44.4.** In case the Third Defendant did not choose any of these two options, the Plaintiff Company reserves the right to resort to arbitration and to claim an amount equaling USD 5,400,000 (Five Million Four Hundred Thousand US dollars), as overall financial losses incurred on the project, as well as USD 50,000,000 (Fifty Million US dollars) as part of the lost profits by the Plaintiff Company during the anticipated life span of the project, which is a right ensured and guaranteed by the Libyan civil law, and a fair amount representing the moral damages, lawyers' fees and arbitration expenses, until all financial problems and issues are conclusively solved between the two parties.
- 45.** On 29/10/2010, the Plaintiff Company's counsel sent a letter to the Third Defendant, attaching thereto the receipts of the expenses that the company has allegedly spent on the project.

46. On 20/10/2010, the Third Defendant sent a letter to the Plaintiff Company explaining therein that the project cancellation came in accordance with the provisions of the applicable law in Libya, and that it hopes to find the appropriate solutions in a teamwork spirit.
47. On 12/1/2011, the Plaintiff Company sent a letter to the Third Defendant notifying it that all the documents have been submitted to a team of counsels to initiate arbitral proceedings.
48. On 6/2/2011, the Third Defendant sent a letter to the Plaintiff Company, as an answer to its last letter dated 12/1/2011, exposing therein that Decision 203 of 2010 cancelling the investment approval was issued in conformity with the Libyan Law, and that the Defendant was ready to hold a meeting to find an appropriate solution in a teamwork spirit.
49. On 26/5/2011, the Plaintiff Company notified the Defendant that the dispute was referred to arbitration.

## **Chapter Five: Statements of the Defendants made in defense:**

### **First: On the jurisdiction:**

The Defendants state that four issues arise from the provisions of Article 29 of the contract drawn up on 8/6/2006 between the Plaintiff Company and the third Defendant:

- a- **Issue One:** Determining the dispute settlement means – the Defendant points out that the provisions of Article 29 of the contract is limited to describing the two means of dispute settlement, the amicable settlement and arbitration in case of failure of the first one.

**a-1-** Notwithstanding the agreement to refer to amicable settlement when the interpretation of the contract's provisions or their performance during its enforcement is at issue, the Plaintiff Company failed to follow this path although it had asked its counsel to opt for amicable correspondence. Said counsel addressed a letter to the third Defendant on 5/8/2010 with the hope of cooperating to reach an amicable and swift solution.

**a-2-** On 13/9/2010, the Plaintiff Company notified the third Defendant through the Court bailiff to decide, within a period of no more than 30 days, whether to annul decision 203/2010 and remove occupancies and people from the site, hand over the project site land and protect the same in order to carry out the project as per what has been agreed upon; or pay the amount of USD \$5 million in compensation of part of its losses in the project. The adoption of either one of these two options shall put an end to the contractual relationship between the two parties.

**a-3-** If the third Defendant fails to pick one of these two solutions within 30 days, the Plaintiff reserves the right to resort to arbitration and claim the amount of five million and four hundred thousand US dollars (USD \$5,400,000), or the equivalent of the overall financial losses invested in the touristic project which was cancelled by virtue of Decision 203/2010, in addition to USD \$50 million to cover part of the profits lost during the anticipated project life span, which is a right guaranteed and warranted by the Libyan civil law, and an amount equivalent to the moral damages it has incurred being an international company with a good reputation in honoring its international obligations with its clients, as well as attorneys' fees and arbitration costs until the final settlement of financial affairs.

**a-4-** On 12/1/2011, the Plaintiff Company sent a letter to the third Defendant whereby it confirms having provided the attorneys' team with the project documents to proceed with the arbitral proceedings, hence ruling out the amicable settlement before it even starts.

**a-5-** Article (2) of the Conciliation and Arbitration Annex of the Unified Agreement for the Investment of Arab Capital in the Arab States ratified by Libya on 4/5/1982 stipulates that if both parties fail to agree to conciliation or where the Conciliator proves unable to render his decision within the specified period or where the parties do not agree to accept the solutions proposed, they may agree to resort to arbitration.

**a-6-** No serious effort has been made to reach a settlement. The Plaintiff Company having resorted to arbitration, the third Defendant may invoke the inadmissibility of the arbitration case due to premature filing given that the amicable settlement was precluded, whereas the contract and the Conciliation and Arbitration Annex provided for referring to amicable settlement as long as the parties had agreed on the same before resorting to arbitration.

**b- Issue Two:** Personal scope of the Arbitration Agreement as to the parties:

**b-1-** The Arbitration Agreement is only binding to the parties, signatory of the agreement, and therefore:

**b-1-1-** It shall not be deemed permissible to invoke the Arbitration clause against the State of Libya, i.e. the first Defendant, for it was not part of the contract concluded on 8/6/2006. Hence, it shall not be considered party to this arbitration. It shall not also be permissible because the third Defendant is an independent juridical person, and Article 14 of the General People's Committee Decision No. 87 of 1375 a.P. (2007) on establishing the General Authority for Tourism and Traditional Industries provides for merging the Tourism Development Authority and the Traditional Industries Development Authority into the General Authority for Tourism and Traditional Industries, provided that all their assets are referred to the General Authority, which now holds their rights and carries out their obligations.

**b-1-2-** Article 15 of Decision No. 87 of 1375 a.P. (2007) stipulates that the competencies granted to the General People's Committee for Tourism in matters related to investment pursuant to Decision No. 7 of 1372 a.P. are vested to the Authority for Investment Promotion. All the contracts, rights, and obligations that are concluded on its part in relation to tourism investment shall be referred to the Authority for Investment Promotion, which now holds their rights and carry out their obligations.

**b-1-3-** The General Authority for Investment and Ownership was established as per Decision No. 89 of 1377 a.P. (2009). Article 1 thereof stipulates that the Authority shall have the status of an independent juridical person and enjoy financial autonomy. It shall be affiliated to the General People's Committee for Industry, Economy and Trade and hold the necessary powers to regulate and handle matters related to investment and ownership.

**b-1-4-** Article 12 of Decision No. 89 of 1377 a.P. (2009) provides for the merger of the General Authority for Investment Promotion and the General Authority for the Ownership of Public Companies and Economic Units into the General Authority for Investment and Ownership. All their obligations and assets shall be referred to it and it shall be entrusted with their competencies and tasks, and their employees shall be moved therein in the same positions. Paragraph 2 of Article 3 of said Decision provides that the General Authority for Investment and Ownership shall implement investment legislation pursuant to the provisions of Law No. 5



of 1426, Law No. 7 of 1372 a.P., and Law No. 6 of 1375 a.P., as well as relevant regulations. Article 7 of said Decision provides that the Secretary of the Administration Committee shall represent the Authority before third parties and before the courts. Decision No. 608 of 1377 a.P. (2009) provides for the appointment of Dr. Jamal El-Nouweissry El-Lamoushi Secretary of the Administration Committee of the General Authority for Investment and Ownership.

**b-1-5-** The First Party to the contract, the Tourism Development Authority, was replaced by a legal person of Public Law currently named 'General Authority for Investment and Ownership ' (the third Defendant) as revealed in the statement of facts. It has an independent juridical capacity and is independent from the State of Libya and the Ministry of Economy. It shall be exclusively considered party to the present arbitration case, provided that the Arbitral Tribunal has jurisdiction of subject matter thereon.

**b-2-** It shall not be deemed permissible to invoke the Arbitration clause concluded in the contract drafted on 8/6/2006 against the Ministry of Economy (Second Defendant):

The Ministry of Economy in Libya is not party to the contract concluded on 8/6/2006, and therefore, it shall not be admissible to invoke the Arbitration clause stipulated in the contract against it, given that, pursuant to Decision No. 89 of 1377 a.P. (2009), the third Defendant is an independent juridical person and enjoys financial autonomy and has replaced the Tourism Development Authority, the first party to said contract, and is affiliated to the General People's Committee for Industry, Economy and Trade, hence, having the competence to be in charge of investment and ownership. Consequently, the third Defendant is the sole signatory of the contract, and the Arbitration clause shall only be invoked against it, in accordance with the substantive scope of the Arbitration clause.

**c- Issue Three:** The substantive scope of the Arbitration clause: Arbitration, being an agreement between the two parties, limits the Arbitral Tribunal to the dispute that the parties have agreed to submit thereto.

**c-1-** Article 29 of the contract drafted on 8/6/2006 strictly determines the scope of disputes that can be submitted to arbitration after efforts to reach amicable settlement have totally failed, be it in relation to the nature of these disputes or their timetable. This Article has limited the disputes that can be arbitrated

between the parties to the interpretation of the contract or its performance during its enforcement.

**c-2-** The Plaintiff claims the equivalent of five million and thirty thousand U.S. dollars (USD \$5,030,000) depending on the exchange rate determined by the Central Bank of Libya at the date of its memorandum, in compensation of the losses and expenses incurred for the opening of its office in Tripoli pursuant to Decision No. 135 of 2006. These losses are accurately reflected in the budget of the Plaintiff Company from 2006 to 2010.

**c-3-** The Plaintiff Company requests the amount of one billion and eighty nine million US dollars (USD \$1,089,000,000) in compensation of the lost profits after due consideration of the operation and management of the project for ninety years.

**c-4-** The Plaintiff Company claims the amount of fifty million US dollars (USD \$50 million) as symbolic moral damages in compensation of the Company's reputation and international position.

**c-5-** The Plaintiff Company requests the amount of USD \$420,000 to cover arbitration costs.

**c-6-** The Plaintiff Company seeks the amount of USD \$500,000 to cover the estimated fees that will be paid to its attorney from the beginning of the dispute until the issuance of the arbitration award.

**c-7-** The overall amount of these claims equals to one billion one hundred forty four million nine hundred and thirty thousand US dollars (USD \$1,144,930,000). They are not included in the substantive scope of the Arbitration clause and are not, in any way, related to the interpretation of the contract or its performance during its validity period. In fact, they are the result of the administrative decision No. 203 of 1378 a.P. (2010) on cancelling the investment approval.

**c-8-** The agreement for arbitration in disputes relating to the interpretation of the contract shall not extend to specific disputes over the failure to perform obligations thereof.

**c-9-** The agreement for arbitration in issues pertaining to the performance of the contract during its enforcement does not include disputes caused by issues falling

outside the scope of the contract or related to the request for termination, rescission or compensation therefrom.

**c-10-** The interpretation of the Arbitration clause substantive scope as a basis for the jurisdiction of the Arbitral Tribunal shall respect the joint will of its parties in compatibility with the principles of good faith in contractual obligations.

**c-11-** Decision No. 203 of 1378 a.P. (2010) is an administrative decision whereby the Authority expresses its single will to produce a final legal effect. Said decision was issued due to the breach by the Plaintiff Company of the terms and conditions laid down in law No. 51 of 1426 (1997) on the promotion of foreign capital investment and its executive regulations. It is separate from the contract drafted on 8/6/2006 where the Arbitration clause is mentioned; which supports the request of the third Defendant on the inadmissibility of the arbitration case as it falls outside the scope of the Arbitration clause.

**d- Issue Four:** The Unified Agreement for the Investment of Arab Capital in the Arab States shall not apply, save for the arbitration rules therein.

**d-1-** After perusing Article 29 of the contract concluded on 8/6/2006, it appears that the reference made to the said Agreement is limited to being a mechanism to settle dispute without any further rules therein, provided that the contracting parties did not expressly call for its adoption and integration in the contract, particularly if it is not possible to apply automatically the provisions of the Agreement, which is the case here.

**d-2-** The non-application of the Agreement, barring the arbitration rules thereof, is supported by the fact that this Agreement has limited the substantive scope of its application to the Arab capital and Arab capital investment.

**d-3-** The statement made by the Plaintiff Company in its letter dated 17/6/2010 that it cannot transfer 10% of the investment value, or the equivalent of USD \$13 million US dollars, to these accounts, asserts that the substantive scope for the application of this Agreement is not fulfilled ipso facto as no transfer of Arab capital has been made from the State of Kuwait to Libya for investment.

## **Second: On the applicable law:**

### **a- The Libyan Law shall apply to the settlement of the dispute:**

**a-1-** Article 30 of the contract dated 8/6/2006 stipulates that “unless otherwise provided for in this contract, the provisions of Law No. 5 of 1426 (1997 A.D.) on the promotion of foreign capital investment and its executive regulations, Law No. 7 of 1372 a.P. (2004 A.D.) on tourism and its executive regulations, as well as other legislation in force in Libya shall apply. The Arbitral Tribunal chose the Libyan Law to apply to the settlement of the dispute.

**a-2-** The selection of the Libyan Law requires to identify the nature of the issue in question, and at first instance, the contractual relationship between the Plaintiff Company and the third Defendant.

**a-3-** Even though the parties to the contract named the latter “Lease Contract”, its provisions and the legal rules that the parties chose to apply confirm that it is an administrative contract, and specifically, a contract authorizing exploitation of public funds through usufruct, rather than a lease contract.

**a-4-** The contract is deemed to be an administrative contract if one of its parties is a legal person of Public Law with activities related to a public utility and if it includes terms and conditions that are not common in the Private Law. Upon reviewing the articles of the contract dated 8/6/2006, it appears that the contract is drafted by a legal person of Public Law, and includes terms and conditions that are not common in the Private Law, given that it determines the type of the contracted project. In other words, the contracting party is not entitled to establish any other projects. It further entails a highly unusual clause that compels the contracting party to carry out the project in a specified period, which shows the intention of the Authority to adopt the procedure of the Public Law. Another highly unusual clause is the Authority’s right to terminate the contract without taking further measures, be it at the delay in paying the fees in consideration of using and benefitting from the land on the maturity date or when the investor fails to initiate the project execution within a period of three months from the date of receiving the license pursuant to Articles 8 and 14 of the present contract. Article 14 thereof included, as well, a highly unusual clause that does not allow waiving the project or transferring the rights thereto to third parties without an express consent from the Administration. As for Articles 15 and 16, they also comprise a highly unusual clause granting technical supervision

and control to the Administration during the construction and usufruct period. Articles 20 and 21 obliged the contracting party to use local necessary raw materials, tools and equipment, to employ and train local labor force, if any, otherwise employ foreign technical labor force. Article 26 of the contract imposes on the contracting party to hand over the project to the Authority at the end of the usufruct period in a good operating condition without having the right neither to claim the expenses invested in the project nor to ask for compensation. All these terms and conditions are uncommon in the Private Law. They are prescribed in the preliminary rules to issue investment approval decisions also provided for in Law No. 5 of 1426 (1997) and Law No. 7 of 1372 a.P. (2004). Therefore, the contract dated 8/6/2006 is characterized as an administrative contract.

**b- The contract is a contract authorizing exploitation of public funds through usufruct:**

**b-1-** The present contract falls under administrative contracts since the relationship between the third Defendant and the Plaintiff Company involve the development of the specified State-owned land aiming at enhancing the level of tourism services in the region through the establishment of a touristic project. The project, subject of this contract, has been granted to the Plaintiff Company by authorizing usufruct for a period of ninety years in return for LYD 720,000 all over the contract period.

**b-2-** The rules to apply to this administrative contract are described in the Libyan Laws that govern such contracts, in particular, the decision of the General People's Committee, Decision No. 138 of 1372 a.P. (2004) providing for the issuance of the executive regulations of Law No. 5 of 1426 (1997) and Decision No. 89 of 1377 a.P. (2009) on the establishment of the General Authority for Investment and Ownership.

**b-3-** Article 27 of the People's Committee Decision No. 138 of 1372 stipulates that the party authorized to invest shall execute the project within a period of six months from being notified of the approval to establish the project. It further states that the People's Committee may recommend the withdrawal or cancellation of the approval decision or liquidate the whole project in the event where the execution is not completed within the set or extended deadline, if the investor fails to make serious efforts to execute the project, is physically unable to execute it, or if he breaches any of the obligations set forth in this article or any of the provisions of Law No. 5 of 1426 and its executive regulations.

**b-4-** Article 1 of Decision No. 89 of 1377 a.P. (2009) stipulates that the third Defendant is an independent juridical person and enjoys financial autonomy, is affiliated to the General People’s Committee for Industry, Economy and Trade, and has the powers to regulate and handle matters related to investment and ownership.

**b-5-** Article 3 of Decision No. 89 of 1377 a.P. (2009) sets domestic and foreign investment affairs as part of the third Defendant’s competencies pursuant to the provisions of Law No. 5 of 1426 and Law No. 7 1327 a.P.

**b-6-** Article 1 of the General People’s Committee Decision No. 194 of 1377 a.P. (2009) stipulates that real estate investment shall mean undertaking building and construction operations for the purpose of building villages, hotels, resorts, recreational areas, restaurants, and tourism facilities for tourism investment purposes, hence the need for a decision from the third Defendant. As per Article 3 of the present decision, the third Defendant may terminate the usufruct contract and return the land ownership to the State if the party, to which the plots of land have been allocated by the State, fails to proceed with the execution of investment projects within a year from the completion of their registration in the Department of Socialist Real Estate Registration and Documentation. Therefore, the investor shall not claim any compensation other than the cost of the contract value.

**b-7-** An Authority authorized to issue an approval for investment, is also authorized to cancel the same in the event of a failure to invest, given that an approval granted to an investment project shall be cancelled as the project always remains related to the purpose for which it was established. The approval shall not, hence, be final. Decision No. 203 of 1378 a.P. (2010) cancelling the investment approval is issued pursuant to the Libyan Laws.

**b-7-1-** Even though three years have already passed since the approval decision has been issued, the Plaintiff Company failed to submit the project’s final designs yet.

**b-7-2-** The Plaintiff Company failed to open bank accounts for the project in accordance with the provisions of Article 22 of the executive regulation of law No. 5 of 1426 on the promotion of foreign capital investment.

**b-7-3-** The Plaintiff Company failed to transfer any funds or provide any assets or equipment for the project.

**b-7-4-** The Plaintiff Company failed to pay any fees in consideration of using and benefitting from the land as per the contract.

**b-7-5-** The Plaintiff Company asked to be exempted from handing over the project by the specified date.

**b-7-6-** The Plaintiff Company refused to choose an alternative site for the project execution and retained the original site.

**b-7-7-** When it was still holding the name of “General Authority for Investment Promotion”, the third Defendant notified the Plaintiff Company on 11/9/2008 of the expiry of the project period and that the investment project shall be liquidated in case it fails to submit a final position within a week.

**b-7-8-** The Secretary of the Administration Committee of the General Authority for Investment and Ownership sent a letter on 4/7/2009 to the Plaintiff Company whereby he asked it to provide the project’s current execution status and the exact work progress along with the timetable and the date expected to initiate project execution within a week.

**b-7-9-** The correct characterization of the Plaintiff Company’s requests in the present statement of defense leads to the application of the appropriate legal rules of the Libyan Law governing the subject of the dispute, upon which Decision No. 203 of 1378 a.P. (2010) is based. Given that the claim is a compensation claim to obtain damages that the Plaintiff Company claim having incurred due to this decision, such characterization and the present legal rules grant this decision the legality in light of the provisions of Article 8 of the General People’s Committee No. 194 of 1377 a.P. (2009). The administrative decision cancelling the investment approval provides for the application of these legal texts. Therefore, the Plaintiff Company may not request any compensation.

**b-7-10-** The statement of claim based on the fulfillment by the Defendants of the contractual liability elements is not legally valid.

### **Third: On the absence of the legal and factual basis of the Plaintiff Company’s Statement of Claim:**

1. The Plaintiff Company established the claim, at times, on the basis of contractual liability and, at other times, on the combination of the contractual and tort liabilities.
2. The contractual fault constituting the first element of the contractual liability is not fulfilled by the Defendant, namely as the alleged damages for which the Plaintiff Company is requesting compensation due to the issuance of the decision

on cancelling the investment approval resulted from the fact that the Company breached the provisions of the Libyan Law.

3. There is no ground to what the statement of claim has mentioned regarding the serious fault made by the second and third Defendants in terms of abstaining from handing over the land. Said fault was refuted in exhibit No. 13 provided by the Plaintiff Company, proving conclusively that it has taken over the investment site, subject of the contract, on 20/2/2007 and in its letter sent to the Director of the Department for the Development of Touristic Areas whereby it acknowledges the taking over of the site.
4. It is unsubstantiated to say that the second and third Defendants refrained to warrant against legal disturbances, by third parties, of enjoyment of the site as the real estate certificate delivered to it on 27/11/2007 had set the plot herein described to be a property of the State of Libya and the Plaintiff Company shall occupy it by virtue of a contract for ninety years.
5. It is baseless for the Plaintiff Company to say that the third Defendant had recommended the issuance of Decision No. 203 of 2010 to cancel the approval and to consider such action as a contractual fault necessitating compensation as this is only a fulfillment of its obligation to control the investment.
6. Article 3 of Decision No. 89 of 1377 a.P. (2009) entrusted domestic and foreign investment affairs to the third Defendant. Article 8 of Decision No. 194 of 1377 a.P. (2009) provided for the return of the ownership to the State if the project execution works are not initiated within a period of no more than a year from the registration in the Department of Socialist Real Estate Registration and Documentation. Consequently, the third Defendant did not commit any contractual fault.
7. If Article 147 of the Libyan Civil Code stipulates that “pacta sunt servanda”, i.e. that a “contract is a binding code for contracting parties. It shall neither be rescinded nor amended unless agreed upon by both parties or for the reasons stipulated in the law”. The recommendation of the third Defendant to annul the decision on the project approval is in compliance with the Libyan Law for this is an administrative contract.
8. A party to a contract with the Authority shall not be permitted to refrain from performing its contractual obligations on time under the pretense that



administrative procedures caused the Authority to fail to fulfill one of its obligations. It shall rather proceed with the execution and claim compensation.

9. The execution period of an administrative contract is fundamental and binding for the two parties to a contract. In breach thereof by the contracting party, the Authority may terminate the contract.
10. The third Defendant suggested a new site to the Plaintiff Company but the latter rejected this proposal. The Plaintiff should have taken over the new site and commenced the execution of the touristic investment project. However, knowing that it refused to do so, the fault lies with the Plaintiff. Accordingly, the Authority is entitled to cancel the investment approval and the Plaintiff Company has no reason to say that the fault lies with the third Defendant and has no grounds to request any compensation for any damages it may have incurred.
11. The third Defendant only recommended the cancellation of the approval following the failure of all efforts to urge the Plaintiff Company to execute the project.

**11-1.** The Authority sent a letter to the Plaintiff Company dated 11/9/2008 on the expiry of the specified project period and the failure to submit an extension request, further stating that the investment project shall be liquidated unless a final position is provided within a week.

**11-2.** The Plaintiff Company acknowledged in its letter dated 8/1/2009 that it failed to carry out the project according to the specified period and asked to be exempted from handing over the same at the set date.

**11-3.** The Authority suggested an alternative site pending the resolution of the obstacles, but the Plaintiff Company rejected such a suggestion.

**11-4.** The Secretary of the Committee of the third Defendant sent a letter to the Plaintiff Company on 4/7/2009, in which he requested the project's current implementation status, the exact work progress along with the necessary timetable for project completion and the estimated date for the initiation of project execution within a week.

**11-5.** On 2/2/2010 the Plaintiff Company was required to present architectural drawings and designs for discussion and adoption, and transfer part of the investment capital within a period of 30 days.

**11-6.** On 24/2/2010 the Plaintiff Company sent a reply in which it stated that it had submitted all project drawings and was awaiting a visa to open the bank account and oversee the taking over of the project site, which resulted in a delay beyond its control.

**11-7.** Failure of the Plaintiff Company to open the account or transfer part of the capital is a breach of its obligations. This alone can cause the issuance of the decision to cancel the investment approval. The Plaintiff acknowledged such a breach in its correspondences whereby it questioned the logic behind transferring 10% of the project's investment value, i.e. the equivalent of USD \$13 million prior to the handing over of the project site, while knowing that the project may not even have an estimated value without the plot of land.

**12.** The request made by the third Defendant to cancel the investment approval falls within its competencies and complies with the Libyan Law applicable to the dispute. Hence, it cannot be considered as a contractual fault that gives the Plaintiff Company the right to claim compensation.

**13.** It is established by the jurisprudence that the Authority is liable for administrative decisions in the event where the decision is vitiated, causing damages, and where there is a causal relationship between the decision's illegality, i.e. the Authority's fault, and the damages affecting the person. The administrative decision to cancel the approval is well founded, not vitiated and such fault cannot be attributed to the Authority, but to the Plaintiff Company, given that:

**13-1.** More than three years have elapsed and the Plaintiff Company did not execute the project nor presented the final designs.

**13-2.** The Plaintiff Company failed to open bank accounts in the name of the project in Libya.

**13-3.** The Plaintiff Company failed to settle any payment in consideration of the usufruct right as per the contract.

**13-4.** The Plaintiff Company rejected the proposal to choose an alternative site.

**13-5.** It failed to initiate the project execution during a period of no more than a year from the completion of registration.

**13-6.** The Plaintiff Company lingered in the project execution, which is confirmed in the dates of conclusion of the contracts, for:

**13-6-1.** Just about two years following the signature of the contract on 8/6/2006, the Director of the Technical Administration in the Plaintiff

Company sent a letter in which he states having submitted the architectural, construction, mechanical, and electrical preliminary drawings along with the project's technical report.

**13-6-2.** The Plaintiff Company has not shown serious efforts towards the execution of the project in good faith, claiming that things will happen on 31/10/2007 whereas the letter was dated 30/10/2007.

**13-6-3.** The Plaintiff Company's allegation that the site chosen by the third Defendant is not free of impediments, is of no consequence. Contracts binding for both parties should be enforced according to the circumstances and cases stipulated in the contract, knowing that it has carried out a thorough due diligence examination of the plot of land, has accepted to conclude a contract thereon, and took over the plot of land on 20/2/2007. It did not make allegations that the Authority had manipulated nor vitiated its will, and stated that it had to take necessary administrative, technical, and legal measures, and failed to transfer funds or equipment for the project or initiate the project execution within a period of no more than a year from the completion of registration.

**14.** The Plaintiff Company lingered in the conclusion of the contracts till 14 May, 2008:

**14-1.** Until 13/2/2008, the Plaintiff Company had yet failed to sign the design and planning service contract agreement.

**14-2.** Article 22 of the contract dated 8/6/2006 calls for the completion of services within a period of 36 months from the enforcement of said agreement referred to in Article 22 of Part 1 on General Provisions.

**14-3.** The General Provisions make reference to the conditions prescribed in the Client-Consultant Model Services Agreement (FIDIC, Third Edition 1998). Article 21 of said Agreement stipulates that "the agreement is effective as of the date of receipt by the consultant of the client's letter of acceptance of the consultant's proposal or of the latest signature necessary to complete the formal agreement, whichever is the later". In compliance with this article, the contract concluded by the Plaintiff Company is not effective yet.

**14-4.** Paragraph 16.1.d of the contract signed between the Plaintiff Company and the consultant provides for the compliance with the laws and regulations of

the Egyptian customs. Article 17 stipulates that the liability period is equal to the contract period extending over one year from the execution of project works. The Egyptian laws shall be applicable in the event of another period. Reference to Egyptian laws is often made given that, in international contracts, the Authority shall choose the applicable law. However, the issue relating to the customs and its compliance with the Egyptian law is deemed exceptional as it falls under the matters governed by the Libyan Law.

- 15.** The contract on the feasibility study drafted on 1/2/2008 stipulated that the work shall commence on the second week of March 2008. In other words, the feasibility study was initially inexistent until mid March 2008 whereas the project was supposed to be handed over on 9/9/2009.
- 16.** All the aforementioned shows that the Plaintiff Company did not take serious endeavors to execute the project, and that the Defendants did not make any fault unlike the Plaintiff Company, which shall have no right to compensation.
- 17.** The aforementioned does not prejudice the integrity of what the Plaintiff Company mentioned on page 16 of the statement of claim that it had fulfilled the only obligation to be executed in advance: paying 0.1% of the investment's total value, i.e. USD \$130 thousand, to the Treasury of the Libyan State. Saying that this is the sole obligation falling upon the Plaintiff Company is not deemed admissible given that it implies to follow a chronological order in the execution of its obligations. That said, the Company acknowledges that it has failed to execute any other obligation.
- 18.** The documents presented by the Plaintiff Company do not include any evidence that the second and third Defendants have deliberately refrained from fulfilling their obligation to hand over the investment land as it is well established in the minutes of handing over and taking over drawn up on 20/2/2007 that the third Defendant has handed over the land, while every time it asked the Plaintiff Company to submit the drawings and designs, the latter pretended to be coping with impediments.
- 19.** The statement of the Plaintiff Company regarding the delictual faults made by the Defendants stand groundless:

**19-1.** In reference to Law No. 5 of 1426 on the Promotion of Foreign Capital Investment, Article 1 (1) provides for the promotion of foreign capital investment

to establish investment projects in line with the States' general policy, and economic and social development objectives. It further provides that there is no such capital as mentioned in paragraph 6 of Article 3 of said law. Therefore, the Plaintiff Company cannot insist on applying this law in the absence of any investment project in the sense referred to in paragraph 7 of Article 3 of the law. The exceptional advantages described in Article 15 address the investor whose conduct is in compliance with the legal rules and provisions of this law. Article 1 (1) also stipulates that the project and foreign capital are not established and the provisions of said law cannot be applicable to the present dispute.

Moreover, the Defendants have not breached paragraph 7 of Article 2 of Law No. 7 of 1372 a.P. (2004) on Tourism, providing that tourism aims at "encouraging Libyan and foreign investors to invest in touristic projects in order to develop the national income resources and sources". Failing to do so asserts that the Plaintiff Company did not invest in touristic projects and breached the purposes of this article.

**19-2.** The Defendants did not commit any acts described as violations of the Unified Agreement for the Investment of Arab Capital, given that:

**19-2-1.** The State of Kuwait and the State of Libya are both members to the Unified Agreement for the Investment of Arab Capital, and the reference made in the contract dated 8/6/2006 to this agreement is limited to the inclusion of the arbitration mentioned therein as a means for dispute settlement barring any other rules thereof. The reference of the parties to arbitration prescribed therein is common and the provisions of this agreement shall not be automatically applied.

**19-2-2.** This Agreement has limited the substantive scope of its application to Arab capital and investment of the same, yet in this case, no capital has been transferred from Kuwait to Libya.

**19-2-3.** The Plaintiff Company shall have no right to any compensation by applying the provisions of this Agreement given that Article 2 thereof stipulates that States Parties shall allow capital transfer and undertake to protect the investor, safeguard the investment, and its related revenues and rights and, to the extent possible, to ensure the stability of legal provisions. This is the purpose of the Libyan Law on Investment Promotion. Therefore, the capital should achieve economic development in the State receiving it. As this failed to happen, the allegations of the Plaintiff Company on the breach of the provisions of Article 2 of said

Agreement should be disregarded, along with the claim of the Plaintiff Company in Article 9 (1) and Article 10 (a, b, and d) of this Agreement given that no Arab capital was transferred from one State to another.

**19-2-4.** Article 14 of the Unified Agreement for the Investment of Arab Capital in Arab States imposes some obligations upon the investor. Said Article lays the foundation of international principles, such as the investor's compliance with the legal rules of the State hosting the investment. In breach thereof, he shall be held liable. The same is reflected in this case. The Defendants are not in breach of the Libyan Law or the provisions of this Agreement, nor committed any contractual faults. The Plaintiff Company has failed to fulfill its contractual obligations as per the contract dated 8/6/2006 and breached the provisions of the Libyan Law; therefore, its claim for compensation shall be rejected.

**Fourth: On the absence of the legal and factual basis of the Plaintiff Company's compensation claim:**

The obligation for compensation necessitates the commission of a fault that prejudices a causal relationship.

**4-1.** The Plaintiff Company claims compensation in the absence of a fault. It is settled that none of the Defendants have committed faults and cannot be held liable in this case. Compensation without fault is not allowed by virtue of contractual and tort liability.

**4-2.** The Plaintiff Company is not entitled to any compensation and the figures provided thereby shall not be taken into consideration, given that:

**4-2-1.** At a first stage, the request mentioned in the notice sent through the bailiff limiting the value of compensation to five millions U.S. Dollars is unsubstantiated, as:

**4-2-1-1.** The notice addressed to the third Defendant offered two proposals: the annulment of Decision 203/2010, the evacuation of the project site from people and occupancies, the handover of the plot of land as agreed upon, the protection of the Company which in return undertakes to initiate immediate execution; or paying the Company a compensation of five million and thirty thousand US dollars as part of the losses incurred in the project, and accepting the termination of the project

and the contractual relationship between the two parties. This proposal cannot be accepted in the absence of faults committed by the third Defendant. Had the Company spent the amount, this would have revealed. Had the third Defendant agreed to annul Decision No. 203/2010, how would the Company possibly agree to end the relationship, while it should have started the business relationship all over again?

**4-2-1-2.** There is no proof that the amount requested by the Plaintiff in the statement of expenses dated 29/10/2010 has been spent in fact. On 8/1/2009, the Company declared that it was unable to execute the project. On 27/1/2009, it claimed having concluded a contract with Hill Company to manage the project, and the latter requested the amount of USD \$215,000 to cover the fees of executed works, while the contract drafted for this purpose was not signed. The details included in the statement regarding the bonuses paid to individuals and the senior management of the project in 2010, i.e. after the cancellation of the same. These bonuses amounted to USD \$250,000. The expenses paid by the Plaintiff Company to the senior management and Engineer Saad Salem for the years from 2006 to 2010 without undertaking any works in the project, except that the latter took over the plot of land on 20/2/2007; this prove these expenses to be false and the Defendants shall not to be held liable for them.

**4-2-2.** At a second stage, the Plaintiff Company indicated that it shall request before the Arbitral Tribunal the amount of USD \$55 million, whereas the notice received through the bailiff specified that the losses allegedly incurred by the Company as a result of the touristic project amounted to USD \$5.4 million. Said Company shall solely be held liable for the damages caused by its own faults. Such request on its part is baseless and shall be rejected. It should also be noted that the request made by the Plaintiff Company through the Court bailiff as mentioned in the notice on the necessity to pay the amount of USD \$50 million to cover any profits lost during the anticipated life span of the project remains unsubstantiated, given that the Plaintiff Company has lost that opportunity when it failed to initiate the execution. It further acknowledged in its letter dated 17/6/2010 that it was not logical to transfer 10% of the project's investment value or the equivalent of USD \$130 million prior to the handover of the project site, while knowing that the project may not even have an estimated value without the plot of land. So how could it determine the lost profits? In the absence of a present estimated value, how can it then estimate future profits in view of the undetermined anticipated life span of a project that is yet to see the

light due to its own mistake? Accordingly, any amount requested by the Plaintiff Company in the notice has no legal or factual basis and should be disregarded.

**4-2-3.** The Plaintiff Company's request for the third Defendant to bear the attorneys' fees until the settlement of dispute is rejected given that the Company chose to refer to arbitration disregarding amicable settlement, whereas the arbitration clause in Article 29 of the contract dated 8/6/2006 provided for the inevitability of an amicable settlement before resorting to arbitration. Consequently, it is solely responsible for this.

**4-2-4.** At a third stage, the company mentioned in the statement of claim submitted to the Arbitral Tribunal the requested compensation which increased from USD \$55 million to USD \$1,144,930,000, of which five million and thirty thousand US dollars (USD \$5,030,000) cover the losses and expenses incurred by the Company's office in Tripoli, pursuant to the issuance of approval Decision No. 135 of 2006. These are material damages that are accurately reflected in the budgets from 2006 to 2010 that were prepared by the Libyan independent auditor Salah Eddin Turki. In addition, the Plaintiff Company requests the amount of one billion and eighty nine million US dollars (USD \$1,089,000,000) to cover the profits it had lost as per the report of the German Specialized Company, Rodle Middle East, the symbolic amount of USD \$50 million in compensation of moral damages to the Company's reputation in the financial and business market inside Kuwait and internationally, as well as the amount of USD \$420,000 to cover arbitration costs and USD \$500,000 to cover the reasonable estimated fees that will be paid to the Company's attorney since the beginning of the dispute until the issuance of the final arbitration award. The Plaintiff Company shall not bear these amounts given that:

**4-2-4-1.** It is confirmed that the Company is not entitled to the amount of USD \$5,030,000 in view of the report of the independent auditor Salah Eddin Turki, who prepared the budgets, where it appears that the Plaintiff Company's account at the Libyan First Gulf Bank has zero balance. The report also shows that these expenses have been covered in cash through bank transfers from abroad to the account of the project manager. These transfers were made and processed to a current account for the Company. This act is in breach of financial legislation and makes all the statements of expenses void.

**4-2-4-2.** Regarding the amount of one billion and eighty nine million U.S. Dollars (USD \$1,089,000,000) representing the profits lost by the



Company, and after reviewing the report of the German Company, Rodle Middle East, we find out that page 4 thereof pointed out that these results were achieved only after carrying out certain procedures relating to the contract agreement and after due discussion with the client who stated that the Libyan Government has failed to perform the provisions of the contract by refraining handing over the land. However, the contract concluded on 8/6/2006 confirms that the Libyan Government is not a party to the contract nor is it bound to any of the obligations of this contract. Furthermore, the plot of land was not handed over as confirmed by the minutes of handing over and taking over along with the Plaintiff Company's acknowledgment. The report further mentioned that the Plaintiff has recorded the legal fees of the contract agreement amounting to USD \$130,000 or 1% of the expected investment value estimated at USD \$130,000,000. However, Article 3 of the decision of the Secretary of the People's Committee for Tourism No. 135 of 1374 a.P. (2006) sets this ratio is at 0.1%. In light of these observations, the report should be disregarded. This expertise report did not take into consideration the political circumstances in the State of Libya since 17 February, 2011, thus affecting the figures included in said report, which are unlikely to be achieved. The Plaintiff Company has taken over the project land and allegedly indicated the presence of factors impeding its execution of the project at the specified period. Having turned down the third Defendant's proposal for an alternative project site makes its claims of lost profits unsubstantiated as it has missed the opportunity to carry out the project and make the expected profits.

**4-2-4-3.** Regarding the amount of USD \$50 million in compensation of moral damages that the Plaintiff Company claims having incurred, it should be noted that no such moral damages have occurred. Furthermore, the issuance of Decision No. 203 of 2010 on the cancellation of the investment approval pursuant to the Libyan Law shall not be considered as a cause of such damages for the Plaintiff Company breached the rules and procedures of this law. The third Defendant did not claim that the Plaintiff Company appalling qualities; which excludes any moral damages. The Plaintiff Company's statements that it will look like it had failed to honor its obligations are groundless. Moral damages require the provision of evidence and proof. Failing that, the Plaintiff Company is not entitled to any compensation of moral damages.

**4-2-4-4.** Defendants should not bear the arbitration costs since the Plaintiff Company chose to resort to premature arbitration. Same applies to the amount of USD \$ 500,000 to cover the attorneys' fees since the beginning of the dispute until the rendering of the arbitral award given that this is the responsibility of the Plaintiff Company and it shall solely bear such costs.

## **Chapter Six: Requests of the Defendants:**

### **First- On the jurisdiction:**

The Defendants invoke the inadmissibility of the arbitration case due to premature filing, as well as the inadmissibility of invoking the Arbitration clause provided for in Article 29 of the contract drafted on 8/6/2006 against the State of Libya, first Defendant, and the Ministry of Economy in Libya, second Defendant. They also invoke the inadmissibility of the case as it breaches the substantive scope of the arbitration clause set forth in Article 29 of the contract drafted on 8/6/2006, and the fact that the Unified Agreement for the Investment of Arab Capital in the Arab States is not applicable to the present dispute.

### **Second- On the merits:**

Reject the case for absence of the legal and factual grounds.

## **Chapter Seven: On the statements of the Plaintiff in its replication submitted on 5/1/2013 by Dr. Fathi Wali and Mahmoud Samir El-Sharkawi in response to the Statement of Defense submitted by the Defendants on November 23, 2012.**

In addition to the statement of claim, as Dr. Wali and Dr. Sharkawi stated on behalf of the Plaintiff, they refer the subject matter of the claim to what is mentioned therein, adding that the Defendants have stated the facts in their statement of defense so as to serve their own viewpoints in terms of the jurisdiction or the merits of the case.

### **7-A- In response to the Defendants' Pleas:**

**7-A-1.** In response to the Defendants' pleas, Dr. Wali and Dr. Sharkawi stated, on behalf of the Plaintiff, that with regards to the inadmissibility of the arbitration case for having been raised prematurely, the statement of defense did not distinguish between an amicable settlement and a conciliation process which are two different processes. Conciliation is a process where two parties ask a third party to assist them in reaching a settlement and to reconcile them. Article 29 of the contract signed by both parties did not encompass any clause of conciliation. Therefore, no referral may be made to the Conciliation and Arbitration Annex of the Unified Agreement for the Investment of Arab Capital in the Arab States. Furthermore, any agreement on conciliation does not lead to the inadmissibility of the arbitration case as long as the conciliation did not succeed. Article 29 stipulates that, in the event an amicable settlement for interpreting and performing the Unified Agreement terms could not be reached, any referral to the Unified Agreement shall be made for the purposes of arbitration, while the Annex of the Unified Agreement may not apply to an amicable settlement before resorting to arbitration.

**7-A-1-1.** In seeking to resolve the matter independently from the Unified Agreement and its Annex, the Plaintiff stated that documents appended to the statement of claim prove that the Defendants' violation began immediately following the contract signing on 8/6/2006, and that the Plaintiff never ceased to communicate letters to the Defendants in the hope of overcoming any difficulties. The Plaintiff did not envisage any amicable settlement as proven by the three consecutive letters sent on 17/6/2010, 29/6/2010 and 8/7/2010 where it requested an amicable solution but received a reply sent by the General Authority for Investment and Ownership on 3/8/2010 ignoring the request for an amicable solution. The Plaintiff replied four days later and denied any responsibility and requested an amicable solution. It did not, however, receive any reply from the General Authority for Investment and Ownership. The Plaintiff then sent the latter on 13/9/2010 a notice offering two alternatives for an amicable solution, to which the General Authority for Investment and Ownership replied on 11/10/2010 in a letter stating its willingness to offer a new plot of land for the establishment of the project, which meant that the Plaintiff would have to bear all the costs already spent to build the project on the original plot of land

mentioned in the contract dated 8/6/2006. The Plaintiff sent a statement to the general Authority for Investment and Ownership on 29/10/2010 requesting a meeting to reach an amicable solution. The meeting was held on 9/11/2010, and the General Authority for investment and Ownership showed no flexibility in this regard. The five-month long attempts to reach an amicable settlement came to no avail, which led the Plaintiff to resort to arbitration. The Plaintiff finds it surprising after this presentation of facts to hear that no efforts to reach an amicable settlement were made.

**7-A-1-2.** The Plaintiff stated that, in any case, should an agreement be reached over an amicable settlement before resorting to arbitration, failing to seek an amicable settlement before resorting to arbitration shall not invalidate the arbitral award. The Plaintiff referred to what is established by the Court of Appeal in Cairo in this regard, and concluded that the facts mentioned in the Statement of Defense stating that the Plaintiff did not attempt to reach an amicable settlement are erroneous, and argued that should no attempt for an amicable settlement be made, this alone shall not be considered as a ground for the inadmissibility of the arbitration case.

**7-A-2. In its reply to the plea of the non-invocation of the arbitration clause set forth in the contract dated 8/6/2006 against the Libyan State and the Libyan Ministry of Economy, the Plaintiff stated:**

**7-A-2-1.** This plea has no factual or legal grounds, as it has been established that the arbitration clause shall apply to all parties involved in concluding or performing the contract, and that any party involved in discussing or clearly performing the contract comprising the arbitration clause shall therefore immediately be bound by the arbitration clause in line with the *Prima Facie* theory. The Plaintiff supported its statement with reference to some judicial decisions and arbitral awards.

**7-A-2-2.** With regards to the contract which is the subject matter of the dispute and comprises the arbitration clause and its performance phases, it has been concluded that no distinction was made between the Libyan State and the Libyan Ministry of Economy, not only in concluding the contract but also in its performance phase. In fact, in concluding the contract dated

8/6/2006, the plot of land which is the property of the State is not owned by the Tourism Development Authority which is solely entrusted with signing the contract and which has signed the contract by virtue of the General People's Committee's Decision No. 87 of 1374 a.P. which is the Council of Ministers and represents the Libyan State. Thus, the State would have contributed to the execution of the project on a land that is the State's property. The contract stipulated that the project shall enjoy the exemptions and privileges set in Law No. 5 of 1426 on the Promotion of Foreign Capital Investment and its executive regulation and Law No. 7 of 1372 a.P. on Tourism and its executive regulation, and these commitments fall upon the Libyan State and therefore make the Libyan State a party to the contract including the arbitration clause. With regards to the performance of the contract, the land allocated for the project is registered in the Libyan Real Estate Registry with an indication that Urban Planning No. 796 will be carried out thereon on behalf of the Libyan State. An ownership and usufruct contract was submitted to the interest of the Bank of Libya, and the real estate is currently registered to the ownership of the Bank of Libya. Therefore, we conclude that the Libyan State had established rights on the real estate it owns through the Public Property Authority to the interest of the Umma Bank contrary to the provisions of the contract subject of the dispute stipulating the allocation of the land to the Plaintiff Company. This is deemed to be a measure relevant to the performance of the contract. Furthermore, following the affiliation of the General Authority for Investment and Ownership concerned with foreign investments to the Ministry of Industry, Economy and Trade, the Libyan Minister of Industry, Economy and Trade issued Decision No. 203 of 2010 to annul Decision No. 135 of 2006 that authorized the Plaintiff to establish the project. Such is another measure relevant to the contract performance. Therefore, it seems obvious that the Libyan State and the Libyan Ministry of Economy have both taken part in the conclusion of the contract and in the procedures relevant to the performance of the contract, and that the Libyan State established rights on the land to the interest of the Umma Bank and thereby prevented the Plaintiff from establishing the project. Consequently, the arbitration clause shall apply to both parties, the Libyan State and the Libyan Ministry of Economy, and each of them shall become a party to the present arbitration. Moreover, the

Defendants' plea to the inadmissibility of the arbitration case against the Libyan State and the Ministry of Economy shall have no grounds and shall be rejected.

**7-A-2-3.** Article 29 of the disputed contract refers any dispute to arbitration in line with the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States, and article 10 of the Unified Agreement stipulates that the Arab investor shall be entitled to compensation for damages which he sustains due to the violation by a State Party, or one of its public or local authorities or institutions, of any of the Arab investor's rights, or the violation of any decision issued by a competent authority pursuant to the provisions of the Unified Agreement. The Unified Agreement was concluded between States that included Kuwait and Libya. In the event of a violation of a contract concluded between the investor and the State's public or local authorities or any public institution, provided the contract includes an arbitration clause, the contract, in line with the provisions of the Unified Agreement, stipulates that compensation be paid not only by the public or local Authority or the institution that concluded the contract, but also by the State or relevant ministry that issued a decision violating any of the investor's rights as per the Unified Agreement, in view of their commitment to the said agreement.

**7-A-3. In its reply to the plea of inadmissibility of the arbitration case as it falls outside the substantive scope of the arbitration clause, the Plaintiff stated:**

**7-A-3-1.** This plea is invalid since the interpretation of the arbitration agreement falls under certain principles, among which a principle stipulating that should the agreement text be understood as having two meanings, the meaning that more likely confirms the validity of the arbitration agreement and its applicability on the current dispute as per the arbitration agreement shall be adopted; and that determining the scope of the arbitration agreement in view of the text of the clause does not dismiss what the parties to the contract intended to submit to the arbitral proceedings; and that a narrow interpretation of the arbitration agreement may only apply to domestic arbitration, while international arbitration shall always follow a wider interpretation of the arbitration agreement;

and it is established by the jurisprudence, doctrine and the arbitral awards that an agreement to arbitrate in disputes over contract performance shall also apply to disputes over the contract nullity, termination, failure to perform any contractual obligations or compensation therefore; and that the arbitration clause in the present dispute which limits its scope to all matters related to the interpretation or performance of the contract during its validity period, shall apply to this arbitration case related to the non-performance of the contract by the Defendants, especially that this is an international commercial arbitration; and that it has been decided that the arbitration clause stipulated in a contract applies not only to the litigation arising from a contractual fault but also to any litigation arising from the promulgation of a law or issuance of an administrative decision related to the contract that comprises the arbitration clause.

**7-B. Defense on the merits in response to the Statement of Defense submitted by the Defendants:**

- 7-B-1.** On 13/6/2012, the arbitral Tribunal decided that the Libyan Law shall be the law applicable to the dispute, and this applies by default to national legislation and regulations, and also to international conventions in force in Libya, among which the Unified Agreement for the Investment of Arab Capital in the Arab States, as it is a part of the legislation referred to in clause 30 of the lease contract. Article 24 of Law No. 5 of 1997 on the Promotion of Foreign Capital Investment stipulates that international conventions in force in Libya shall prevail over any national legislation.
- 7-B-2.** It is inadmissible to state that Article 29 of the lease contract is limited to referral to arbitration provided for in the Unified Agreement and its regulation excluding other rules therein as this is deemed an attempt to narrow the interpretation of a general clause. This clause is clearly interpreted as the agreement of both parties to the contract to settle the dispute through arbitration in line with the provisions of the agreement.
- 7-B-3.** The Plaintiff has transferred part of its funds to Libya and has paid the contracted companies as part of its implementation of the investment project in Libya.
- 7-B-4.** The contract subject of the dispute is interpreted as being a lease contract as mentioned in the contract title and in Articles 2 and 26 thereof.
- 7-B-5.** The State has private ownership right with regard to State private property and not administrative ownership right. These properties fall under the

provisions of ownership of private property alike the properties owned by individuals.

**7-B-6.** The preamble of the lease contract stipulated that the first party to the contract was entrusted with allocating lands located in the regions designated for tourism development and owned by the State and signing the lease contracts thereof. This proves that the land forms part of the Libyan State's private property that the Libyan State may establish rights thereon at its own discretion without violating any legislation or regulation, including the lease set forth in the preamble to the contract. Article fifteen of Law No. 5 of 1997 is final and conclusive in stating that the land allocated to the project is a private property of the Libyan State. Furthermore, Article 2 of Decision No. 87 of 2006 issued by the General People's Committee (the Council of Ministers) stipulated that the Tourism Development Authority shall handle the task of allocating lands for tourism development projects and sign lease contracts with investors.

**7-B-7.** The disputed contract is not an administrative contract since the relevant project does not provide a public service, but rather a private service to whomever is seeking it for a price charged in consideration of this service, depending on the conditions of supply and demand in a largely global market, i.e. the tourism market. Therefore, the price charged does not represent a fee determined by the State. The Plaintiff is thus liable before the State solely for paying the agreed upon rent and respecting the public policy and public morality of the State, since the project may not be described as a public utility.

**7-B-8.** It is false to state that determining the type of the project and losing the right to establish various projects is deemed a highly unusual clause in Private Law contracts. It is also not true to state that commitment to a project's execution within a set timeline reveals the Authority's intention to adopt the procedure of the Public Law since such a clause is set out in contracts for works between persons of Private Law. It is untrue that the clause stipulating the Authority's right to terminate the contract upon delay of rent payment without any prior notice is a highly unusual clause since it represents an explicit terminating clause that is listed in almost every lease contract governed by the civil law. This also applies to the clause setting forth that no party is entitled to waive the contract as a whole or a part thereof to third parties. It is not true as well to state that the Authority's power to supervise and control is a highly unusual clause in administrative contracts, since all special contracts for works are usually subject to continuous control and supervision by the consulting engineer or the employer. It is untrue that Articles 20 and 21 of the contract



comprise a highly unusual clause since Article 20 institutes a commitment in favor of both parties, and Article 21 has similar equivalents in all Private Law contracts which provides for the transfer of know-how.

**7-B-9.** The Defendants rely on abrogated legislation and on the Decision of cancellation which is void, since referring to Law No. 5 of 1997 on the Promotion of Foreign Capital Investment, and to Decision No. 194 of 1377 a.P. (2009) issued by the General People's Committee in reference to laws that were abrogated as per Law No. 9 of 1378 a.P. (2010) in which Article 30 cancelled Law No. 5 of 1426. Decision No. 203 of 1378 a.P. (2010) issued by the General People's Committee for Industry, Economy and Trade stipulating the cancellation of the investment approval granted to the Plaintiff as per Decision No. 135 of 1374 a.P. (2006) was issued on 10/5/2006, that is following the entry into force of Law No. 6 of 2010. Article 19 of said law stipulated that in case of a violation by the investor, the Authority shall notice the latter for rectification under penalty of invalidating any exemptions and benefits that the project may enjoy, or withdraw the project or refer the case to competent judicial authorities to settle any previous exemptions. Article 20 of this law also stipulated that any approvals and authorizations be withdrawn in the event the project was not commenced or was not completed within the specified period without any valid justification.

**7-B-10.** the Decision of the General People's Committee for Industry, Economy and Trade No. 203 of 2010 issued on 10/5/2010 and cancelling the investment approval shall be considered as void since it violated Article 23 of Law No. 9 of 2010 on the Promotion of Investment. Said Article provides that projects may not be nationalized or submitted to procedures having the same effect unless by virtue of a law or a judicial decision and in return for compensation, which is not the case in Decision No. 203 of 2010. Consequently, Decision No. 203 is considered as null and vitiated for being issued by non-competent authorities exceeding their powers.

**7-B-11.** The contract and the dispute are subject first to the agreed upon by the two parties and to the Unified Agreement, second to the Libyan Civil Code and third to the Libyan legislation on promoting foreign capital investments and regulating tourism.

**7-B-11-1.** Defendants have breached their commitment to good faith stipulated in Article 148 paragraph (1) of the Libyan Civil Code; in fact, commitment to good faith is not limited to the performance of the contract but is also applied during the conclusion of the contract through error, fraud and coercion as it justifies any request made by the party whose will was vitiated to request the

nullification of the contract and claim for compensation, or request that both the contract and the compensation remain applicable. The reason behind this clause may be attributed to the fact that the other party to the contract knew, or could have easily noted, that the party whose will has been vitiated, only accepted signing the contract due to an error, coercion or fraud. This means that the party who signed a contract with the aggrieved party proved to be of bad faith, and that commitment to good faith supersedes the enjoyment of the due right, while the violation of that commitment forms the basis of the theory of abuse of that right. Article 124 of the Libyan Civil Code is an additional and conclusive proof that the abuse of the right is a violation of the commitment to good faith. It is needless to say that Public Law entities entrusted with the use of public power to serve the public interest shall commit to the rule of law and the duties and functions they are tasked with by issuing decisions and concluding contracts in good faith.

**7-B-12.** The Defendants violated their commitments since the Plaintiff repeatedly required over four years that the project land be handed over thereto in line with the project approval decision and the lease contract, but to no avail. The Plaintiff fulfilled its commitment to transfer 130 thousand US dollars pursuant to Article 3 of the approval decision.

**7-B-12-1.** The third Defendant has answered the requests made by the Plaintiff company in a non-substantive manner after the elapse of more than eight months after the contract was concluded, i.e. on 20/2/2007. The answer was limited to visiting the site and identifying its borders.

**7-B-12-2.** The reason why the delivery committee's work was limited to examination, is that the plot of land is occupied with a number of containers, pipes and equipment belonging to the General Company for Building and Construction, and was sold to the Umma Bank; furthermore, the land contained the Tahrir Club in Tajura for maritime sports as well as a restaurant and a cafeteria. All these issues were well known to the Defendants before concluding the lease contract of the plot of land.

**7-B-12-3.** In-kind rights were established on the land. And despite the request of the Plaintiff sent in its two letters on 22/4/2007 and 15/5/2007 to the Secretary of the Tourism Authority and the Secretary of the General Authority for Investment Promotion

complaining about the failure to solve the issue, the Authority chose not to reply, until 1/7/2007 when the Secretary of the General Authority for Tourism and Traditional Industries, who was previously the minister who issued the investment approval decision, replied, recognizing in his letter the hindrances that the Plaintiff had repeatedly complained about, and stating that he will address all the obstacles delaying the project execution within the timeline. The Libyan Administration would have thereby postponed the fulfillment of its obligation to hand over the land free of any occupancy, persons and in-kind rights established in favor of third parties.

**7-B-12-4.** On 1/8/2007, the Plaintiff once again sent a letter to the Secretary of the General Authority for Tourism and Traditional Industries requesting to obtain any documented proof that the State owns this plot of land and that the land does not bear any occupancy and that the State shall hand over the site free of any impediments. The General Authority for Tourism and Traditional Industries replied in a letter dated 7/8/2007 stating that the Plaintiff will be provided with a proof of the land ownership and a real estate certificate verifying the project's usufruct. The letter added that in terms of handing over the land free of any impediments, this can be worked out and difficulties may be overcome if any, and the Plaintiff may contact the General Authority for Tourism and Traditional Industries to identify the impediments. This points out to the deliberate attempt by the General Authority for Tourism and Traditional Industries to ignore the information communicated through the Plaintiff Company's letters, and this was not done in good faith since the Defendants knew that the project land was the subject of a contract of sale of ownership and usufruct rights to the interest of the Umma Bank as per a decision by the Council of Ministers. The proof thereto is the letter sent by the Secretary of the Administrative Committee at the Public Property Authority to the General Manager of the Umma Bank dated 1/8/2007 requesting that the Administrative Committee at the Public Property Authority take all the necessary measures to annul the decision to allocate a plot of land to the interest of the Umma Bank.

**7-B-12-5.** The Plaintiff asked the General Authority for Investment Promotion on 1/8/2007 to grant it an authorization to build a temporary fence around the land. The General Authority for

Investment Promotion replied twenty one days later that the authorization will be granted after the remaining procedures are finalized. However, the Plaintiff was subjected to many violations from different persons and informed the General Authority for Investment Promotion thereof, yet the latter did not allow it to take possession of the land. After long correspondence, the General Authority for Investment Promotion required the Tourism Police to protect the site, but the Municipal guards stopped the works and seized the equipment. After consulting once more with the General Authority for Investment Promotion, the Plaintiff received an order from the Department for the Development of Touristic Areas to stop all works and withdraw all the equipment from the site.

**7-B-12-6.** On 3/2/2008, the Secretary of the General Authority for Tourism sent a letter to the People's Leadership Coordinator in Tajura requesting him to explain his decision not to allow the establishment of any of the touristic projects already begun along the coast and to inform him of the opinion of the People's leadership in Tajura, for the Secretary of the General Authority for Tourism to take the necessary decision with regards to the investors who signed investment contracts with the Authority and to whom real estate certificates have already been issued to allow them to use these lands and sites. All these measures prove that authorities in Libya were disputing jurisdiction, and that they still failed to fulfill their obligation set forth in Article 5 of the lease contract and requiring them to hand over the plot of land to the Plaintiff free of any occupancy and people, to guarantee the absence of any physical and legal impediments that prevent the project's execution or operation throughout the usufruct period, and to allow the Plaintiff to take possession of the land to establish the project upon the signing of the contract.

**7-B-12-7.** Accordingly, the Plaintiff sent a letter to the Director of the Department for the Development of Touristic Areas on 8/1/2009, requesting to be exempted from the project handing over within the set deadline and to remain under the supervision of the General Authority for Tourism as this status would help expedite the execution of the project once resumed upon the removal of all impediments. The Director of the Department for the Development of Touristic Areas replied on 21/9/2009 and stated that the issue is left to the discretion of the Plaintiff, and that he will endeavor to solve all the problems that stand in the way of the

project execution, that he appreciates the necessity of expediting things and understands the reasons of the delay. This is another proof of the Tourism authorities' failure in fulfilling their obligation to remove all physical and legal impediments from the project land, and their violation of their substantial obligation to hand over the land to the Plaintiff for more than thirty nine months.

**7-B-12-8.** Due to the failure of the Libyan Authority to hand over the land, and adhering to the principle of good faith, the Plaintiff once again sent three letters dated 3/3/2010, 10 and 11/2010 to the Secretary of the General Authority for Investment and Ownership, after informing him in its letter dated 15/2/2010 of having submitted to the General People's Committee for Tourism on 14/5/2008 three copies of the project's architectural, construction, mechanical and electrical designs, and suggested that the effective handing over of the project land be carried out as per the contract terms, yet the Plaintiff did not receive any replies. Furthermore, instead of remedying the violation of its obligation, the General Authority for Investment and Ownership issued Decision No. 203 of 2010 to cancel the investment approval.

**7-C. Legal Grounds for the Defendant's liability:**

In studying the legal grounds for the Defendants' liability, the Plaintiff claims the following:

**7-C-1.** Article 563 of the Libyan Civil Code binds the lessor to hand over the leased premises and any annexes thereto in a state that allows it to be used for the purpose declared in the agreement or in accordance with the nature of the premises itself. Under Article 570 of the Libyan Civil Code, the lessor shall refrain from any practice that may prevent the lessee from disposing of the leased premises; that the lessor may not introduce any amendments to the premises that may undermine the purpose of use; that the lessor's guarantee of all the above shall not be limited to guaranteeing his own conduct or that of his successors, but shall also apply to every violation based on legal grounds that may be committed by any other lessee or person to whom the lessor transferred the relevant right.

**7-C-2.** Handing over the premises is the lessor's prime obligation. And contrary to the facts, the Defendants have recognized that the land is free of any in-kind rights, then deliberately refrained from handing over the said land to the Plaintiff.

- 7-C-3.** The Defendants have breached Law No. 5 of 1997 on Foreign Capital Investment and specifically Articles 1, 12 , 13, 15, 16 and 23 thereof.
- 7-C-4.** In line with Article 1 of Law No. 7 of 2004 on Tourism, tourism seeks to attract Libyan and foreign investors in order to develop all sources and resources of national income. Article 4 of this law vested in the Ministry of Tourism the authority and duty of determining the areas of tourism development, while Article 8 of the same law granted certain exemptions to touristic projects. Article ten entrusted the Ministry of Tourism and the Minister of Tourism with the decision-making authorities of the General Authority for Investment in all that relates to touristic projects, and, pursuant to Article six of the decision issued by the Council of Ministers No. 73 of 2006 dated 11/4/2006, all rights, obligations and concluded contracts were transferred to the Ministry of Tourism whether performed or under performance, and vested in this Ministry the power to take all necessary measures for the performance of what have been transferred in coordination with the Ministry of Planning and the Ministry of Finance. In line with article two of the Council of Ministers No. 87 dated 20/4/2006, the Tourism Development Authority shall allocate lands to touristic projects and sign their lease contracts with investors.
- 7-C-5.** On 28/1/2010, Law No. 9 of 2010 was promulgated and Article 10 thereof abrogated Law No. 5 of 1997 and its amendments, and article 23 thereof stipulated that the provisions of this law shall govern all investment projects and all related facts and acts set by virtue of the laws aforementioned in this article upon the promulgation of this law, without any prejudice to the exemptions and benefits granted prior to its promulgation. The Defendants' failure to hand over the project land to the Plaintiff in line with the agreement and by virtue of the Defendants' obligations is to be deemed in the least a serious fault on their part, if not an act of deceit, as they violated the obligations entrusted to them pursuant to Law No. 5 of 1977, Law No. 7 of 2004 and its amendments and Law No. 9 of 2010.
- 7-C-6.** In stating the second Defendant's illicit decision to cancel the Plaintiff's project, the Plaintiff stated:
- 7-C-6-1.** The second Defendant's Decision No. 203 of 2010 to cancel the project was notified to the Plaintiff on 9/6/2010

following its issuance on 10/5/2010, i.e. after Law No. 9 of 2010 entered into force on 28 January 2010, and assuming the Plaintiff made a mistake, the second and third Defendants ought to have acted in accordance to Article 9 of this law requiring that the investor be notified to rectify the violation he committed within a proper time limit to be determined in the notice, yet the second and third Defendants failed to do so. The cancellation decision is a breach of Article 20 of this law that allows and does not impose the withdrawal of authorizations when the failure to carry out or to complete the project in the set time is unjustified. Furthermore, Article 42 of the executive regulation of Law No. 9 of 2010 issued pursuant to Decision No. 499 of 2010 of the Council of Ministers stipulates that the General Authority for Tourism retains the right to terminate the contract for land allocation and return the land to the property of the State in the event the party to which the land was allocated failed to begin the project execution phase within six months and failed to finalize the registration of the land as free of all occupancy or rights. It is obvious that the Defendants did not fulfill their obligation to hand over the land free of any occupancy to the Plaintiff; accordingly, the Plaintiff's failure to begin the execution phase is duly justified while the decision to cancel the project is unjustified and groundless.

**7-C-6-2.** The Defendants' bad faith is demonstrated in the letter sent on 26/4/2010 by the Secretary of the Department of Real Estate Registration and Documentation to the Secretary of the General Authority for Investment and Ownership whereby he expressed his wish that the latter takes all necessary measures to terminate the lease contract concluded with the Plaintiff for the Department of Real Estate Registration and Documentation to allow the Libyan Local Investment and Development Fund to use this real estate property that was allocated to it. This is evidenced in exhibit No. (20) of the exhibits submitted by the Defendants, which indicates that the Libyan Council of Ministers decided on 30/12/2009 to annul the decision to allocate the land for the Plaintiff. This decision would have been notified to the Secretary of the General Authority for Investment and Ownership; nevertheless, the latter sent a letter to the Plaintiff company on 2/2/2010 requesting the Plaintiff Company to coordinate with the General Authority for investment and Ownership about the actual handover

of the project site and to submit all architectural designs and drawings for discussion and adoption by competent authorities, and to transfer a part of the investment project capital. This points out to the bad faith of the Secretary of the General Authority for Investment and Ownership when sending his letter to the Plaintiff, as his letter contradicts the recognition made by the Libyan authorities responsible for Tourism, before and after the letter sent by the Secretary of the Department of Real Estate Registration, that they have not handed over the project land to the Plaintiff. Accordingly, Decision No. 203 of 2010 made by the Minister of Industry, Economy and Trade to cancel the Plaintiff's project and referred to in the minutes of the fourth meeting held by the Administration Committee of the General Authority for Investment and Ownership was illicit.

**7-C-7.** The Plaintiff stated that the Defendants have breached Articles two, three, and four, paragraph one of Article nine and Article ten of the Unified Agreement for the Investment of Arab Capital in the Arab States.

The Plaintiff added that honoring the contracts concluded is one of the most important common principles adhered to by the League of Arab States and recognized by the international law, as set forth in Articles 147 and 148 of the Libyan Civil Code. The contract is not limited to binding the parties thereto to the terms stipulated therein, but also sets forth the parties' obligations. However, the Defendants violated this principle in a deliberate and serious manner, since the People's Leadership Coordinator in Tripoli prevented the establishment of the Plaintiff's project as shown in exhibit 41 appended to the statement of claim, and the municipal guards repeatedly prevented the Plaintiff from building the fence that was authorized by the Assistant Secretary of the General Authority for Investment Promotion as shown in documents 28, 23 and 39 submitted by the Plaintiff. The Libyan authorities did not prevent the destruction of the constructed part of the fence as shown in documents 30 and 39 submitted by the Plaintiff. The third Defendant did not take any serious and positive measure towards the Plaintiff to prevent the violation of the Plaintiff's right by the Umma bank, the General Company for Building and Construction and Al-Tahrir Club. Such is a violation of their obligation set forth in Article 9 of the agreement which in turn breaches substantially the Plaintiff's right, in its capacity as investor, to take peaceful possession of the most important of its assets, that is the land. The order issued by the Tourism Development Authority for the Plaintiff to stop the work and



withdraw its equipment from the site on 29/12/2012 until a final settlement is reached is one of the measures taken that have prevented the Plaintiff from the full use of its rights and the fulfillment of its obligations, knowing that the Plaintiff has not breached any of its obligations, and has therefore the right to plead the non-performance thereof.

**7-C-7-1.** The Plaintiff has not violated its obligations and has fulfilled the due obligations. Although Article 3 of Decision No. 135 of 2006 stipulates that the Plaintiff shall deposit 0.1% of the value of the investment in consideration of reviewing the project's designs, drawings, and technical studies, the follow-up on its execution and the promotion thereof at both the local and international levels, and although this text of law did not set a date for the Plaintiff to fulfill this obligation, the Plaintiff took the initiative upon the signature of the lease contract on 8/6/2006 of making the payment of this sum on 22/6/2006 although it could have exercised its right to retain the sum by refusing to pay.

**7-C-7-2.** Article 7 of the contract prescribes that the Plaintiff shall pay an annual sum of 720 thousand Libyan Dinars in consideration of the usufruct right. The Defendants refrained from handing over the said land, and accordingly, the Plaintiff's failure to pay is based on its legitimate right to plead the non-fulfillment of their obligations.

**7-C-7-3.** Article 11 of the contract did not set a date for the Plaintiff's obligation to deliver to the third Defendant a copy of the design and execution documents. It is well known by the second and third Defendants that this is only feasible after the handing over of the land.

**7-C-7-4.** The real estate certificate was issued on 27/11/2007, one year five months and twenty one days after the lease contract was concluded, and indicates that the land is under the occupancy of the Plaintiff. This statement is extracted from the lease contract but is irrelevant since the Plaintiff did not take over the land and did not make any use thereof in view of the legal and physical impediments therein. Letter No. 6/6/451 sent by the Director of the Department for the Development of Touristic Areas to the Plaintiff on 21/1/2009

lists the reasons mentioned by the Plaintiff as impeding the commencement of the project execution, and suggests that the Plaintiff selects an alternative site, which inevitably means that the Plaintiff did not take possession of the site mentioned in the contract.

**7-C-7-5.** The request made by the Secretary of the General Authority for Tourism in his letter dated 1/7/2007 to submit the project timetable and designs for approval, expresses the wish of the Authority to display the Plaintiff's project among other projects on display in the Exhibition of touristic projects to be inaugurated on the fortieth anniversary of the Revolution, as confirmed by the Secretary of the General Authority for Tourism in his letter dated 5/12/2007. This shows that the Defendants' request for submission of the project timetable and designs was not for the purpose of performing the terms of Article 11 of the contract, but for the purpose of taking part in the exhibition. It is to note that the Plaintiff submitted the project timetable and designs in the letter dated 2/9/2007.

**7-C-7-6.** The letter sent by the Secretary of the General Authority for Investment Promotion on 11/9/2008 and which has been submitted by the Defendants as exhibit 11, and which stated that the Plaintiff Company until the date of this letter has not fulfilled any of its obligations and is therefore subject to Article 29 of the executive regulation of Law No. 5 of 1997, was interpreted by the Defendants in a way that makes Article 29 applicable to the Plaintiff since the project's validity came to an end, the Plaintiff failed to apply for a renewal or the renewal request was rejected, and the project could no longer proceed. The letter of the Secretary deliberately ignored all previous letters sent by the Holding Company for tourism and hotels on 14/5/2008, 15/9/2008, and 23/9/2008 and referring to the non-handing over of the land and to the impediments therein. It is to note that said Company falls under the powers of the Libyan General Authority for Tourism.

**7-C-7-7.** The statements made by the Defendants about the fact that the Plaintiff is not serious in the fulfillment of its obligations are refuted as they are based on the letters of the Defendants who concluded from the letter sent by the Director of the Department

for the Development of Touristic Areas on 21/1/2009 that the third Defendant tried to overcome the difficulties preventing the Plaintiff from taking over the project land. In line with Article 147 of the Libyan Civil Code, a contract is the law of the contracting parties and may not be revoked or amended unless with mutual consent or for reasons stipulated by the law. Although the Plaintiff rejected the alternative site, it used its right in good faith since it drafted designs for the building of the facilities on the land subject of the contract, and signed the timetable thereof. Furthermore, the Plaintiff contracted the Holiday Inn International Company for hotel and hotel apartment management and determined all the details for the building of the facilities. Also, the Company contracted a consultant and Hill International Company for execution work management and contractors were qualified. The investment return of any given project increases or decreases according to its location, and this principle was taken into account upon concluding the contract, and the letter sent by the Plaintiff and dated 17/6/2010 is proof thereof.

**7-C-7-8.** The Plaintiff did not breach its obligation to transfer 10% of the project's value as the Defendants are claiming. In fact, this obligation was not mentioned in the investment approval Decision No. 135 of 2006, and the Defendants only requested that the Plaintiff transfers the sum in the letter sent by the Secretary of the General Authority for Investment and Ownership dated 2/2/2010, i.e. following the issuance of the Decision by the Council of Ministers in 2009 to cancel the project and allocate the land thereof to the Libyan Local Investment and Development Fund, and following the request made by the Council of Ministers to the Department of Real Estate Registration to enforce the Decision. It is therefore only sensible and righteous that the Plaintiff pleads non-performance, which adds legality to the Plaintiff's conduct expressed in clause 7 of its letters dated 17/6/2010 to the Minister of Economy, the Secretary of the General Authority for Investment Promotion, the Governor of the Libyan Central Bank and the Secretary of the Department of Real Estate Registration, asking whether it was logical to transfer 10% of the project's investment value, i.e. 13 million US dollars, while the project land has not yet been handed over.

**7-D. In presenting the grounds of its right to compensation, the Plaintiff said:**

**7-D-1.** The claim for compensation of the material and moral damages and which the amount is indicated in the statement of claim was re-evaluated pursuant to three reports issued by three international accounting offices, which the Plaintiff appended in its replication as an estimate of the damages to be added to what had been already mentioned in the statement of claim.

**7-D-2.** The Plaintiff's right to compensation is based on Article 244 of the Libyan Civil Code stating that compensation shall comprise the creditor's incurred losses and lost profits, and that the Defendants' violation of their obligations includes at least a serious fault by deliberately failing to fulfill their obligations, and should therefore pay the Plaintiff compensation for the direct damages, foreseeable and unforeseeable, the latter incurred. The Plaintiff has also the right to claim compensation for the moral damages.

**7-D-3.** The Plaintiff's right against the first and second Defendants relies on the illegality of the Council of Minister's Decision of 2009 to annul the decision of the project land allocation, and to the illegality of the second Defendant's Decision to cancel the investment approval. The Administration is therefore liable for the damages arising from its illegal decisions, and the Plaintiff's right to claim compensation from the first Defendant is in line with Articles (6) and (10) of the Unified Agreement for the Investment of Arab Capital in the Arab States since it is unequivocal that the Plaintiff made an investment in Libya by transferring 130 thousand US Dollars, relied on a significant number of employees and workers in Libya, contracted with companies to manage the hotel and apartments, and provide services related to project design and execution supervision.

**7-E.** At the end of its replication in reply to the statement of defense, the Plaintiff requested a final and binding award that guarantees joint liability, considering that the second and third Defendants represent executive administrations that form an integral part of the Libyan government, by ordering a final and binding sum amounting to 2,055,530,000 US dollars (two billion, fifty five million, five hundred and thirty thousand US dollars), to be paid *in solidum*, detailed as follows:

6,539,000 Libyan Dinars equivalent to 5,030,000 US Dollars as per the exchange rate traded on the same day at the Central Bank of Libya, representing the value of the losses and expenses of the office it opened in Tripoli; 2,000,000,000 US Dollars (two billion US Dollars) representing the lost profits, knowing that this sum is an amendment to its previous request and is justified as per technical reports; 50,000,000 US Dollars (fifty million US Dollars) as a compensation of moral damages; 500,000 US Dollars (five hundred thousand US Dollars) as estimated fees to be paid to the Plaintiff's counsels; and a sum of money to be decided by the Arbitral Tribunal that is equivalent to the arbitration costs and expenses paid in this arbitration case.

### **Chapter Eight: On the statements of the Plaintiff in its replication submitted on 7/1/2013 by Counsel Rajab EL-Bakhnug in response to the Statement of Defense submitted by the Defendants on November 23, 2012.**

- 8-1.** The Plaintiff company began its reply to the Defendants' statement of defense by declaring that pursuant to Decision No. 364 of 2010 of the Council of Ministers, the third Defendant shall be the General Authority for Investment Promotion and Privatization Affairs instead of the General Authority for Investment and Ownership, considering that the Decision by the Council of Ministers stipulated the amendment of the previous government Decision No. 89 which established the General Authority for Investment and Ownership.
- 8-2.** The Plaintiff requested that the Ministry of Finance in Libya be joined as a party to the arbitration case as it is also entrusted with the enforcement of judicial judgments issued domestically and outside Libya against Libyan public entities funded by the Libyan State Treasury.
- 8-3.** The Defendants submitted their statement of defense within the set time limit, and did not present any document of support or reference. They based their statement on the documents submitted by the Plaintiff but misinterpreted their content. They stated that the lease contract is an administrative contract and that the Plaintiff was handed over the land but did not transfer any money and did not commence the project execution.
- 8-4.** The Plaintiff's plea by virtue of which it states that the arbitration case was prematurely submitted to the Arbitral Tribunal because no effort was made to

reach an amicable solution is unfounded, since the Plaintiff acted in line with Article 29 of the contract and tried to solve the dispute amicably before resorting to arbitration. In fact, the Plaintiff did the following:

**8-4-1.** The Plaintiff was not handed over the land free of obstacles, although it paid its dues and opened bank accounts. It also addressed a letter to the Authority requesting a meeting to discuss the issue and reach amicable and satisfactory solutions. Exhibit 61 annexed to the docket confirms the good relationship and proves that the third Defendant's way of dealing with the case was the reason behind this friendly and amicable relationship turning into a dispute. The letter is considered a request for an amicable solution.

**8-4-2.** The Plaintiff issued a power of attorney to its counsel allowing him to act on its behalf and reach amicable solutions. The counsel sent a letter to the third Defendant on 4/8/2010, a copy of which has been annexed to the docket and bears number 62, requesting a fast amicable solution.

**8-4-3.** The third Defendant replied in a letter dated 13/7/2010, exhibit 63 annexed to the docket submitted by the Plaintiff, stating that the land has not been handed over in line with the contract without any reference to the meeting required by the Plaintiff to discuss an amicable solution.

**8-4-4.** The Plaintiff notified the third Defendant through bailiff by virtue of a letter sent by its counsel. The letter gave the third Defendant the option to take a decision within thirty days to annul the decision cancelling the investment project and handing over the land, or to pay five million dollars as part of the expenses spent. Such is an offer and an invitation to adopt an amicable solution as a first means for dispute resolution as stipulated in the contract. This has been proven in exhibit 65 annexed to the docket submitted.

**8-4-5.** On 11/10/2010, the third Defendant suggested an alternative investment site in replacement of the one agreed upon in the contract, which represents an explicit decline of the amicable solution.

**8-5.** The Defendants' plea stating that the arbitration clause stated in the contract shall not be invoked against the government of Libya is baseless and has no legal grounds. The Tourism Development Authority that contracted with the Plaintiff and whose powers have been transferred to the General Authority for Investment and Ownership by virtue of Decision No. 89 of 2009 issued by the General People's

Committee (Council of Ministers) is the third Defendant. The Plaintiff relied on the following reasons:

**8-5-1.** The General Authority for Investment and Ownership is not vested with decision-making authority and any measure it may take is of a procedural nature. The decision making authority is vested in the ministry, which was the reason why the contract was signed by the Tourism Development Authority. The approval Decision No. 135 was issued one day later by the Ministry of Tourism. According to Article 1 of the General People's Committee's Decision No. 89 of 2009 for the regulation of investment, the General Authority for Investment and Ownership falls under the Ministry of Economy. In line with Article 14 of this decision, the budget of the General Authority begins and ends with the State Budget, and the Court of Accounts reviews and examines its financial records just as it examines the records of the government.

**8-5-2.** The third Defendant is an integral part of the Ministry of Economy and falls under its power. The Ministry of Economy falls under the government's authority which is a Defendant in this arbitration case; consequently, the arbitration clause stipulated in the contract can be invoked against the third Defendant and also against the Libyan government since the third Defendant falls under the government's authority.

**8-5-3.** The second Defendant is a sovereign ministry and forms a part of the Libyan government which is the highest Authority. Decision No. 322 of 2007 of the General People's Committee (Council of Ministers) on the amendment of the State Budget and accounts stipulates in Article 1 that the Ministry of Finance shall undertake the allocation of due sums for the purpose of the execution of final judicial decisions issued inside and outside Libya against public entities funded by the State Treasury. The party that contracted with the Plaintiff as well as the third Defendant that replaced it in terms of competence and responsibility are both funded through the State Budget in line with their establishment decision; therefore the Ministry and the government are both responsible for the enforcement of decisions.

**8-6.** In response to the statement of defense on the merits that the arbitration clause shall be applied solely to the interpretation of the contract during its validity period, the Plaintiff said:

**8-6-1.** Upon its signature, the contract became binding and enforceable to the contracting parties, was registered in the Tax department, and duly entered into

force. Any dispute thereon afterwards shall be an issue of total or partial performance or interpretation.

**8-6-2.** The allegation of the Defendants that the cancellation Decision No. 203 of 2010 by virtue of which they allege that said decision is not related to the contract and any challenge thereto shall therefore be made separately as it is an administrative contract, is erroneous since the contract is not an administrative contract but a primary legal procedure that is necessary. The provisions of the contract comprise preparatory and enforcement measures in the form of obligations for the enforcement of Decision 135 on establishing the rights and obligations of every party.

**8-7.** The Plaintiff agrees with the Defendants that the Libyan Law is the applicable law. The legal jurisprudence and international dealings all state that the party whose grievance is caused by a State shall therefore receive compensation. The internationally recognized compensation principle shall cover all the damages as well as the profits lost, which complies with the Libyan Law.

**8-7-1.** The contract signed by the Plaintiff and the third Defendant is not an administrative contract despite the fact that one of the parties thereto is a Libyan administrative authority. The contract is a civil law contract since its subject lies in what is set forth in Articles one and ten of Law No. 5 of 1997 on Arab capital investment in Arab States. Therefore, the nature of the contract is different from that of administrative contracts. The project is to remain the property of the Plaintiff, in terms of its management, operation, and profits for ninety years. The main element of an administrative contract lies in the subject of the contract and does emanate from the status of the contractor.

**8-7-2.** The contract subject of the dispute is not related to a public utility. The privileges provided to the Plaintiff are incompatible with the public interest that the Libyan State will obtain as set forth in Articles one and seven of Law No. 5 of 1997.

**8-7-3.** The cancelled project subject of the arbitration case is not a project intended to serve the public interest, but rather an investment by a foreign person in the State of Libya. The project's services and facilities do not serve the general public since the project's aim is to make financial gains, while a public utility is concerned with providing the citizens with their basic needs without making profits.



**8-7-4.** The contract does not encompass highly unusual clauses. Its terms serve the interest of the Plaintiff Company, and it does not include terms that allow the Administration to impose of its own single will any commitments to the Plaintiff Company as it is the case in administrative contracts. The contract does not include any article that refers to the regulation on administrative contracts which is part of the Libyan Law. This regulation, issued as per Decision No. 563 dated 5/7/2007 of the General People's Committee and which was in force upon the conclusion of the contract, confirms that the contract is not an administrative contract, as no reference was made to the said regulation upon the signing of the lease contract as is usual in administrative contracts in Libya.

**8-7-5.** The contract concluded with the third Defendant was not made with prior authorization from the Council of Ministers (formerly the General People's Committee) as is required in administrative contracts concluded by Libyan administrative entities in line with Article 3 of the regulation on administrative contracts, knowing that no administrative contract is concluded in Libya without the prior authorization of the Council of Ministers.

**8-8.** The minutes of delimitation of the borders was drafted on 20/2/2007 and shall not be deemed as a handover of the land free of all impediments and occupancy.

**8-9.** The Plaintiff Company presented the timetable and all designs on 15/2/2010 after having been presented on 24/10/2007 and 14/2/2008.

**8-10.** The Plaintiff Company holds a bank account in the Trade & Development Bank, and sums of money were transferred in hard currency and amount to 404,000 US Dollars, other than the sums in hard currency brought by the Director of the Plaintiff Company and exchanged into Libyan currency in local banks and amounting to 6,539,000 Libyan Dinars. Moreover, the Plaintiff Company opened a bank account in the First Gulf Bank and notified the third Defendant thereof on 11/3/2010.

**8-11.** In response to what the Defendants stated about the failure to pay the land rent, the Plaintiff stated that it requested the handing over of the land but the Authority failed to make the handing over despite the multiple letters sent by the Plaintiff, and asked whether the third Defendant would have failed to demand payment had it handed over the land.

**8-12.** The Plaintiff Company requested that the actual handing over of the land in its status quo then be postponed until the third Defendant removed all occupancies

therein. And since the actual handing over date is essential, it shall therefore be held accountable for execution.

- 8-13.** The Defendants' statement about the Plaintiff's decline of the alternative site is true, and exhibit 13 referred to by the Defendants proves the Plaintiff's statement as it recognizes the third Defendant's inability to hand over the contracted land, and the impediments that caused the Plaintiff Company to request an extended period of time for its lost time. The offer of an alternative site is proof of the Defendant's bad faith and does not exempt the third Defendant of liability for its delictual fault.
- 8-14.** The Plaintiff Company referred in paragraph two of page 12 of the arbitration case to the exhibits that amount to 13 and include a recognition that the project land has not been handed over and was sold to the Umma Bank, with the Department of Real Estate registry having confirmed it. The Plaintiff Company submitted exhibit No. 77 confirming the sale operation, while the Plaintiff also presented exhibits 78 and 79 conclusively confirming that the land was allocated to the Umma Bank, a fact also verified as per exhibit 80. Therefore, all the said exhibits verify the failure to hand over the project land to the Plaintiff.
- 8-15.** In response to the Defendants' statement that Decision No. 203 of 2010 issued by the Ministry of Industry, Economy and Trade complied with the Libyan Laws, the Plaintiff Company stated that it had presented the final designs, and opened a bank account in the First Gulf Bank and the Trade & Development Bank, and has carried out a number of financial transfers where foreign currency was transferred to Libyan Dinars that were spent in Libya. It is to note that these said transfers represented part of the losses incurred by the Plaintiff, as the money transfer is undertaken gradually according to the execution terms, and that the Plaintiff company also paid to the contractors.
- 8-16.** The Defendants, particularly the second and third Defendants, violated the law. The second and third Defendants breached Articles 1 and 6 of Law No. 5 of 1997 and paragraph 7 of Article 2 of Law No. 7 of 2004 as they have not promoted investments but rather drove them away.
- 8-17.** With regards to the Defendants' statement that the Unified Agreement for the Investment of Arab Capital in the Arab States does not apply to this dispute, the Plaintiff stated that economic growth has not been achieved in the interest of the Libyan State due to the actions of the second and third Defendants, because, had the land been handed over, the money would have gradually been injected in line

with the project execution and timetable, thereby fulfilling the interest of the Libyan State. The two said Defendants have in fact violated Article 19/1 of the Unified Agreement that sought to establish the highest protection and support for the security and sustainability of the Arab capitals invested in Libya or any other Arab state.

**8-18.** In discussing its claim for compensation, the Plaintiff said that the Defendants' interpretation of Article 10/1/B of the Unified Agreement is erroneous as the Plaintiff has the right to claim compensation for the damages it incurred in its quality as an Arab investor in the State of Libya for the following reasons:

**8-18-1.** Decision No. 203 of 2010 issued by the second Defendant violates the Plaintiff Company's rights, and the second Defendant is one of the Libyan State's public authorities, i.e. the government.

**8-18-2.** The Libyan State breached its obligations towards the Plaintiff Company as it did not safeguard its investment; the State cancelled the investment project and drove the Plaintiff Company away from Libya.

**8-18-3.** The Libyan government is liable for the damages incurred by the Plaintiff due to the government's fulfillment of the unlawful request made by the third Defendant and due to its cancellation through the second Defendant of the investment project.

**8-18-4.** The Plaintiff Company did not violate any of Libya's laws and regulations by violating Article 14 of the Unified Agreement for the Investment of Arab Capital in the Arab States, and insisted on cooperating and showing good faith.

**8-19.** The Defendants' statement that none of them committed any fault to be sufficient cause for compensation is not true, since the decision to cancel the project and the approval thereof is a fault that calls for compensation, knowing that the Plaintiff suggested amicable solutions to which it received no reply.

**8-20.** The Plaintiff Company was forced to resort to arbitration and has requested a total of 1,144,930,000 US Dollars as compensation for the losses it incurred and profits it lost due to the project cancellation. The Plaintiff Company had in this regard consulted with experts as well as the German company that gave an estimate of the lost profits, and also with other companies which stated in their reports the value of the lost profits and appended financial reports thereto. The first report was carried out by Ernst & Young and estimated the lost profits at

2,606,695,000 US Dollars. The second report was carried out by Prime Global and put the lost profits at 2,242,451,000 US Dollars. The third report done by expert Habib Khalil EL-Masri gave an estimate of lost profits amounting to 1,744,242,000 US Dollars. Another report written by the Libyan expert Ahmad Ghatour & Partners estimated the lost profits at 2,550,660,000 US Dollars.

**8-21.** The moral damages are real since the Plaintiff's case is soon to be known and shall have a negative influence on the global financial and business markets as the company was driven out of Libya and had its investment project cancelled.

**8-22.** The Plaintiff Company concluded by insisting on what it stated in its replication in response to the statement of defense. It invoked the admissibility of the arbitration case against the Libyan Government, the Ministry of Economy in Libya, and the General Authority for Investment Promotion and Privatization Affairs in Libya as well as the Ministry of Finance in Libya. Furthermore, the Plaintiff raised its right to invoke the arbitration clause included in the contract dated 8/6/2006 concluded between the Plaintiff and the third Defendant, and that the Unified Agreement for the Investment of Arab Capital in the Arab States should be applied. The Plaintiff requested that the Defendants be jointly sentenced to pay the sum of 2,055,530,000 US Dollars (two billion fifty five million five hundred and thirty thousand US Dollars) after increasing the total of lost profits to two billion US Dollars as an average estimate of the amounts detailed in the experts' reports.

## **Chapter Nine: On the statements of the Plaintiff in its replication dated 3/1/2013 submitted by counsel Dr. Nasser EL-Zaid in response to the statement of defense submitted by the Defendants on November 23, 2012:**

On 3/1/2013, the Plaintiff submitted a replication in response to the Statement of Defense, and appended documents thereto in support thereof. The Plaintiff began by making observations on the increase in the compensation value to cover the lost profits up to two billion US Dollars, and reiterated its other demands, and claimed that the final binding arbitral award be immediately enforced. The Plaintiff added that the third Defendant is now called the General Authority for Investment Promotion and Privatization Affairs as per Decision No. 364 of 2012, and that the Ministry of Finance in Libya shall be joined as fourth Defendant as it is bound to enforce final judicial decisions

rendered inside and outside of Libya in line with the Law on the State Financial System and the Decision of the General People's Committee (Council of Ministers) No. 322 of 2007.

The Plaintiff added that its request to increase the compensation value to two billion fifty five million five hundred and thirty US Dollars is based on four accounting reports, and had the Plaintiff signed a settlement for the value of fifty five million Dollars, it would have been annulled before the Libyan courts for lack of consent, fault and fraud, as it had submitted the case file before Libyan counsels and international audit offices that thoroughly analyzed the investment of each touristic site in every touristic resort, and concluded the value of lost profits, thereby driving the Plaintiff's claim to increase the compensation value in line with the Libyan law.

The Plaintiff stated that this claim is not filed against Libya but against the corruption and oppressive conduct that undermined a touristic project without having the State pay any compensation, as the administration abused its power and cancelled the license to invest in a touristic project. The Plaintiff stated that it communicates this replication within the time limit that ends on 7/1/2013 as set in procedural order No. 10 issued by the Arbitral Tribunal on 17/11/2012.

**9-A- In correcting the facts, the Plaintiff stated:**

**9-A-1.** That it had responded to the letter sent by the Secretary of the General Authority for Tourism and Traditional Industries dated 1/7/2007 in a letter dated 1/8/2007, and requested to be notified that the land ownership is held by the State free of any constraints, to be handed over the land free of all impediments, obtain all necessary authorizations, approve the designs, have work permits issued, see all customs exemptions and procedures facilitated, receive cooperation and primary approval to allow a professional global company to run the hotel; and that the Defendant's lack of cooperation was the main reason behind the failure to execute the project.

**9-A-2.** That what has been stated in the correspondence of the Director of the Department for the Development of Touristic Areas dated 11/7/2007 is untrue, as the Plaintiff had responded to all previous correspondence and sent a letter dated 29/7/2007 requesting to expedite the setting of the land handing over date to allow the Plaintiff to set the timetable, as this is directly linked to the effective handing over of the land free of all impediments in line with the contract. The timetable clarifies the project execution plan and is linked to the handover of the land free of all impediments.

**9-A-3.** That the letter sent by the Director of the Department for the Development of Touristic Areas on 11/9/2007 on the handing over of the drawings prior to 4/11/2007 is not accurate, and that the Plaintiff's technical director responded thereto in a letter dated 24/10/2007 stating that he appends three copies of all the designs and three copies of a CD therein.

**9-A-4.** That it had responded to the letter sent by Director of the Department for the Development of Touristic Areas and the head of the permanent working team at the General Authority for Tourism and Traditional Industries on 12/11/2007, noting that the minutes dated 20/2/2007 are solely drafted for the purpose of handing over the border points of the site, reiterating that the land is still riddled with physical and legal impediments and occupied by a third party, and that the Plaintiff was unable to commence its project execution work despite having finalized the primary designs and drawings, hoping to receive some assistance to be handed over the site free of any impediments.

**9-A-5.** The letter drafted on 30/10/2007 where the Plaintiff speaks of an incident that will happen o 31/10/2007 may be attributed to a typing mistake, as the letter refers to preventing the contractor from pursuing work on the fence and calls for a radical solution to this problem. This is confirmed in the letter of 30/10/2007 stating that on that day, 31/10/2007, violations were perpetrated against the land and the fence.

**9-A-6.** That the reason behind requesting in its letter dated 8/1/2009 to the Director of the Department for the Development of Touristic Areas that it be exempted from handing over the project in the set time was the impediments in the project land, the unlawful occupancy by third parties and the continuous violations thereof, and the interruption of the work therein by the municipal guards. In the said letter, the Plaintiff requests the assistance and intervention of the government authorities to expedite the execution of works.

**9-A-7.** The suggestion made by the Director of the Department for the Development of Touristic Areas and the head of the permanent working team at the General Authority for Tourism and Traditional Industries dated 21/1/2009 to choose an alternative site is based on the Plaintiff's request to be informed of the State's ownership of the land, following its finding that the land was allocated to the Umma Bank, after the Administration had recognized the difficulties hindering the commencement of the project execution and its inability to solve them. The Authority's suggestion to allocate an alternative site is attributed to a

pressuring intervention by the Department for the Development of Touristic Areas. The Administration failed to determine the alternative plot of land, while all drawings and designs cover the plot of land agreed upon in the contract.

**9-A-8.** After fulfilling the request made by the Secretary of the Administration Committee of the General Authority for Investment and Ownership in his letter dated 2/2/2010, and coordinating with the General Authority for Investment and Ownership on the effective handover of the site, and after submitting drawings and designs, it is unacceptable that the Plaintiff transfers ten per cent of the project investment value prior to taking possession of the allocated plot of land that should be free of any impediments. And in reference to Decision 135 of 1374 AH, i.e. 7/6/2006, it appears that the investment approval decision did not stipulate the transfer of part of the capital prior to the project land handing over. In any event, the estimated value is linked to the plot of land that was agreed upon, that is allocated to the project and that the Plaintiff did not take control of, noting that the estimated value varies from one plot of land to another.

**9-A-9.** The letter sent by the Secretary of the Department of Socialist Real Estate Registration and Documentation to the Secretary of the Administration Committee of the General Authority for Investment and Ownership where he requested taking measures to terminate the lease contract is due to the fact that the competent Administrative Authority failed to vacate the site and to hand it over free of all impediments, and to the fact that the plot of land had already been allocated to AL Umma Bank, and the dispute was not settled, although the Plaintiff had registered its right to the plot of land in the Investment Registry.

**9-A-10.** The reason why the work and execution of the project did not commence is due to the fact that the Plaintiff did not take possession of the land in line with the contract and the Administration's obligation thereto. The letters sent by the Plaintiff on 22/4/2007, 15/5/2007, 22/7/2007, 30/10/2007 and 22/11/2007 all state that the Plaintiff was unable to commence the project execution despite having finalized the primary design phase, and express its wish that the Administration would intervene to expedite the land handing over to the Plaintiff free of all impediments. The Administration failed to take any positive measures to remove all legal and physical impediments. Article 163 of the Libyan Civil Code states the right to refrain from performance in binding contracts, should the corresponding obligations be due and should the other party to the contract fail to fulfill his own obligations.

**9-A-11.** The minutes of handing over and taking over dated 20/2/2007, in which the Plaintiff states that the land has been handed over and taken over, are untrue as they only determine the land border points and include that the land was examined, as confirmed by the letter sent by the Plaintiff on 28/7/2007 requesting to be informed of the effective handover date in order to set the proper project timetable.

**9-A-12.** The purpose of the minutes of handing over and taking over of an Investment Land is a mere inspection and delimitation of the land borders. The Libyan legislator, in Article 90 of the Libyan Civil Code, relies on the real will, not on the apparent will. The real will is what binds the parties to the contract, not the apparent will mentioned in the title of the said minutes.

**9-A-13.** The suggestion by the Defendant of an alternative site to the agreed upon project land breaches the principle "*pacta sunt servanda*" as set forth in Article 147 of the Libyan Civil Code; furthermore, Article 148 of this law stipulated the contract performance in accordance with its terms and in line with the requirements of good faith. The Defendant has violated the principle of good faith, and in misinterpreting the content of the minutes of handing over and taking over of an Investment Land, breached Article 152 of the Libyan Civil Code.

**9-B.** In responding to the statement made by the Defendant on the lack of jurisdiction of the Arbitral Tribunal to decide the dispute considering that the decision rendered by the Administration is independent and not related to the contract encompassing the arbitration clause, and on the fact that arbitration shall not be claimed prior to amicable endeavors to settle the dispute, and that arbitration clause shall not be invoked against the State of Libya and the General Authority for Investment and Ownership, the Plaintiff stated the following:

**9-B-1.** The decision rendered by the Administration to terminate the disputed contract that comprises the arbitration clause is not disassociated from the contract concluded on 8/6/2006 and may be challenged along with the contract before the Arbitral Tribunal. The Libyan law did not prevent the resort to arbitration, and that according to the Libyan case law, it is established that arbitration shall settle disputes arising from an administrative contract that the ministry is party thereto, and has jurisdiction to examine the decision of terminating the contract concluded by the Administration.

**9-B-2.** The Plaintiff stated having initiated a number of amicable endeavors as alternative solutions aiming at settling the dispute, and having made multiple



efforts to solve the dispute with the Defendant through a number of letters among which a letter dated 17/6/2010 in which it requested a meeting to discuss the reasons behind Decision 203 cancelling the project and the means to free the plot of land of any impediments and the handing over the said plot of land free of occupancies. The Plaintiff received no reply to its request, yet sent another letter on 29/6/2010 in which it reiterated its request made on 8/7/2010 to the general Authority for Investment and Ownership and the Central Bank of Libya to identify the reasons behind the project cancellation, so it avoids any disputes and disagreements and maintains a relationship of cooperation and investment. The Plaintiff's Counsel sent a letter on 4/8/2010 in which he expressed his wish for further cooperation to reach an amicable solution expeditiously. The Plaintiff's counsel sent another letter dated 29/10/2010 in which he requested a meeting to discuss an amicable solution within one week. The Plaintiff's previous requests to find an amicable solution remained unanswered by the Administration. All these initiatives made by the Plaintiff prove that it sought an amicable solution and a settlement without referring the case to competent persons.

**9-B-3.** The Libyan Administration, i.e. the Defendants, is the party that made it impossible for an amicable settlement to be reached, considering that the letter sent by the Secretary of the Administration Committee of the General Authority for Investment and Ownership dated 11/10/2010, and not 20/10/2010 as mentioned in the statement of defense, stated the willingness of said Authority to assist the Plaintiff once again in finding an investment site. This proves that the Libyan Administration had already made its decision not to endeavor for an amicable solution. Accordingly, the Defendants can no longer invoke the inadmissibility of the arbitration case because it had been filed prematurely before resorting to an amicable settlement. In such a situation, arbitral proceedings set forth in Article 29 of the lease contract dated 8/6/2006 have been respected, and it is the Plaintiff's right to resort to arbitration that starts with its referral of the case to His Excellency the Secretary General of the League of Arab States.

**9-B-4.** All the Administrative Authorities that are Defendants in the case are governmental entities that represent the Libyan State from a legal point of view, and form a part thereof. All the public properties are registered under the name of the Libyan State, while the parties contracting with the Plaintiff are governmental institutions falling under the authority of the Libyan State. Had the party contracting with the Plaintiff not been a governmental institution, it would have been unable to dispose of the State's assets and lands, as provided for in decisions issued by the General People's Committee No. 73 of 2006 and No. 87 of

2006 specifically in Articles 2, 9, and 15, No. 88 of 2007 , No. 150 of 2007 stating in Article two the establishment of the General Authority for Tourism and Traditional Industries and in Article 4 the competences of the General Authority for Investment Promotion, No. 234 of 2007 issued based on the Decision of the People's Committee No. 150 of 2007. All these decisions governing the structuring and jurisdiction of the General Authority for Tourism and Traditional Industries prove that the General Authority for Investment Promotion is the Libyan State. In fact, as per Decision No. 364 of 2012 amending Article one of Decision No. 89 of 2009, the General Authority for Investment and Ownership is now called the General Authority for Investment Promotion and Privatization Affairs, and is the third Defendant in this arbitration. The tasks entrusted to the General Authority for Investment and Ownership comprised the issuance of authorizations and allocation of lands owned by the State, concluding usufruct contracts and collecting taxes thereon as stipulated in Article six of Decision No. 194 of 2009.

Furthermore, the General Authority for Tourism and Traditional Industries is funded by the Libyan State Budget, as is set forth in Article one of Decision No. 322 of 2007 issued by the General People's Committee. This proves that the Defendant is a governmental entity that forms the Libyan State within the legal meaning.

The Plaintiff stated similarly that the Libyan arbitral jurisprudence and doctrine as well as the international jurisprudence and doctrine have established that the arbitration clause may be extended to other parties that are not signatories of the arbitration agreement. The Plaintiff has concluded that according to the Libyan jurisprudence and doctrine, unlike the Defendants' allegations, that an arbitral claim can be filed against the Libyan state, the Ministry of Economy and the General Authority for Investment and Ownership. Hence, the Libyan state is a party to the claim since the contracting parties are governmental institutions that form part of the Libyan State.

**9-B-5.** In responding to the Defendants which stated that the substantive scope of the arbitration clause does not cover the subject matter of this claim, the Plaintiff declared that the subject of the arbitration clause is the interpretation of the contract and its performance, knowing that the term performance definitely covers the failure to perform, i.e. the duty of resorting to arbitration in the event of a failure to perform the obligations, as well as the effects of that failure to perform the obligations among which is the claim for compensation, and therefore the resort to arbitration in this matter, should no amicable solution be reached.

**9-C.** In responding to the statement of defense about the law governing the arbitration clause, the Plaintiff stated:

**9-C-1.** By signing the Unified Agreement for the Investment of Arab Capital in the Arab States, Libya has incorporated the said Agreement into its legal system, and the Agreement is hence an integral part of the Libyan law. The Agreement shall therefore prevail over any other Libyan law in line with Article 3 (2) of this Agreement.

**9-C-1-1.** The two parties have agreed to apply the Libyan law. Applying the Libyan law means that the Agreement shall automatically apply and only the Libyan laws that are mentioned in the contract and are related to a subject raised during the settlement of the dispute shall apply. The investment law shall apply on foreign investments, while the real estate law shall apply on real estate matters; the administrative law applies in the administrative field, while the civil law shall apply in civil matters. Article 30 of the contract made a reference to the application of the Libyan Code, while the contracting parties clearly expressed in Article 29 of the contract their will to apply the entirety of the Unified Agreement including the arbitral proceedings to settle the dispute. This Agreement shall supersede regardless of whether the contract or the arbitration clause had made reference thereto.

**9-C-1-2.** Article ten of the Unified Agreement stipulates that should the violation of any of the investor's rights or obligations be proven, or should there be confirmation of any damage sustained by the investor, the latter shall be entitled to compensation for the damage sustained. The Libyan Civil Code provides in Article 224 that compensation shall cover the losses incurred and the profits lost, hence the due compensation in line with the Agreement shall cover the losses incurred and the profits lost.

**9-C-2.** The text of the arbitration clause in Article 29 of the contract provides that the parties to the contract expressed their will to apply the provisions of the Unified Agreement to settle any dispute about the contract arising from its interpretation or performance, not only the arbitration provisions contained therein. In fact, Article 26 of the Agreement stipulates that arbitration and conciliation shall be governed by the rules and procedures set in the Annex to the Unified Agreement which forms an integral part thereof, and that Article six of the Annex confers to the Arbitral Tribunal the authority to determine the arbitral proceedings. The Tribunal determined the arbitral proceedings before it, i.e. the

proceedings of the Cairo Regional Center for International Commercial Arbitration (CRCICA), except for peremptory rules of the Agreement which are not in conflict with the proceedings of the Cairo Regional Center.

**9- D.** On the law applicable to the contract, the Plaintiff stated the following:

**9-D-1.** The contract signed by the parties is not an administrative contract from a legal point of view for the following reasons:

**9-D-1-1.** An administrative contract is one that is concluded by a legal person of Public Law with the intent of managing or operating a public utility. Article 3 of the regulation on Administrative Contracts in the Libyan Law stipulates that the contract must fulfill 3 essential rules in order to be characterized as an administrative contract: an administrative authority must be a signatory of the contract; the contract must include highly unusual clauses; and the contract must revolve around an activity of a public utility. Should any of the aforementioned rules be unfulfilled, the contract shall not be considered an administrative contract. In the current case, and although the first rule is fulfilled, the other two are not, seeing as the contract does not include highly unusual clauses and is not linked to a public utility.

The contract signed by the Administration does not include highly unusual clauses. In fact, the Administration acted in the capacity of a normal person, while the judiciary and jurisprudence gave no definition for “highly unusual clauses”. Several scholars agree that highly unusual clauses are not enclosed in contracts concluded between individuals as they are uncommon, meaning that they are not agreed upon freely, and that the contract encompasses Administration-specific privileges that are not enjoyed by the other contracting party, or a provision attributing the jurisdiction to the administrative judiciary to settle the dispute. The lease contract signed by the Administration does not include such clauses; it comprises terms and texts that are inherent to lease contracts. In fact, the terms of technical control and supervision by the Administration, along with the use of local materials, tools, and labor, as well as timely handover of the project in an operationally sound state, are all conventional terms among parties to agreements governed by the Civil or Commercial Code, and in the field of contracting and work execution. Additionally, the contract that was signed with the Administration is not linked to activities relating to a public utility, the latter being a project that seeks to fulfill needs of a public interest, which cannot be achieved

through individual projects in a way that fulfills citizens' needs, offers public services, and meets objectives other than profit. Therefore, not every project that is established or supervised by the State is a public utility, and the touristic project subject of the contract signed between the Plaintiff and the Administration is not linked to the concept of a public utility, seeing as it is not related to the citizens' daily public life, therefore, its suspension shall not disturb their daily lives or the continuity of services that the State must provide. Moreover, the Administration sought material profit from the project, considering the large amount of money it will be receiving over ninety years; besides, the Administration's supervision of the project is effective throughout the execution phase and does not extend to the usufruct period.

All conflicts are to be settled by ordinary courts with the exception of those mentioned in special texts as per Article 14 of the Judiciary Law No. 51 of 1976. According to the Libyan Legislator, conflicts strictly relating to contracting agreements, procurement contracts and contracts of supply are settled by administrative courts only, and the lease contract signed by the Plaintiff and the Administration does not fall within that category. Furthermore, in line with Article 99 of the Libyan regulation on administrative contracts, the Administration reserves the right to exclude Libyan Judiciary from conflicts on administrative contracts in cases involving foreign parties by stating the right to resort to arbitration, which is currently the case.

**9-D-1-2.** Should the Arbitral Tribunal consider the contract as an administrative contract, it shall therefore be considered an international administrative contract. This is due to the fact that arbitration is a form of private contractual justice which complies with Private Law and is likely to reverse the concept of Administrative Law. This allows for applying the Civil Law along with the Administrative Law, particularly since this private arbitral nature emanates from the parties' will and is integral to the Private Law. Since the parties willingly chose the Unified Agreement for the Investment of Arab Capital in the Arab States to settle the conflict, the contract shall be deemed an international administrative contract, where neither the Administrative Law nor the Private Law of a State shall be applied independently.

**9-D-1-3.** According to Article 14 of the Libyan Foreign Investment Law No. 5 of 1997 and Law No. 7 of 2004, as well as Article 9 of its executive regulation, investment projects are not bound by either the

Administrative Law or the Civil Law; in other words, they do not fall under the Administrative Law, and they are not viewed as civil law contracts falling under the Civil Law; they are viewed as contracts of a special nature governed by the general principles of the Libyan Law, be they civil or administrative.

The Plaintiff adds that Article 30 of the contract provides that in the absence of an express provision mentioned in the contract to apply a specific law, the Libyan Law shall apply- namely Law No. 5 of 1997 and Law No. 7 of 2004. This means that, contrary to what the Defendants had stated, the Law that governs any of the contract clauses shall supersede other Libyan laws, and that since Article 29 stipulates that the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States shall apply, then the Unified Agreement supersedes other Libyan Legal Texts, seeing as the principle of the autonomy of will is the one applicable to the conflict, and the agreement is part of the Libyan Law, and assuming that the contract is an administrative contract, thus it shall be considered an international administrative contract to which both the Administrative Law and the Civil Law shall apply.

**9-E.** In discussing the legal and factual grounds pertaining to the Defendant's liability upon which the compensation claim was based, the Plaintiff stated the following:

**9-E-1.** The Defendants committed a contractual fault by refraining from handing over the land free of all impediments as per the contract; moreover, the Defendants violated their obligations to allow the Plaintiff to take possession of the land free of any occupancy and persons, which constitutes a contractual liability on the government part.

**9-E-2.** The Defendants committed a delictual fault as well as a contractual fault, which can be presented as follows:

**9-E-2-1.** The Defendants acted against a legal obligation to perform the contract in good faith, a principle according to which the Libyan Government shall abide by the rules of International Public Law and international agreements in particular; additionally, the majority of Arab Laws state that the principle of good faith shall be honored in the performance of the contract. However, the decision issued by the Minister of Economy superseded the one allowing for the execution of the investment project, a clear deviation from the principle of good faith.

**9-E-2-2.** The Defendant, i.e. the Administrative Authority has acted against the Unified Agreement for the Investment of Arab Capital in the Arab States, where Article 9 prevents subjecting the Arab investor to any measures leading to the freezing or sequestration. In fact, Decision No. 203 of 2010 issued by the Minister of Economy led to the unlawful confiscation of the project, which is detrimental to the investor's rights and guaranties agreed upon in the Agreement, and gives him the right to claim compensation for the damage that was sustained as a result of prejudice to his contractual and legal rights as well as the guaranties set forth by the contract and the Investment Law. Additionally, the Defendant has violated Article 16 of the Agreement, which stipulates that the investor shall be given investment privileges, while the Plaintiff was unable to take possession of the land. These measures are forbidden by Decision No. 5 of 2007 and Decision No. 7 of 2004 of the Libyan Investment Law, since these measures bear the same impact as the freezing and confiscation of the project, which also allows the Plaintiff to claim compensation in line with Article 10 (1) of the Unified Agreement.

**9-F.** In detailing the elements constituting the claimed compensation, the Plaintiff stated the following:

**9-F-1.** Compensation in terms of contractual liability and tort involving serious fault and fraud, is limited to direct damages; and, in the case of serious fault, compensation shall cover both foreseeable and unforeseeable damages. Article 166 of the Libyan Civil Code provides that faults causing damages require both material and moral compensation in accordance with Article 225 of the Libyan Civil Code, keeping in mind that the Plaintiff is one of the largest global companies in the field of investment and contracting, with a substantial commercial and moral value estimated roughly at 1 Billion US dollars in 2009.

**9-F-2.** In addition to compensation for the direct damages that were sustained, the Plaintiff required compensation for the loss of the project's anticipated profits, in accordance with Article 224 of the Libyan Civil Code, seeing as the lost profits and the sustained damages are major components of the compensation resulting from contract termination or serious fault. This applies in both the Civil Law and Administrative Law, and the Libyan case law has established this compensation for lost profits, as did the case law of the Cairo Regional Center for International Commercial Arbitration. The Judge evaluates the damages sustained by the creditor as a result of the debtor non-performance of his

obligation, then he evaluates the creditor's lost profits; the compensation is the total of both evaluations. In administrative contracts, the Administration shall provide full compensation for the contracting party once it is proven that the damages are due to an act of the Administration "*fait du prince*"; in this case, the compensation encompasses the loss incurred by the creditor as well as the profits that were lost as a result of an act of the Administration "*fait du prince*", i.e. the expected profits by the creditor had no disproportionate financial inequality in the terms of the contract had happened; moreover, compensation for the loss of certain profits is mandatory, when the loss has been established and confirmed, as is the case in this arbitration.

**9-F-3.** Compensation for lost profits is estimated in the State's General Principles governing international arbitration. Arbitral jurisprudence has established the principle of full compensation for actual damages and lost profits, while certain international jurisprudence views that lost profits must not necessarily be substantiated, and that compensation claims must not be dismissed just because it is difficult to determine their value; they also view that compensation that is ruled as a result of the non-performance of the obligation equals the performance of the said obligation, and that the judge reserves the discretion to estimate the value of lost profits and should based himself on substantive grounds and realistic elements that are collected and verified by an expert in the event that the profits were unclear. Additionally, the manner in which lost profits are calculated differs from that in which material losses are.

In the same manner that international arbitral jurisprudence established compensation for material damages and lost profits, it also outlined compensation for damages to reputation and image (moral damages), taking into account that we currently live in a world led by Media institutions and social networking websites, where any rumor could damage the Plaintiff's status within its international scope of work.

**9-G.** In calculating the size and value of the damages sustained and the elements of lost profits, the Plaintiff relied on financial reports drawn by financial experts. The reports calculated the total net profit after adding the total basic investment cost, taxes, and the total subsequent investment cost and subtracting the total subsequent exceptional cost, and after having estimated the financial value of the Plaintiff's lost profits for the total elements of the touristic project as shown in the financial reports drawn up by Experts from ERNST & YOUNG, PRIME GLOBAL, Ahmad Ghatour & Partners, and Habib El-Masri, which helped estimate the value of lost profits claimed by the Plaintiff.



- 9-H.** In discussing the power and finality of the arbitral award, the Plaintiff called for a final arbitral award to be immediately enforceable based on Article 34 of the Unified Agreement for the Investment of Arab Capital in the Arab States which establishes the final aspect of the arbitral award that shall be immediately enforced without the need for a leave for enforcement. Enforcement cannot be stayed in the event of a challenge to the arbitral award or of any means of recourse as it shall be final, binding and not subject to any means of recourse. Moreover, international arbitration centers, including the Cairo Regional Center for International Commercial Arbitration, as well as arbitral jurisprudence, have decided that arbitrators enjoy discretionary powers enabling them to order that the arbitral award be immediately enforced. In addition, laws in several Arab countries, such as Article 194 of the Kuwaiti Law and Articles 290(4) et seq. of the Egyptian law as well as Articles 382(3) et seq. of the Libyan Civil and Commercial Code state that the arbitral award shall be immediately enforced. Furthermore, Article 34 of the Unified Agreement for the Investment of Arab Capital in the Arab States, which shall prevail over the laws of States Parties, is not inconsistent with the provisions providing for immediate enforcement in Libyan law in accordance with Article 379 et seq. of the Civil and Commercial code.
- 9-I.** the Plaintiff concluded its replication submitted in response to the statement of defense, by requesting that the final arbitral award be considered as immediately enforceable, and that the Defendants be compelled, *in solidum*, to pay two billion, fifty five million, five hundred and thirty thousand US Dollars with interest according to the current rates from the date of the final and binding arbitral award until payment date, after having demanded in its replication that the Libyan Ministry of Finance be joined as a party to the current arbitration case.

## **Chapter Ten: On the Legal opinion written by Dr. Burhan Amrallah concerning the Statement of Defense submitted by the Defendants:**

Beside the replication submitted by the Plaintiff, in response to the statement of defense submitted by the Defendants, the Plaintiff submitted a legal opinion prepared by Dr. Burhan Amrallah upon the Plaintiff's request, followed by an addendum in which he listed the documents and papers submitted to him by the Plaintiff and also listed the content of the said documents on which he based his legal opinion:

Dr. Amrallah began his legal report by declaring his independence vis-à-vis the parties to the arbitration case, mentioning his experience and his multiple judicial and legal positions, as well as his participation in a number of Arab and European arbitral positions, and his position as an international arbitrator. He also stated having relied solely on the Libyan law in preparing the legal report that comprised a summary of the facts that led him to conclude the main issue of the dispute between the parties to the contract dated 8/6/2006 until the Plaintiff filed the arbitration case before the Arbitral Tribunal.

After stating the facts, Dr. Amrallah expressed his legal opinion as follows:

**10-1.** The plea to the inadmissibility of the arbitration case as it was filed prematurely is irrelevant. However, Article 29 of the disputed contract stipulates that the two parties agreed to refer any dispute that may arise between them to arbitration in the event where no amicable solution could be reached. The two parties, however, did not determine the means or the schedule to reach this amicable solution. The documents submitted by the two parties to the dispute show that the Plaintiff endeavored towards resolving the dispute amicably before filing the arbitration case. The letter issued by the Department of Real Estate Registration dated 27/4/2010 indicates that the land allocated to the project had been the subject of a letter issued by the General People's Committee dated 30/12/2009 to entrust the Department of Real Estate Registration to cancel any rights established thereon. The date of this request precedes the Decision issued by the General People's Committee for Industry, Economy and Trade No. 203/2010 dated 10/5/2010. Therefore, the amicable solution became impossible and pointless. According to the established in international arbitration, fulfilling the procedural requirements of the arbitration agreement shall not be deemed a binding clause for the competence of the Arbitral Tribunal, and reference to Article two of the Conciliation and Arbitration Annex of Unified Agreement for the Investment of Arab Capital in the Arab States is irrelevant since the two parties to the contract had not agreed on resorting to conciliation and arbitration prior to the commencement of the arbitral proceedings.

**10-2.** Although the arbitration clause originally binds solely the parties to the contract comprising the arbitration clause, it applies to the State of Libya and to the Libyan Ministry of Economy. This relies on the fact that the parties are well aware of the existence and scope of the arbitration clause and have implicitly agreed on enforcing it, as was established in international arbitration on the extension of the arbitration clause to those parties. The extension of the arbitration clause

and the fact that non-signatories of the contract are parties thereto arise from the role they played in concluding, performing or terminating the contract comprising the arbitration clause.

The legal opinion added in this context that the Libyan government represented by the General people's Committee (Council of Ministers) and the General People's Committee for Industry, Economy and Trade (Ministry of Economy) have both taken part in the performance and termination of the contract, which suffices to consider them as parties to the contract, considering that the first party to the contract signed on 8/6/2006 is the Tourism Development Authority falling under the authority of the General People's Committee for Tourism back then (Ministry of Tourism) which stated in the preamble of the contract that it is vested with allocating lands located in the regions of touristic development owned by the State and signing the contracts thereon. This Committee authorized the conclusion of the contract and set the terms thereto in its Decision No. 135 of 2006. The project enjoyed exemptions and privileges set forth in Laws No. 5/1997 and 7/2004. In entrusting the Department of Socialist Real Estate Registration and Documentation with cancelling any disposal of the disputed land, the Committee took part in the contract. The Department requested the General Authority for Investment and Ownership to terminate the contract, and the latter took part in the contract by drafting a memorandum and suggesting the annulment of the decision granting approval for the project No. 135/2006, then the General People's Committee for Industry, Economy and Trade also took part in the contract in its Decision No. 203/2010 dated 10/5/2010 by cancelling the investment approval granted to the Plaintiff, which leads to the termination of the contract dated 8/6/2006. Then the General People's Committee (Council of Ministers) issued its Decision No. 213/2010 on 7/6/2010 to cancel any disposal of the plot of land subject to dispute and to return its ownership to the Libyan State.

The legal opinion added that it is not sufficient for the Tourism Development Authority and then the General Authority for Investment and Ownership to be an independent juridical person since they both are totally subject to the authority of the Ministry of Economy (General People's Committee for Industry, Economy and Trade) and the higher authority of the General People's Committee. All these authorities dealt with the Plaintiff regarding the disputed contract in their quality as instruments of the Libyan State and enforcers of the State's will. On certain occasions, the independent juridical personality of units and entities falling under the State's authority may be overlooked, and the State is therefore bound by the terms of the contract concluded by one of these administrative units.

**10-3.** In discussing the substantive scope of the arbitration clause mentioned in Article 29 of the disputed contract, the legal opinion stated that when interpreting the arbitration clause, one must not interpret its wording literally. When faced with any ambiguity, one must find the real will of the contracting parties and dismiss any literal interpretation. The court of merits shall have the absolute authority to interpret documents and contract terms and provisions as it deems satisfactory to the contract without abiding by the literal text thereof. When interpreting the arbitration clause in good faith, the real common will of the contracting parties shall supersede. Stating that the scope of the arbitration clause does only apply to the interpretation of the contract and its performance during its validity period, and does not extend to the disputes arising from the non-performance, or to the request to annul or terminate the contract violates the choice made by the contracting parties to resort to arbitration as an effective means to solve any dispute arising or that may arise in the future. The parties' agreement to settle their disputes through arbitration means that they wished to grant the Arbitral Tribunal a wide competence, as was established by Arab and international jurisprudence. It is worth noting that a narrow interpretation of the arbitration clause shall not be accepted by international arbitration as it has become the globally adopted means of settling international trade disputes, and shall be interpreted in a way that is deemed closest to the real will of the parties.

**10-4.** After the Legal Opinion reviewed the articles of the disputed contract signed by the Defendant and the Plaintiff, it concluded that the contract is of a complex nature, and may be considered as a BOT contract deemed by some as administrative contracts and by others as Private Law contracts, while a third opinion states that each contract shall be examined separately in light of its own terms and conditions.

The legal opinion stated that BOT contracts concluded by the State with the investor are not of a single nature and are not governed by one legal system. The contract dated 8/6/2006, even if one of the parties thereto was an administrative party and the contract revolved around a touristic investment that seeks to promote touristic services, however this project shall not be deemed a public utility as set forth in administrative contracts, since it is a profitable project for both parties thereto. The terms set in the contract and documents prior to the conclusion of the contract clearly reveal the two parties' will to submit the contract to the provisions of the Private Law and not to consider it as an administrative contract. The terms encompassed in the contract place it under the Libyan Commercial Code and bind the parties by equivalent and mutual obligations that bear no resemblance to the elements of the Public Law. The explicit termination clause enclosed in Articles 8 and 14 of the contract is one

that is usually enclosed in Private Law contracts. Article 20 is an explicit termination clause specific to the Private Law contracts, while the arbitration clause in Article 29 of the contract established equity between the two parties thereto and confirmed the commercial aspect thereof. The legal opinion concluded that the disputed contract is a Private Law contract and is not deemed an administrative contract, nor does it fall under the provisions of administrative contracts.

- 10-5.** With regards to the Defendant's contractual liability, the legal opinion states that the relationship between conflicting parties is originally a contractual relationship governed by the provisions of the contract dated 8/6/2006; that in the absence of a provision in the said contract, Law No. 5/1997 and its executive regulation and Law No. 7/2004 and its executive regulation shall prevail, as well as other legislation in force in the Great Jamahiriya; that Article 147 of the Libyan Civil Code stipulates that the contract is the law of the contracting parties; that Article 148 of said Code sets forth the contract performance in good faith, and provides that the contracting party shall commit to the contract and the requirements therein, while Article 159/1 of the same Code provides that the contracting party may, after accepting that the debtor, the other contracting party, has not fulfilled its obligation, require the performance of the contract or its termination with compensation in both cases if appropriate.

The debtors failure to fulfill its contractual obligation is deemed a fault from which arises a liability where the debtor remains liable for non-performance until the failure to perform the contract was proven to have been attributed to a force majeure or foreign reason or to the fault of the other contracting party. Proving the fault is left to the discretion of the court of merits. Article five of the disputed contract binds the Defendants to specific obligations and failure to fulfill is deemed a violation by said party of its contractual obligations vis-à-vis the Plaintiff, through the failure to hand over the project land as stipulated in Article five of this contract.

Furthermore, the party that contracted with the Plaintiff failed to hand over the plot of land subject of the contract. The Plaintiff required in multiple letters to be handed over the relevant land, to prevent any attempts to stop its work and to remove all occupancies and impediments. The party that contracted with the Plaintiff recognized and did not deny the failure to hand over the land, while the General People's Committee for Industry, Economy and Trade (Ministry of Economy) cancelled on 10/5/2010 the project subject of the contract as per its Decision No. 203/2010 dated 7/6/2010 stating that all works on the project land be cancelled and the project land ownership be returned to the State. The General Authority for Investment and Ownership stated that the cancellation of

the approval granted to the project was due to the Plaintiff's four-year delay in executing the project, a statement which is erroneous and unfounded. This is in harmony with the fault according to which the contractual liability of the Defendants is established, and therefore the Defendants shall be held accountable to compensation to be paid to the Plaintiff in line with Article 218 of the Libyan Civil Code.

The contractual fault committed by the Defendants is deemed a serious fault and does not require an intentional element to be deemed as such. It also falls within the scope of discretion of the court of merits. A serious fault arises from a major recklessness in fulfilling contractual relations, or reveals a major failure in fulfilling obligations. A fault is deemed serious in the event the party committing it perceived the damage caused to the aggrieved party as a potential consequence of his act. Evaluating the damages relies on an objective criterion, i.e. the criterion of the reasonable person, and not on the debtor's will.

The party that contracted with the Plaintiff has committed a serious fault, and shall compensate the damages caused to the Plaintiff in line with paragraph one of Article 224 of the Libyan Civil Code. The compensation shall comprise the loss sustained by the creditor and the lost profits. The law does not prevent from including into the lost profits the profit that the aggrieved party anticipated making within reasonable limits. Wherever a potential opportunity for making profits is proven, then the loss of said opportunity shall be real and compensated. Compensation shall also cover the moral damages in line with article 225/1 of the Civil Code. The Plaintiff deserves the compensation decided by the Arbitral Tribunal for the material damages it sustained, the profits it lost, and the moral damages caused to it. Dr Amrallah concluded his legal opinion by saying that he only stated what he thought was right in line with the information and documents submitted to him, after declaring that this report was drafted specifically to be communicated to the Arbitral Tribunal and the two disputing parties, and shall not be disclosed to third parties nor used by any party without his written prior approval.

## **Chapter Eleven: On the Statements made by the Defendants in their memorandum made on 6/2/2013 in reply to the memoranda and Legal Opinion submitted by the Plaintiff on 4/1/2013:**

On 6/2/2013, the Defendants submitted a rejoinder in reply to the Plaintiff's memoranda and legal opinion dated 4/1/2013, before 7/2/2013, the date set in the procedural Order No. 10 dated 17/11/2012 by the Arbitral Tribunal.

The Defendants stated that their rejoinder completes the numerical order of the statement of defense submitted by them on 22/11/2012, in terms of either the pages or paragraphs. The Defendants have made reference to what they had previously submitted in their memorandum dated 22/11/2012 and responded to the statements of the Plaintiff made in its memorandum and in the legal opinion. The Defendants have voiced their position on the jurisdiction of the Arbitral Tribunal and the subject matter of the dispute, as well as their position on the four reports submitted by the Plaintiff and appended to the replication submitted on 4/1/2013. In conclusion, they reiterated their requests that were previously included in the statement of defense submitted on 22/11/2012, and added to those demands, with regards to jurisdiction, that the arbitration clause included in Article 29 of the contract drafted on 8/6/2006 may not be invoked against the Ministry of Finance in Libya. The Defendants stated the following:

**11-1.** The Plaintiff's allegations about the invalidity of the pleas raised by the Defendants on the jurisdiction of the Tribunal are unfounded. The Defendants adhere to the pleas they had already raised.

**11-1-1.** The Defendants' adherence to the inadmissibility of the arbitration case is invalid as it is prematurely filed is well founded. The Defendants did not confuse the concept of amicable settlement and conciliation stipulated in the Conciliation and Arbitration Annex of the Unified Agreement for the Investment of Arab Capital in the Arab States. The parties' opting for an amicable settlement which is binding by virtue of the contract is a means of expressing an alternative mechanism of dispute settlement other than arbitration. Article 29 of the contract drafted on 8/6/2006 is an amicable settlement mechanism considered as an alternative dispute settlement mechanism, the other mechanism being arbitration should the amicable settlement fail to achieve the sought objective.

**11-1-2.** No serious attempt was made to reach an amicable settlement. The Defendants may choose to adhere to the plea of inadmissibility of the

arbitration case due to premature filing. The Conciliation and Arbitration Annex stipulates that an attempt to reach an amicable settlement is necessary as long as the parties have agreed thereon prior to resorting to arbitration.

**11-1-3.** The legal opinion submitted by Dr. Amrallah indicated that Article 29 of the contract signed on 8/6/2006 did not specify the means and schedule for a settlement, and the two parties did not set any procedures to follow to reach a settlement. The legal opinion interpreted the article as a mere primary expression of the parties' will to make the effort for an amicable settlement before arbitration and did not consider it a binding article. This interpretation does not agree with the parties' real intention, since the expression "to be settled amicably" is a proof of the binding nature of the article. Only when the parties fail to reach an amicable settlement can they resort to arbitration.

**11-1-4.** A month after the Plaintiff requested Counsel Mr. Rajab EL-Bakhnug to commence amicable settlement procedures, the Defendants received a notice through bailiff putting an end to any amicable settlement before allowing such a settlement to bear any success.

**11-1-5.** The letter sent by the third Defendant to the Plaintiff on 20/10/2010 confirms the Defendants' wish to settle the dispute amicably.

**11-1-6.** Among the legal principles agreed upon to interpret contractual clauses is a principle stating that a clause is always preferable to be applied than neglected. Article 29 of the contract dated 8/6/2006 stipulates that amicable settlement shall be deemed obligatory prior to resorting to arbitration, in view of its explicit terms and practicality.

**11-1-7.** The Defendants' adherence to the plea of inadmissibility of the arbitration case does not aim to challenge the upcoming arbitral award since this award may not be challenged because the arbitral awards rendered in any arbitration governed by the Unified Agreement for the Investment of Arab Capital in the Arab States may not be challenged. Such plea forms a procedural plea before international arbitral Tribunals and is related to public policy and shall be raised ex officio by the Arbitral Tribunal.

**11-2.** The plea raised by the Defendants by virtue of which they stated that the arbitration clause stipulated in the contract drafted on 8/6/2006 may not be invoked against the State of Libya and the Ministry of Economy is well founded.



**11-2-1.** The State of Libya was not a party to the contract. The Tourism Development Authority, the third Defendant, which name was changed to General Authority for Investment Promotion and Privatization Affairs is a juridical person independent from the State of Libya and the Ministry of Economy. The arbitration agreement is a civil law contract governed by the principle of the privity of contracts and the General Authority for Investment Promotion and Privatization Affairs may solely be a party to this arbitration and is not totally subject to the authority of the Minister of Economy since every minister represents his own ministry. The legislator may entrust the head of one administrative unit to represent it, and the head of said unit, not the Minister, shall therefore have the capacity to represent it.

**11-2-2.** As the arbitration clause may not be invoked against the State of Libya, it may also not be invoked against the Ministry of Finance in Libya, since the memoranda submitted by the Plaintiff on 4/1/2013 stated that the Ministry of Finance shall be joined as a fourth Defendant in this arbitration.

**11-2-3.** The Arbitral Tribunal issued on 16/1/2013 its procedural order No. 13 in which it considered that the request to join the Libyan Ministry of Finance to this arbitration has been approved in form as it reserved its right to defense and due process, after the Arbitral Tribunal received a copy of the writ of summons to join the Ministry of Finance as a party to the arbitration case, with the writ of summons requiring that the Ministry of Finance be notified thereof.

**11-2-4.** Stating that the General Authority for Investment Promotion and Privatization Affairs is one of the parties funded by the public budget of the Libyan State to justify the joinder of the Ministry of Finance as a party to the arbitration case is rejected since the Ministry of Finance is not party to the claim and therefore the arbitration clause shall not apply thereto.

**11-2-5.** The Law on the Financial System in Libya applies to all ministries and departments. When drafting this law, the legislator decided that the State's public budgets shall include all activities undertaken by the said ministries and departments. However, this does not apply to the budgets of economic public bodies, among which the General Authority for Investment Promotion and Privatization Affairs which has an independent juridical capacity and enjoys financial autonomy. The relationship between the General Authority for Investment Promotion and Privatization Affairs and the State Treasury is limited to the surplus that is referred to the State. The General Authority does not figure among the public entities funded by the State Treasury. The Ministry of

Finance is not concerned with the enforcement of final judicial rulings rendered against the General Authority, and the third Defendant is the sole signatory of the contract, therefore, the arbitration clause may only be invoked against it. Filing the arbitration case against the State of Libya, the Ministry of Economy and the Ministry of Finance is irrelevant in line with the personal scope of the arbitration clause as to the parties.

**11-2-6.** Alleging that the arbitration clause is extended to the Libyan State and the Ministry of Economy since they have both contributed not only in the conclusion of the contract but also in its performance is rejected. The contract stipulated that the plot of land is a state owned property, which does not entail that the State is a party to the contract since the Tourism Development Authority is entrusted with allocating the lands situated in touristic areas and signing the contracts thereof with investors, and shall therefore be the sole party bound by the arbitration clause.

The guarantee made by the Administrative Authority (third Defendant) on the Plaintiff's enjoyment of exemptions and privileges shall not mean that the State contributed to the conclusion of the contract, but shall remain a commitment made by the Tourism Development Authority to the mandatory rules of law related to public policy and adopted as per Law No. 5 of 1426 Heg. and Law No. 7 of 1372 a.P. Therefore, stating that the arbitration clause is extended to the State is irrelevant.

**11-2-7.** The Libyan State has no role in the performance of the contract. Therefore, no reference shall be made to Decision No. 203 of 1378 a.P. to cancel the investment project approval as per Decision No. 135 of 2006 to confirm that the arbitration clause applies to the Ministry of Economy, since it is an administrative decision unrelated to the contract. The Libyan State has not taken part neither in the conclusion nor in the performance of the contract, and stating that the arbitration clause is extended thereto goes against the practices of international arbitration laws and jurisprudence.

**11-2-8.** Alleging that the extension of the scope of the arbitration clause can be concluded from Article 10 of the Unified Agreement for the Investment of Arab Capital in the Arab States is irrelevant since the said article determines the parties liable for compensation, and which shall not be confused with parties submitted to arbitration.

**11-2-9.** The legal opinion presented by the Plaintiff regarding the extension of the arbitration agreement to non-signatories, stipulates the necessity of

identifying the true intent. This criterion leads to a different result compared to what has been concluded regarding the scope of the arbitration clause and the reliance thereon to file an arbitration case against the State of Libya and the Ministry of Economy. When examining the arbitration clause, it is noted that Article 29 of the contract clearly states “when a dispute arises between both parties”, whereas the State and the Ministry are not parties to the contract. Maintaining that the scope of the arbitration clause extends to the State of Libya and the Ministry of Economy is in violation with Article 152 and Article 154 of the Libyan Civil Code stating that the contract does not entail a third party obligation.

**11-3.** The plea to the inadmissibility of the arbitration case as it falls outside the substantive scope of the arbitration clause is justified.

**11-3-1.** Article 29 of the contract drafted on 8/6/2006 established the jurisdiction of the Arbitral Tribunal in any dispute arising between both parties on the interpretation or performance of the contract during its period of validity. It excluded therefore anything arising after its expiry and any disputes related to compensation claims for any damages. Since arbitration is a special judicial system arising from the will of the parties to resort thereto, and since the national or international aspect does not affect the interpretation of the will of both parties, this leads to conclude that the present claim does not fall within the jurisdiction of the arbitration Tribunal.

**11-3-2.** Article 29 of the contract drafted on 8/6/2006 refers exclusively to the rules of the Unified Agreement for the Investment of Arab Capital in the Arab States notwithstanding the substantive rules stipulated therein. Therefore, the submissions presented by the Plaintiff stating the contrary are unfounded.

**11-3-2-1.** Article 30 of the contract drafted on 8/6/2006 stipulates that the contract is subject to its own provisions and to the Libyan Code in case its own provisions proved to be insufficient. The Arbitral Tribunal decided, during the first procedural hearing, to adopt the Libyan law as the applicable law to settle the issue.

**11-3-2-2.** It has been established that the Libyan law applicable to the dispute includes as well the ratified conventions. However, these only apply in cases where they should naturally apply and the Unified Agreement for the Investment of Arab Capital in the Arab States limited the scope of its substantive application to Arab capital and

investment of Arab capital. Article 1 of the Agreement identified the investment of Arab capital as investing in an economic development field with a view to obtaining return in the territory of a state Party other than the State of which the Arab investor is a national or its transfer to a State Party for such purpose. However, since the Plaintiff Company did not provide the State of Libya with any funds, the Unified Agreement provisions shall not apply.

**11-3-2-3.** The interpretation of Article 24 of Law No. 5 of 1427 Heg. as mentioned in the replication submitted by the Plaintiff, did not distinguish the fact that international conventions prevail over national legislation and that this prevalence is concluded from Article 24. This interpretation shall not be deemed admissible when establishing that international conventions prevail over the Libyan law, since Article 24 is only limited to identifying parties that are competent in settling disputes arising between the foreign investor and the State of Libya. Furthermore, claiming that this article establishes the prevalence of international conventions over Libyan legislation means that prevalence could be concluded from the parties' will and consent, which is not the case.

**11-3-2-4.** The grievance of the Plaintiff against the Defendants, in its interpretation of Article 29 of the contract drafted on 8/6/2006 claiming non-enforcement of the substantive rules of the Unified Agreement, is unfounded. In fact, according to Article 152 of the applicable Libyan Civil Code, one shall not deviate from contract provisions when they are clear, and the provision in Article 29 is clear in adopting arbitral proceedings stipulated in the Unified Agreement for the Investment of Arab Capital in the Arab States, without reference to its substantive rules.

**11-4.** In its response to the memoranda and Legal Opinion submitted by the Plaintiff with regard to the merits, the Defendants stated the following:

**11-4-1.** The Libyan law is the law applicable to settle the dispute, and it shall identify the legal nature of the contract drafted on 8/6/2006. This contract is a typically administrative contract since it meets the conditions required by Libyan law to be characterized as such.

It is clear from Article 3 of the Decision issued by the People's Committee No. 573 of 1375 a.P. (2007 A.D.) that the Libyan law defined administrative

contracts based on a set of criteria, all of which are met in the contract drafted on 8/6/2006. The third Defendant that concluded the contract with the Plaintiff is a legal person and aimed at executing one of the development plan projects and achieving public interest. While an administrative contract is similar to a civil law contract with regard to the basic elements for its establishment, it is characterized by the fact that the administration has rights and privileges to advance public benefit or interest, and by the fact that the public figure relies in its conclusion and performance on Public Law provisions whether stipulated in the contract or in laws and regulations. It is possible to amend the contract by virtue of the Administration's sole decision, without applying the rule that provides for "*Pacta sunt servanda*". The said contract drafted on 8/6/2006, included nine highly unusual clauses: (1) Identifying the project nature so as to prevent any alteration thereto, (2) Commitment to project execution within a set time limit, (3) The Administration's right to terminate the contract without any measures, (4) The inadmissibility of waiver without the Administration's authorization, (5) The Administration's authority in technical monitoring and oversight, (6) Compelling the contracting party to use locally manufactured materials and machines and employ and train national labor force, (7) Handing over the project to the Administration at the end of the usufruct period, (8) Refraining from making any additions to activities without the consent of the Administration, (9) The agreement of the parties to apply the provisions of Law No. (5) of 1426 on the Promotion of Foreign Capital Investment and its executive regulation, Law No. (7) of 1372 a.P. on Tourism and its executive regulation, and other Libyan laws in matters that are not stipulated in the provisions of the contract.

The memoranda and legal opinion submitted by the Plaintiff diverge with regards to the statement of defense on the contract characterization, despite its proven administrative nature.

**11-4-1-1.** When referring to Articles 557, 562 and 563 of the Libyan Civil Code on the lease contracts, it is clear that they do not apply to the contract drafted on 8/6/2006. The said contract is not a lease contract but rather an administrative contract as concluded from its preamble (state-owned plot, promoting touristic services), Article 8 of the contract (clearing the plot through administrative means, respecting urban planning requirements), Article 12 (an adopted timetable), Article 14 (inadmissibility of waiver without the Administration's authorization), Article 15 (execution of the project under the Administration's supervision), Article 16 (notes and reports on the investment project), Article 20 (use of local materials and

equipment), Article 21 (employment and training of national labor force), Article 24 (cancelling the project if execution is not initiated within three months from obtaining the license) and Article 30 (applying investment and tourism laws). In light of all of the above, the characterization of the contract as a lease contract would be erroneous. The fact that contracting parties described this contract as a lease contract does not change its nature as an administrative contract. Therefore the claims in the Plaintiff's memoranda to apply provisions from the Civil Code do not apply to the contract drafted on 8/6/2006, and characterizing the contract as an administrative contract is justified.

**11-4-1-2.** Classifying the contract as a B.O.T. contract confirms its administrative nature and the fact that it is not a Private Law contract. Administrative jurisprudence and laws have established that B.O.T. contracts include highly unusual clauses such as: granting the Administration monitoring and oversight capacities, the right to unilaterally terminate the contract and the inadmissibility of waiver of the project by the company or of B.O.T. contracts without the explicit consent of the Administration. Therefore, the characterization of the contract drafted on 8/6/2006, does not occult its administrative nature. Regardless of the contract characterization as a B.O.T., it has an administrative nature and the Plaintiff's attempt to conceal it is unfounded.

**11-4-2.** The submissions in response and the Legal Opinion denying that the contract drafted on 8/6/2006 is considered as a contract having the same characteristics of an administrative contract, on the grounds that it includes clauses proving its private law nature and that it does not encompass highly unusual clauses unfamiliar in the Private Law are factually unfounded. Referring to the Commercial Law in the preamble of Decision No. 135 (of 2006) granting approval for the investment does not define the legal nature of the contract. This confirms the provisions of Article 2 of that decision stating that the Tourism Development Authority is responsible for listing the project in the Commercial Register and taking the necessary measures in that regard. The Plaintiff's request to obtain an official recent extract of the Commercial Register shall not confirm or deny the administrative nature of the contract, since it aims at confirming the financial status of the contracting company. The claim of the Plaintiff's counsel, Mr. Rajab Bashir El-Bakhnug, in his submission that the lack of referral to the regulation on administrative contracts at the time of contracting with the Plaintiff Company renders this contract a civil law

contract, is unfounded. In fact, not referring to the administrative regulation in the contract does not void it of this nature. Article 3 of the regulation on administrative contracts defines administrative contracts as: contracts concluded by the Administration to execute one of the approved projects in the development plan including highly unusual clauses uncommon in civil law contracts and aiming at advancing public interest. Stating that Article 3 requires a prior authorization from the Council of Ministers before concluding such contracts does not change this fact, since said article does not stipulate such authorization. And even if the prior authorization is required, failure to obtain it does not alter the administrative nature of the contract, and would be considered as an administrative fault.

The provisions of the contract drafted on 8/6/2006 do not give it the characteristics of a Private Law contract and it shall not be characterized as a lease contract. Characterizing it as a B.O.T. contract also does not deprive it of having the same characteristics of an administrative contract. The Plaintiff's allegations that the clauses of this contract confirm the fact of considering it as having the same characteristics of a Private Law contract and which do not figure in administrative contracts, do not concur with the facts or the law.

**11-4-3.** The Plaintiff's claim that the Decision of the General People's Committee for Industry, Economy and Trade No. 203 of 1378 a.P. (2010 A.D.) on cancelling the project approval violated Articles 19, 20 and 21 of Law No. 9 of 1378 a.P. (2010 A.D.) is unfounded. By stating that the violation of these articles nullifies the contract, the Plaintiff seems to confuse between the administrative decision being non-existent or null. Violating Decision No. 203 does not render the decision void but rather null, and when a decision is not nullified and withdrawn, its legal effects remain in force. It is therefore unacceptable to say that the administrative dispute over the legality of administrative decisions or compensation can concur with arbitration. It is also to be mentioned that the absolute jurisdiction *ratione materiae* to decide the compensation resulting from the issuance of an administrative decisions remains reserved to administrative courts. The decision to cancel the authorization is separate and independent from the contract drafted on 8/6/2006 as mentioned in the arbitration clause. The Plaintiff can therefore raise an appeal against it independently as it falls outside the substantive scope of the arbitration clause mentioned in this contract.

Stating that Decision No. 203 of 1378 a.P. (2010 A.D.) is illicit does not coincide with the law, since Article 19 of Law No. 9 of 1378 a.P. (2010 A.D.) similar to Article 18 of the old Law No. 5 of 1426 stipulated the possibility of denying the project some privileges and withdrawing the granted license if it has been

proven that the investor violated any of the provisions of this law. This right granted to the Administration was not stipulated in Article 18 of Law No. 5 of 1426. Moreover, Article 19 of this law and Article 20 of Law No. 9 of 1378 a.P. (2010 A.D.) point out to the fact that failure to begin or complete the execution of the project by the set deadline leads to withdrawing the license. Article 21 of this law as well as Article 20 of Law No. 5 of 1426 stipulate that appeal against any decision should be addressed to the instance defined in the executive regulation of each of both laws. In case failure to begin or complete the execution of the project by the set deadline is justified, the license shall not be withdrawn in line with Article 19 of Law No. 5 of 1426 and Article 20 of Law No. 9 of 1378 a.P. (2010 A.D.) both including the verb “may”.

The Plaintiff stated in its memorandum that the decision cancelling the approval should be considered void given that it violated Article 23 of Law No. 9 of 1378 a.P. (2010 A.D.) on Investment Promotion. This statement is irrelevant given that Article 23 stipulates as a condition the existence of the project in the sense specified by the aforementioned law. Article (1) of said law in its seventh paragraph defined the investment project as an investment activity that meets the terms and conditions set out in this law irrespective of their legal form. The project was not granted a license to establish an investment business given that the requirements set out in Article (23) of Law No. 9 of 1378 a.P. (2010 A.D.) were not met.

Furthermore, Article (52) of the executive regulation of Law No. 9 of 1378 a.P. (2010 A.D.) stipulates that the Administration Committee of the Authority may present a recommendation to the Secretary of the competent sector to cancel the approval for the establishment of the project in the event of the failure to initiate the registration procedures in the Investment Registry and to acquire a license for the execution of an investment project within six months as of the date of issuance of the approval decision, and in the event the Authority deems that the investor has not shown serious willingness to execute the investment project.

Granting approval to an investment project by the Concerned Authority does not entail the transformation of this project into a project independent from the purpose for which it was established, i.e. the common good of the national economy and the investor. Decision No. 203 of 1373 a.P. (2010 A.D.) on cancelling the investment approval was issued in compliance with Libyan laws and in light of the violations committed by the Plaintiff. The third Defendant, formerly called the Authority for Investment Promotion, notified the Plaintiff on 11/9/2008 that the project deadline had expired and that the investment project shall be liquidated in the event of the failure to submit a final position within one week. On 4/7/2009, Dr. Mahmoud Ahmad El-Foutaiss, the



Secretary of the Administration Committee of the General Authority for Investment and Ownership, delivered the same notice in his correspondence to the Plaintiff in order to determine the percentage of the work accomplished at the time. Furthermore, the same notice was sent by Dr. Jamal El-Nouweisry El-Lamoushi in his correspondence dated 2/2/2010, further proving that Decision No. 203 of 1378 a.P. (2010 A.D.) on the cancellation of the investment approval granted to the Plaintiff is in compliance with the old Law No. 5 of 1426 Heg. on the Promotion of Foreign Capital Investment and the new Law No. 9 of 1378 a.P. (2010 A.D.) on Investment Promotion, thus ensuring that the claim has no legal grounds.

**11-5.** The legal grounds of the arbitration case are null and void. The Plaintiff company initiated the arbitration case based on the Defendants' violation of the provisions of the lease contract, the provisions of Law No. 5 of 1426 on the Promotion of Foreign Capital Investment, the provisions of Law No. 9 of 1378 a.P. (2010 A.D.) on Investment Promotion, and the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States. The Plaintiff also maintained its right to plead non-performance of the contract. However, maintaining that right is irrelevant, for the following reasons:

**11-5-1.** The Defendants fulfilled the obligations arising from the contract concluded on 8/6/2006. The minutes of handing over and taking over of the plot of land were signed on 20/2/2007, mentioning the name of the site recipient, the inspection date and place, and the delimitation of the borders. Additionally, the Plaintiff's letter dated 13/9/2006, in which it requested the initiation of official procedures for land handing over and designated an authorized representative for the purpose of taking over the land to commence project execution, ascertains land take over. Article 6 of the contract concluded on 8/6/2006 whereby the Plaintiff acknowledged that it carried out a thorough due diligence examination of the plot of land, establishes that these minutes were minutes of handing over and taking over and not minutes of inspection. Moreover, the minutes made no mention of any occupancy or impediment. In other words, the Plaintiff had taken over the plot of land free of any occupancies or impediments, and made no serious effort to initiate project execution.

The Plaintiff Company did not submit the necessary timetable for project execution. The absence of the project resulted in the failure to obtain a license to operate a touristic project. The Plaintiff has made-up the fact that it was not handed over the plot of land, contrary to what was mentioned in the minutes of handing over and taking over.

The Plaintiff's statement that in-kind rights were established on the plot of land, subject of the contract concluded on 8/6/2006, is erroneous, given that the real estate certificate for State property ascertains that the plot of land was occupied by the Plaintiff and the disposal of the land was not cancelled. Furthermore, the property was not transferred back to the State until 7/6/2010, i.e. following the issuance of Decision No. 203 of 1378 a.P. dated 10/5/2010.

**11-5-2.** The Defendants did not violate Law No. 5 of 1426 Heg. on the Promotion of Foreign Capital Investment. The decision cancelling the investment approval was issued as a result of the Plaintiff company's violation of all the conditions set out in Article 1 of this Law. The Plaintiff considered that it was unreasonable to transfer 10% of the project investment value and delayed using and benefitting from the land for a period of over four years. Article 6 of this Law stipulates that the legislator entrusted the Authority, the third Defendant, with the task of safeguarding the investment. However, such a task entails the existence of the investment in the sense determined by the Law, whereby paragraph 6 and 7 of Article 3 determined the scope of application of the provisions stipulated therein, in other words, to have a capital and a project. The Plaintiff did neither transfer any funds to Libya nor did it provide any service in the absence of any investment project. The privileges maintained by the Plaintiff and set out in Article 15 of this Law are extended to the investor that complies with the rules and conditions stipulated in the Law. The fact remains that the foreign capital and the project were not executed.

Furthermore, paragraph 2 of Article 7 of Law No. 7 of 1372 a.P. on Tourism referred to by the Plaintiff stipulates encouraging Libyan and foreign investors to invest in touristic projects and develop resources and income sources. The Plaintiff received 240 thousand square meters which remained under its control and it failed to execute the touristic project, which proves it was working against investment in touristic projects. The Defendants did not commit any violation by virtue of Law No. 5 of 1426 Heg. on the Promotion of Foreign Capital Investment, Law No. 7 of 1372 a.P. on Tourism and Law No. 9 of 1378 a.P. (2010 A.D.) on Investment Promotion.

**11-5-3.** The Defendants did not violate the provisions of Law No. 9 of 1378 a.P. (2010 A.D.) on Investment Promotion, given the absence of the foreign capital referred to in paragraph 5 of Article 1 of the Law. The Plaintiff's statement that it transferred USD \$130,000 is irrelevant, given that this amount was in consideration of the work carried out by the third Defendant in reviewing the technical drawings, designs, studies and promotion of the project.

**11-5-4.** The Defendants did not violate the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States given that the conditions of applicability of said agreement were not met.

The referral in Article 29 of the contract concluded on 8/6/2006 to this Agreement is only limited to the introduction of the arbitration as a dispute resolution mechanism excluding all other rules mentioned therein, given that the contracting parties thereto did not expressly stipulate the adoption and integration of the same in the contract. This Agreement determined the scope of its substantive application with the notion of Arab capital and investment of Arab capital.

No compensation is due to the Plaintiff company in accordance with the text of this Agreement which stipulates in Article 2 therein that the States Parties to this Agreement shall be permitted to transfer capital freely between them and to promote and facilitate its investment, as stipulated also in the Libyan Law. The Plaintiff failed to transfer any capital, no economic development or benefit was achieved and therefore, there was no violation of Article 2 of this Agreement as the Plaintiff stated.

Furthermore, there was no violation of Article 9 of this Agreement which stipulates that Arab capital shall not be subject to any specific measures which lead to confiscation or liquidation given the absence of the capital of the Arab investor. Article 10 (a), (b) and (d) of this Agreement stipulate that the Arab investor shall be entitled to compensation for damages which he sustains due to any action by a State Party to undermine any of the rights provided for the Arab investor, to breach any of the obligations binding on the State Party or to cause any damage, whether by deed or prevention. The Plaintiff failed to show that the Defendants violated the Libyan law or any international obligations or undertakings binding on the Libyan State. The referral of the Plaintiff to the text of this article is therefore irrelevant. Furthermore, this article does not apply given the absence of capital transfer. The Defendants did not make any contractual faults or violations as stipulated in the Libyan law or the Unified Agreement for the Investment of Arab Capital in the Arab States. For that reason, the right of retention and to plead non-performance as invoked by the Plaintiff is irrelevant and should be rejected.

**11-5-5.** The principle of the Plaintiff's right of retention and of pleading non-performance is considered as a proof that it failed to fulfill its obligations by virtue of the contract concluded on 8/6/2006 or by virtue of Libyan investment laws, which ascertains the validity of the reasons provided by the Defendants for the issuance of Decision No. 203 of 2010.

Pleading non-performance requires specific conditions, mainly the fulfillment of obligations. Failing that, the principle of good faith in fulfilling obligations prevents said party from making such a pleading. It has been established that the contracting party with the Administration is not permitted to stop the fulfillment of its obligations and shall not be entitled to plead non-performance given that said plea does not apply to administrative contracts. Work on a s should not be stopped for any reason whatsoever, irrespective of whether the reason is a fault or negligence on the part of the Administration. The Plaintiff Company ceased to fulfill its obligations and has thus committed a contractual fault, which justifies the application, by the Administration, of Article 28 of Law No. 9 of 1983 on tenders and bids. Therefore, the Authority's decision to withdraw the works from the Plaintiff Company and execute the same at its own expenses is in compliance with the facts and the law.

**11-6.** The request submitted by the Plaintiff Company for compensation is legally and factually unfounded, given that compensation entails the commitment of a fault by the debtor that causes damages to the aggrieved party. Furthermore, a causal relationship needs to be established between the fault that was committed and the damage that occurred.

**11-6-1.** The Defendants committed no fault given that the third Defendant has handed over the plot of land. Moreover, it was not proven that the Defendants violated any Libyan law or the Unified Agreement for the Investment of Arab Capital in the Arab States. Pursuant to the provisions of Article 168 of the Libyan Civil Law, the Defendants shall not be liable for any damages that the Plaintiff claims to have incurred and for which it is requesting reparation given that such damages resulted from the fact that the Plaintiff failed to fulfill its obligations contrary to the provisions of Article 148 of the Libyan Civil Law which stipulates the performance of the contract in accordance with its contents and in compliance with the requirements of good faith.

**11-6-2.** The Plaintiff made a fault when it failed to submit the project's final designs. The Secretary of the General Authority for Tourism and Traditional Industries requested in his letter dated 1/7/2007 that the company submits a timetable for project execution stages in addition to the necessary project designs. The Director of the Department for the Development of Touristic Areas at the General Authority for Tourism and Traditional Industries also requested in his letter dated 11/7/2007 final project plans and designs, whereas the Director of the Department for the Development of Touristic Areas and the head of the permanent working team at the General Authority for Tourism and Traditional

Industries requested in his correspondence the project's architectural drawings. Furthermore, he reiterated this request in his correspondence dated 8/10/2007. The Plaintiff Company replied in its letter dated 24/10/2007 and sent only three copies of the designs and three copies of a CD. However, it failed to send what was requested in letter dated 8/10/2007, i.e. a three-dimensional configuration of the project's master plan, given that the designs were not final. Therefore, another letter was sent on 12/11/2007 requesting the immediate submission of the final designs. Six months following the Authority's approval to exempt the Plaintiff from handing over the project by the specified date, the Secretary of the Administration Committee of the General Authority for Investment and Ownership sent a letter dated 4/7/2009 to the Plaintiff, in which he requested the project's current execution status and the exact work progress along with the timetable for the completion of the execution process and the date expected to launch the project. In its reply, the Plaintiff stated that economic feasibility studies were made and project technical designs were prepared in cooperation with the Tourism Development Authority, and the designs were submitted and approved with the knowledge of the Authority on 24/10/2007. This statement is erroneous, given that the Plaintiff would have obtained a project execution license had this was true.

The Plaintiff Company did not obtain a license to execute the investment project and a license to operate the project, given that requirements stipulated in Article 22 of the executive regulation of the Law on Investment Promotion which provides for the submission of necessary documents, and in Article 23 of the executive regulation which provides for the submission of the investment project's opening budget and other financial affairs were not met. The Plaintiff also failed to pay fees to obtain a work permit, proving yet again that the Plaintiff Company did not obtain a license to execute the project.

The Plaintiff did not obtain a license to build a touristic project given that it is established through the exhibits submitted that it failed to submit the project's final designs. It also did not obtain a building permit and a license to conduct an investment activity, and it is therefore difficult to talk about physical impediments hindering the execution of the project or delaying the execution timetable.

The Plaintiff Company did not open a bank account in the name of the project in Libyan banks and did not attempt for several years to submit an application to the Libyan Central Bank for approval to open a bank account in the name of the project up until 14/3/2010, while knowing that said account was a private investment account. The Plaintiff Company further acknowledged that it did not transfer any amount for the execution of the investment activity, in other words, it did not transfer any funds to Libya. Paragraph 6 of Article 3 of Law No. 5 of

1426 Heg. stipulates that the capital shall be the overall financial value that enters the Great Jamahiriya and the Plaintiff stated that it cannot transfer 10% of the investment value given that the plot of land was not yet handed over. Additionally, the Plaintiff failed to pay any fee in consideration of using and benefitting from the land according to the provisions of Article 7 of the contract concluded on 8/6/2006. The Plaintiff decided solely to permanently discontinue the execution of the project without the approval of the third Defendant on 22/1/2009. It further failed to commit to the timetable it submitted to the Authority on 2/9/2007. The Counsels of the Plaintiff Company felt embarrassed and mentioned in their memorandum reasons that are inconsistent with the facts. They stated that the Plaintiff, in its letter dated 8/1/2009 to the Director of the Department for the Development of Touristic Areas, complained of conditions beyond its control that prevented the opening of the project on time and asked to be exempt from handing over the project by the specified date. The purpose of this letter was to conceal the fact that the company has ceased working on the investment project, and showed no serious inclination towards fulfilling its obligations and honoring the timetable it has submitted. It was obvious that the Plaintiff Company was not serious about fulfilling its obligations from the slow pace of signing project-related contracts, given that the Plaintiff signed the design and planning service contract agreement after 13/2/2008, and reached an agreement with United Engineering Management to perform the necessary testing of the soil's hydrologic and engineering characteristics and determine its border points on 2/7/2008. Article 5 of the Libyan Civil Code indicated the cases where the exercise of a right is considered unlawful. However, the company refrained from executing the project and has thus committed a serious fault by causing considerable damages to the third Defendant by retaining the plot of land extending over 240 thousand square meters despite the urgent need for this plot of land for projects, and therefore the Plaintiff Company has no right to claim compensation. As for the impediments, if any, that the company had claimed were the reasons that prevented project execution, they do not represent an obstacle that could prevent the effective initiation of project execution. Its negligence is considered a flagrant misuse of its right and a violation of the principle of good faith in fulfilling contractual obligations. Administrative Decision No. 203 of 2010 would not have been issued had the Plaintiff Company fulfilled its obligations. The underlying causes of this decision are corroborated by the decision itself. The Plaintiff committed a fault and incurred damages, if any, due to its own faults. In other words, the Defendants are not liable pursuant to Article 168 of the Libyan Civil Law and Article 165 of the Egyptian Civil Law.

**11-6-3.** The grounds on which the Plaintiff Company based its claim for compensation are characterized by corruption. The Defendants are not liable to make reparation for any damages given that they have not committed any faults requiring compensation pursuant to Article 168 of the Libyan Civil Law. The figures in terms of compensation indicated by the Plaintiff, along with the amount of money it is requesting, have passed through three stages. In its memorandum, the Plaintiff has mentioned a fourth stage:

**11-6-3-1.** During the first stage, the value of compensation amounted to five million US Dollars. In the notice sent by the Plaintiff to the third Defendant, it suggested either to annul Decision No. 203 of 2010 on cancelling the approval or to provide compensation in the amount of USD \$5,030,000 for the overall costs incurred. The bank statements submitted to the third Defendant detailing the amounts of money spent by the Plaintiff revealed that the amount of USD \$250,000, paid as fees to Hill Company (the company managing the project), resulted from a contract that was not signed with the company, given that on 27/9/2009 the Plaintiff had declared its inability to execute the project, then how is it possible that the Plaintiff have disbursed bonuses to persons and to the management for the year 2010, i.e. following the cancellation of the project. Furthermore, expenses were paid to the management for the years 2006 to 2010 and to Engineer Saad Salem, although no work had been done on the project by the management or the Engineer except for receiving the plot of land, which asserts the invalidity of the expenses and further proves that the Defendants are not responsible for their reimbursement.

**11-6-3-2.** The second stage lies in the notice sent through bailiff to the third Defendant, in which the Plaintiff requested the payment of 50 million US Dollars under the pretense of profits lost by the Plaintiff Company during the anticipated project life span, which remains unsubstantiated. The Plaintiff Company knowingly missed the opportunity to initiate project execution, so how can it determine profits lost while acknowledging that no amounts were transferred for the project and no estimated costs were determined in without the land. How can the Plaintiff Company possibly have an estimated cost for the future in light of a project life span? Concerning the request that the third Defendant shall bear the attorneys' fees until the final settlement of the dispute, it should be noted that said request should be rejected

given that the Plaintiff resorted to arbitration without attempting to reach an amicable settlement first.

**11-6-3-3.** During the third stage, the Plaintiff requested in its statement of claim that the Defendants pay the sum of one billion, one hundred forty four million, nine hundred and thirty thousand US Dollars of which the sum of USD \$5,030,000 representing the value of material losses. According to the budget prepared by the independent auditor Salah Eddin El-Turki, the report shows that the expenses were covered by bank transfers to the account of the manager in charge of the project, which is a procedure that violates the financial legislation in force, and all documents relating to expenses and costs should therefore be disregarded. The same applies to the account of the State Treasury, given that the financial management implemented by the Plaintiff does not comply with the basic principles of project financial management. The report of the specialized financial company, Rodle Middle East relating to the loss of profits which amounted to the sum of USD \$1,089,000,000 was based on the Plaintiff Company's claim that the Libyan Government failed to perform the provisions of the contract regarding the handover of the plot of land. However, any profits lost by the Plaintiff came as a result of its own refusal to take over an alternative plot of land. The report also encompassed mathematical errors, and therefore should not be given due consideration. Additionally, it did not take into account the political circumstances in the State of Libya since February 17, 2011, which affected the figures mentioned in the report, while knowing that no project could possibly achieve such figures. Concerning the fifty million US Dollars in moral damages, there is no proof in the exhibits submitted that the Plaintiff Company incurred any moral damage. Furthermore, the Defendants are not obligated to pay attorneys' fees estimated by the Plaintiff at five hundred thousand US Dollars. Only the Plaintiff is concerned with such fees and not the Defendants.

**11-6-3-4.** During the fourth stage, the value of compensation was increased to two billion, fifty five million, five hundred and thirty thousand US Dollars according to the memoranda submitted by the Plaintiff. The Defendants responded to the new claim, by stating that it remains unverified until one of the two parties, the Plaintiff or the Defendant, disburses the amount mentioned in the procedural order No. 12 issued by the Arbitral Tribunal on 4/1/2011, given that the payment date occurs after the specified date for responding to the



Plaintiff Company. Furthermore, the Plaintiff has increased its relief sought based on four reports submitted to the Arbitral Tribunal. The Defendants stated that these reports should not be taken into consideration.

**11-6-3-4-1.** The report submitted by Khaled El-Ghannam and Partners mentioned that the estimates relied on assumptions, data and information provided by the Plaintiff Company, while knowing that said assumptions, data and information were not reviewed by the company. This invalidated the report, given that it was based on erroneous assumptions and data and should thus be disregarded. The report further stated that it is unnecessary for future financial results to completely match the findings of the financial forecasting study. The report estimated the loss of profits sustained by the Plaintiff during the usufruct period at 2,242,451,000 US Dollars, without deducting the financial value of these amounts as mentioned in the report. The report considered that the project was established and had achieved a surplus in terms of accumulated cash flows. This does not apply because the project was not established to begin with. The conclusions of the report only relied on erroneous assumptions provided by the Plaintiff and were not reviewed for verification purposes. The Defendants are entitled to disregard this report.

**11-6-3-4-2.** The report carried out by Ernst & Young – Egypt calculated the revenues of Sidi al Andalusi project in Tripoli pursuant to the instructions of the Plaintiff Company. The objective of the report was to assist in calculating the revenues projections and evaluating profits and losses during the projection period. The report provided guidance and not recommendations for future steps and only favored the client. Information related to financial projections was essentially based on client assumptions. The report did not take into account the nature of the relationship between the Plaintiff Company and the third Defendant, in other words the report did not examine the most important document that determines the nature of the relationship. The report also mentioned that the information provided by the client were not reviewed or audited. Furthermore, no procedures were carried out to verify the accuracy of the information. The report relied on explanations and factors which were provided by the client and its

consultants, and the experts who drafted the report are therefore not responsible for its content. This report was drawn up by experts that did not verify the accuracy of the information.

**11-6-3-4-3.** The report submitted by expert Habib Khalil El-Masri began by tackling a question of law that does not fall within his competence, stating that any material damages incurred by the Plaintiff came as a result of the termination by the Libyan Government of the contract signed in June 2006 without any legal or contractual justification. The report made significant errors in figures and information, by indicating in page 3 that the plot of land was for the establishment of a touristic investment project, while page 9, 11, and 13 mentioned erroneous dates, number of a law and designation of another law. The report also featured erroneous information, stating that the Libyan authorities approved the studies and designs. It also mentioned that work began on the project's infrastructure along with the initiation of the works and building of the hotel during the fourth quarter of 2007. How can it mention such works while the Plaintiff did not obtain a project building permit or a license to operate the project? This clearly indicates that the report was talking about a different project.

Furthermore, it is inconceivable to conclude a contract for hotel and hotel apartment management with I.H.G. and Holiday Inn, while knowing that the Plaintiff Company did not submit the final designs. The report also indicated that expenses were paid during the pre-execution period, which further proves that the execution stage did not commence at all. The report made the same error as the specialized German company regarding contract expenses, including the amount of USD \$130,000, whereas it referred to the 1% of the investment cost as a lease contract fee as well as designs review and authentication fee. It should be noted the Plaintiff did not pay 1%; it only deposited 0.1% in the account of the third Defendant in consideration of reviewing promotion issues, designs and drawings. The inability to mathematically distinguish between 1 and 0.1% makes the report unreliable.

Moreover, the report mentioned the period during which the work was stopped and which extended over nine months in 2011, and a 20% drop in the percentage of the works due to the events that took place in that period, but was there a hotel to talk about works?

**11-6-3-4-4.** The report prepared by expert Ahmad Ghatour & Partners relied on a number of assumptions and data provided by the Plaintiff Company that were not subject to any review on their part. It revealed a partiality in favor of the Plaintiff. It also tackled a question of law on the legality of Decision No. 203 of 2010 cancelling the approval granted to the project. The report also indicated that the Plaintiff concluded a contract with the United Engineering Management Company in Benghazi valued at 254,100 US Dollars. The report did not specify whether this company provided consultancy on soil works, for whom, and whether or not the contract value was settled. The report referred to the contract on the economic feasibility study of the project signed on 1/2/2008. Such a contract cannot be signed, while knowing that based on the timetable, the inauguration of the first part of the project was supposed to take place on 9/9/2009. As for the design and planning service contract agreement concluded on 13/2/2008, were these designs submitted to the competent authorities in Libya for approval? The service execution agreement contract was signed prior to the management contracts on 13/12/2007, i.e. prior to the economic feasibility study, while knowing that management contracts are not concluded prior to the establishment and existence of the project. The planning illustrates the lack of credibility of these contracts and of the report that came up with a compensation sum based on fictitious assumptions. The same applies to the international management agreement with Intercontinental Hotel Group, given that the Plaintiff failed to obtain a project execution license and a license to establish an investment business. These are nonexistent contracts to falsely claim that the Plaintiff spent money on the project, when in reality, it did no such thing.

These reports violated professional principles and the Defendants are entitled to disregard them since they do not help to uncover the truth and should thus be ignored.

**11-6-4.** The Plaintiff violated its obligation when it failed to prevent the aggravation of damages pursuant to Article 224 of the Libyan Civil Code, given that the damage is a natural consequence whenever the creditor fails to exert reasonable efforts to avert it. It follows that the creditor deserves no compensation if the damages could have been averted by exerting reasonable efforts. The standard is the same that applies to a reasonable person being in the

same legal position as the aggrieved party. Pursuant to that principle, the Plaintiff violated its obligations by failing to prevent the aggravation of the damages alleging it have sustained. The ordinary option would have been to terminate the contract concluded between the Plaintiff and the third Defendant and resort to the Courts or to arbitration for compensation. Delaying the termination of the contract constitutes a violation on the Plaintiff's part that led to the aggravation of the damages. The Plaintiff also violated its obligation by rejecting the alternative plot of land for the establishment of its investment project, and therefore is not entitled to compensation.

The Defendants did not violate their obligations pursuant to the contract concluded on 8/6/2006. They also did not violate the laws on investment promotion in force in Libya or the Unified Agreement for the Investment of Arab Capital in the Arab States. On the other hand, the Plaintiff Company has violated its obligations, which led to the issuance of Decision No. 203 of 2010 cancelling the approval granted to the project. It also failed to exert reasonable efforts to avert the damages pursuant to the Libyan law. The Plaintiff's claim for compensation is unfounded and should be dismissed.

The Defendant concluded its response to the memoranda and the legal opinion submitted by the Plaintiff, by reiterating its requests in terms of competence, and pleading that the arbitration clause set out in the contract concluded on 8/6/2006 may not be invoked against the Ministry of Finance, and further adding on the merits that the claim should be dismissed given the lack of legal and factual grounds.

## **Chapter Twelve: On the Statements of the Plaintiff in its final submission submitted by Dr. Fathi Wali and Dr. Mahmoud Samir El-Sharkawi on 20/2/2013 in response to the rejoinder submitted by the Defendants on 6/2/2013:**

1. The Plaintiff reiterated its claims set out in the statement of claim and in its previous memorandum as well as what was stated in the Legal Opinion submitted by Dr. Burhan Amrallah, adding that it would like to join to the present arbitration case the Libyan Investment Authority, given that pursuant to the decision of its establishment, it is entrusted with investing and developing funds allocated by the General People's Committee in a way that supports the State Treasury resources annually to limit the impact of oil revenues and income in accordance with article 4 of the establishment decision. It also addresses all

aspects of the investment (article 7 of its establishment decision). The present dispute concerns an investment subject to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States, and this Authority is entrusted with managing the investments of the Libyan State, and therefore should be joined as a Defendant.

2. On the response provided by the Defendants regarding the plea to the inadmissibility of the arbitration case for premature filing, the Plaintiff stated that:

**2-1.** The Defendants denied that they confused in their defense between reaching an amicable settlement as stipulated in the disputed contract, and conciliation as stipulated in the Conciliation and Arbitration Annex of the Unified Agreement for the Investment of Arab Capital in the Arab States.

**2-2.** The third Defendant stated that no attempt was made to reach an amicable settlement as stipulated in the contract. This statement should be rejected since it contradicts the interpretation of Article 29 given by Dr. Burhan Amrallah which do not differ from the interpretation provided by the Defendants for the same article. The two opinions agreed that efforts should be exerted to reach an amicable settlement without having to commit to reaching such settlement. If a settlement had been reached, the dispute would have ended and the arbitration case would have been dismissed. The commitment is limited to an attempt to reach a settlement and not to complete such settlement. The Plaintiff Company made several attempts to reach an amicable settlement but to no avail and the Defendants ascertained their refusal in their letter to the Plaintiff dated 26/2/2011 (exhibit No. 26 of the statement of claim). According to the established case law, the failure to resort to an amicable settlement prior to arbitration does not lead to the annulment of the arbitral award. Therefore, the Defendants may not plead the inadmissibility of the arbitration case.

**2-3.** On the Defendants' final submission regarding their defense relating to the plea by virtue of which they stated that the arbitration clause may not be invoked against the Libyan State and the Ministry of Economy, the Plaintiff referred to its previous memorandum (page 7 et seq.). In their final submission regarding their defense relating to the plea above mentioned, the Defendants relied on the procedural order issued by the Arbitral Tribunal on the approval to join the Ministry of Finance as a party to the arbitration case; consequently, the Plaintiff sees no reason why the Defendants would maintain that the arbitration clause

may not be invoked against the Ministry of Finance and does not perceive the correlation between the two.

The Plaintiff added that the Defendants did not deny the fact that the contract, as it already mentioned, was only signed by the Tourism Development Authority pursuant to a decision issued by the Council of Ministers of the Libyan Jamahiriya, and that the Libyan State disposed of the plot of land, subject of the dispute, thus hindering the execution of the contract. This confirms that the Libyan State was involved in the preparation of the contract and in its performance. The Plaintiff did not indicate that the State allocated the plot of land; it only said that the State owned the land, in other words the contract, subject of the dispute, would not have been concluded without the approval of the Libyan State, owner of the plot of land. The disposal of the land in favor of the Bank of Libya by the Libyan state is the main reason why the project was not completed. It cannot be said that the cancellation of the investment project license was not issued during the validity period of the contract relating to the project, or to state that it was an administrative decision that did not involve any intervention in the execution of the project, since said decision was behind the cancellation of the project, subject of the contract.

**2-4.** Regarding the response of the Defendants submitted in reply to the Plaintiff's defense pertaining to the substantive scope of the arbitration clause, the latter stated that the Defendants' memorandum did not include any response in this regard. The Defendants stated that the Arbitral Tribunal does not have jurisdiction to decide on compensation for damages resulting from the issuance of an administrative decision, given that said compensation cannot coexist with the rules of arbitration. However, this statement should be rejected since arbitration in matters relating to financial rights resulting from this decision is permissible, given that financial rights can be submitted to conciliation and subsequently to arbitration, as set out in the arbitral award recently issued in the Cairo Regional Center for International Commercial Arbitration on 29/2/2012 in the arbitration case No. 704/2010 published in the Journal of Arab Arbitration – Issue 18 – June 2012, p. 243.

**3.** In its defense on the merits, the Plaintiff stated that it will only comment on the new statements mentioned in the Defendants' statement of defense, p.119 et seq., as follows:

**3-A.** The allegations of the Defendants pertaining to the law relating to the subject matter of the dispute and to the characterization of the contract, should be rejected. It should be noted that:

**3-A-1.** Article 29 of the contract referred to the substantive rules of the Unified Agreement for the Investment of Arab Capital in the Arab States. The Plaintiff transferred the amount of one hundred and thirty thousand US Dollars, established an investment company, contracted a hotel and tourism facilities management company, paid the salaries of employees, contracted supervisors and engineering consultancy companies, and incurred expenses to erect a fence, while knowing that the works relating to the fence were stopped by the third Defendant. This is validated by the definition of Article one of the Unified Agreement for the Investment of Arab Capital in the Arab States, given that it fulfills the meaning of Arab capital investment.

The statements of the Defendants on the Plaintiff's reliance on Article 24 of Law No. 5 of 1997 is under examination, given that the Plaintiff included in page 62 of its replication that shall be submitted on 7/1/2013, the provisions of Article 3 of this Agreement that expressly indicate that the Agreement shall prevail over the legislation of the States Parties. The Defendants further indicated that the referral in Article 29 of the contract concluded on 8/6/2006 is limited to the arbitration rules in that Agreement without its substantive rules, but that statement should be rejected given that the Plaintiff invested money in Libya and Article 29 of the contract refers to all the provisions of the Agreement. Had the two parties intended to limit the referral in the contract concluded on 8/6/2006 to the arbitration rules of the Unified Agreement, they would have referred to the Annex of the Agreement. However, they expressly referred to the Agreement itself that encompasses the substantive provisions set out therein and then to its annexes.

**3-A-2.** The Defendants characterized the contract, subject of the dispute, as an administrative contract that fulfills all the requirements of an administrative contract, given that one of the parties thereto is a legal person and the contract encompasses highly unusual clauses deemed uncommon in Private Law contracts. This is inaccurate for the following reasons:

**3-A-2-1.** The Defendants stated that the contract is a contract authorizing the use and benefit from land and public funds on the basis that the relationship is founded on the development of a land owned by the State and the use of public funds, but it should be noted that this is a wrong characterization, given that the plot of land, subject of the contract, is a private property and not a public

property owned by the Libyan State as specified by the Plaintiff in its replication submitted on January 2013, pages 22-27. The Defendants failed to make any response in this regard in their rejoinder submitted on 6/2/2013.

**3-A-2-2.** The contract, subject of the dispute, was concluded on 8/6/2006 and the regulation on administrative contracts was issued by virtue of the decision of the Libyan Council of Ministers No. 563/2007, which implies that the contract was concluded at a time when the regulation was not part of the Libyan Law, and the reliance of the Defendants on the regulation of 2007 relating to administrative contracts would be considered as applying the regulation with retroactive effect., The legislator did not provide for such application in the constitutional terms and conditions given that a decision issued by the executive authority is not sufficient for said retroactive effect..

The contract concluded on 8/6/2006 does not fall within the definition of administrative contracts set out in Article three of the regulation on administrative contracts, although one of the two parties is a legal person, given that the regulation on administrative contracts regulates the relationship between a legal person and the other contracting party for the establishment, development and construction of a public utility, while the subject of the contract concluded on 8/6/2006 is the lease of a plot of land to the Plaintiff as an investor in a touristic project where it solely manages, makes profits and withstands losses. The Plaintiff is only required to pay the fees in consideration of the annual usufruct right and to respect public policy.

The preamble of the contract ascertains that it is not an administrative contract, but a Private Law contract, whereby the Plaintiff committed to invest its own funds. The contract rightfully indicated to the Law on the Promotion of Foreign Capital Investment, and the Law on Tourism, mainly the texts of Articles 12, 13, 15, and 17 of the Law No. 5 of 1997. Furthermore, the text of Law No. 9 of 2010 on the Promotion of Investment and its executive regulation confirm more so than the Articles of Law No. 5 of 1997 that the investment project is a private project. This is further confirmed in the texts of Articles 28, 12 and 46 of the executive regulation of Law No. 9 of 2010 on the Promotion of Investment. This project cannot be characterized as a public utility project and



no argument supports the statements made by the Defendants in their statement of defense pages 130 to 134 on highly unusual clauses set out in the contract concluded on 8/6/2006. The Plaintiff indicated in pages 27 to 29 of its previous memorandum that these clauses set out in the contract, subject of the dispute, are common in Private Law contracts. Additionally, the Defendants stated in page 129 of their statement of defense that the Tourism Development Authority concluded the contract with the Plaintiff for the purpose of executing a touristic project among the projects accredited in the development plan; this statement is unfounded and should be rejected. The Defendants further stated that the plot of land is a public property owned by the State and that public funds cannot be subject to any rights established thereon, but are merely licensed for usufruct by virtue of an administrative decision. This statement is also incorrect. The Defendants did not respond to the arguments of the Plaintiff used to refute their statements and substantiated by the jurisprudence of the scholar Sanhoury. The Defendants cannot argue that the contract ensured the right of the first party to the contract to clear the plot of land through administrative means, given that this is not related to the characterization of the contract, since there is a difference between the nature of the right and the means of enforcing it and since the State is entitled to use administrative means to suppress any aggression or remove any facilities established in violation of the laws regulating buildings.

**3-A-2-3.** The contract is a lease contract and meets the requirements of the law pursuant to the provisions of Articles 577 and 563 of the Libyan Civil Code. This is not only confirmed in the title of the contract concluded on 8/6/2006, but also in its preamble which indicates that the first party is entitled to allocate the lands located within the touristic development areas owned by the state, and to sign the lease contracts thereof. This is also ascertained in Article two of the contract which provides that the first party leased to the second party, and Article four which stipulates that the first party is legally entitled to allocate the lands, to sign the lease contracts and collect revenues. Furthermore, Articles five and seven determined the fees in consideration of using and benefitting from the land by the Plaintiff during the contract validity period. The Defendants cannot refer to Article 562 of the Libyan Civil Code

because Article two of the contract concluded on 8/6/2006 determined that the land usufruct period shall be for ninety years and because the description provided in Article 557 of the Libyan Civil Code is applicable to this plot of land.

**3-A-2-4.** Characterizing the contract as a B.O.T. contract entails that it is not an administrative contract, contrary to the Defendants' statements based on the publication of Dr. Mohamed Rubi. On the other hand, Dr. Hani Salah Sarie-Eldin presented in his publication "Legal and Contractual Organization for Infrastructure Projects Financed by the Private Sector" the forms of private sector involvement in providing infrastructure services, stating that some contracts fall under administrative contracts such as the public utility contracting agreements, services contracts, and management contracts while other contracts fall under Private Law contracts. The same applies to the regulation relating to construction, ownership, operation and property transfer. The designation in itself is not important after a thorough analysis of the content of the Agreement. Furthermore, the investor owns the assets of the project during the license validity period, and undertakes to transfer the property to the State at the end of the period. The investor will thus have the authority to operate and manage the project while the State will retain the role of controlling said project. This role does not entail having any part in the operation or supervision process or services pricing, except within the limits specified in the contract. Dr. Salah Sarie-Eldin further stated that in accordance to the established International Practice, these agreements do not include highly unusual clauses in the meaning set forth by administrative jurisprudence and doctrine, but do include contractual clauses similar to the clauses commonly agreed upon in the Private Law field. The fact that the project is not the property of the public sector, in the absence of the public authority and hegemony of the latter, and in the absence of highly unusual clauses in the contract, result in the contracts falling outside of the scope of public policy. Dr. Sarie-Eldin mentioned in footnote (1) of page 17 of his publication that "The Administration may resort to contracts for the use of tourism facilities such as tourism hotels and restaurants owned by the Administration. These contracts are not considered administrative contracts given that their subject is the

management of a private property owned by the State, and they are therefore – duly – considered as Private Law contracts".

**3-A-2-5.** The Defendants stated in page 160 of their statement of defense that the Plaintiff confused between two things, the fact that the administrative decision is nonexistent and the fact that it is null. They further indicated that the violation does not make the decision as nonexistent, rather it makes it null, and that cancelling one of the four elements of the decision does not make it void but rather vitiated or subject to annulment or cancellation. This statement is erroneous, given that the illegality of the decision may be significant enough to make it void, therefore its prima facie existence is not a legal impediment but a mere physical impediment to be ignored by the judge. This has been established in the jurisprudence and the doctrine".

The cancellation decision imposes more burden than receivership, formulation of reservations or freezing of an investment project in accordance with the provisions of Article 23 of Law No. 9 of 2010 on the Promotion of Investment. A cancellation decision is only issued by virtue of a law or a judicial ruling. The decision issued by the Ministry to cancel the approval granted to the investment encroached on the prerogative of the legislator and the courts.

**3-A-2-6.** The Defendants did not respond to the Plaintiff's statement regarding the irrelevance of their invocation of Article 8 of Decision No. 194 of 2009 issued by the Council of Ministers. They only mentioned in pages 163 and 164 of their statement of defense the provisions of Article 19 of Law No. 5 of 1997 and Article 20 of Law No. 9 of 2010 to prove the absence of disparity between the two texts. This is an erroneous statement given that clause 1 of Article 19 of Law No. 5 of 1997 authorizes the withdrawal of the license if "the execution of the project was not initiated or the project was not completed in accordance with the terms and conditions set out in the executive regulation", while clause 1 of Article 20 of Law No. 9 of 2010 provides for the possibility of withdrawing the license if "the execution of the project was not initiated or the project was not completed by the specified date and without just cause". This last text imposes an important restriction on the Administration not imposed by the previous text, i.e. the violation made by the investor should be unjustified. Therefore, the

decision of cancelling the investment approval was vitiated for illegitimacy reasons due to the flagrant violation of Law No. 9 of 2010. Referring to the minutes of the meeting of the Administration Committee of the General Authority for Investment and Ownership dated 19/4/2010 indicates that this Committee based its recommendation for the cancellation of the approval on facts not related to the real reason behind the impossibility of project execution. Legally, the recommendation was based on Law No. 5 of 1997 amended by Law No. 7 of 2004 and its executive regulation, while Law No. 5 of 1997 was abrogated by Law No. 9 of 2010. Decision No. 203 of 2010 issued by the General People's Committee for Industry, Economy and Trade on the cancellation of the investment approval did not refer to Law No. 9 of 2010. The decision, as the recommendation, were based on an abrogated law, and disregarded the text of paragraph 1 of Article 20 of Law No. 9 of 2010 providing that the approval shall not be cancelled unless the project execution was not initiated or the project was not completed by the specified date for unjustified reasons. Therefore, the cancellation decision was based on erroneous reasons and on an abrogated law, making this decision void and a mere physical impediment and not a legal impediment to be ignored by the arbitral Tribunal.

**3-A-3.** The non-characterization of the contract, subject of the dispute, as an administrative contract which is a lease contract, result in the contract and the subject matter of the dispute being subject to the Unified Agreement for the Investment of Arab Capital in the Arab States, the Libyan Civil Law and the Libyan legislation relating to the promotion of foreign capital.

**3-B.** The Defendants violated their contractual and legal obligations as well as the legal basis of their liability. The Plaintiff did not violate any of its obligations and is legally entitled to request compensation for the material and moral damages it incurred as stated in pages 32 to 82 of its response to the Defendants' statement of defense.

At the end of its replication, the Plaintiff referred to the Defendants' allegations pertaining to the lack of credibility of the technical and accounting reports that included the statement of losses and lost profits and an estimation of the amount of compensation for material damages and moral damages, and indicated that there is a presumption of the credibility of the research and findings of these

expertise firms. The Defendants are entitled to challenge these reports by submitting counter-experts' reports, which they did not do. The Arbitral Tribunal is the highest expert and has the authority to accept or refuse experts' reports in its estimation of the due compensation for material and moral damages sustained by the Plaintiff. The Plaintiff concluded by seeking the rendition of an award in its favor on the requests set out at the end of its replication that is scheduled to be filed on 7/1/2013.

### **Chapter Thirteen: On the Statements of the Plaintiff in its final submission submitted by Counsel Rajab El-Bakhnug dated 20/2/2013 in response to the rejoinder submitted by the Defendants on 6/2/2013:**

- 13-1.** The Plaintiff declared that it was notified of the Defendants' memorandum and responded consequently, beginning with what they raised in their defense on the jurisdiction. The Plaintiff indicated that what was stated in the Defendants' memorandum concerning the fact that the Plaintiff closed the door on an amicable settlement is erroneous, given that the notice sent by the Plaintiff to the third Defendant aimed to binding it to settle the dispute amicably, but the responses of the latter were merely rhetoric and the conclusion reached by the Defendants that the claim was filed prematurely, is erroneous.
- 13-2.** The General Authority for Investment Promotion and Privatization Affairs, and, before it, the Tourism Development Authority, are two legal entities funded by the State Treasury. Article 9 of Decision No. 150 of 2007 issued by the General People's Committee stipulated that its funding shall be provided by which is allocated in the State Budget .
- 13-3.** The General Authority for Tourism and Traditional Industries that substituted the Tourism Development Authority which contracted the Plaintiff Company is also funded by the State Treasury.
- 13-4.** The Defendants' statement that the Libyan State and the Ministry of Economy did not interfere in the conclusion of the contract is erroneous, given that the State has established rights on the project land , and the Director of the Department of Real Estate Registry sent a letter to the Director of the Department of Real Estate Registration, referring to the sale of the same plot of land from the Public

Property Authority to the Umma Bank which refused to cancel the sale and recover the amount paid.

- 13-5.** The authority to decide at the time of the conclusion of the contract lied with the Ministry of Tourism which issued Decision No. 135 of 2006. And after this Ministry ceased to exist, the authority to issue or to annul such decision became the prerogative of the Ministry of Economy based on the recommendation of the third Defendant.
- 13-6.** The Libyan law shall be the law applicable to the dispute and the Libyan Supreme Court ruled in Civil Appeal No. 123/43 J dated 18/12/2000 that some administrative units, even if they enjoy legal personality, are not deemed fully independent from the State.
- 13-7.** The third Defendant is a public legal entity affiliated to the Ministry of Economy. The State and the Ministry interfered in the conclusion of the contract and the issuance of the cancellation Decision No. 203 of 2010, and therefore the arbitration clause shall be extended to third parties.
- 13-8.** The plea to the inadmissibility of the arbitration case raised by the Defendants on the grounds that it does not fall within the substantive scope of the arbitration clause is groundless.
- 13-9.** The contract concluded on 8/6/2006 between the Plaintiff and the third Defendant is not an administrative contract. It did not stipulate that the provisions of the regulation on administrative contracts are a part thereof. The touristic project is not a project of public interest. Both parties intended it to be a lease contract as well as the administrative entity, which according to the contract, exercised its leasing authority by virtue of the law that provided for its establishment.
- 13-10.** It is within the jurisdiction of the Arbitral Tribunal to characterize the contract. This contract is a lease contract given that administrative contracts require an authorization from the Council of Ministers for their conclusion, which is not the case with regard to the contract dated 8/6/2006. The clauses included in the contract granting rights to the Administration are common clauses in Private Law contracts. This does not change the fact that the Administration is entitled to provide observations on studies and drawings, given that project execution must comply with the requirements of tourism, culture and architectural history implemented in Libya, and public interest is not being given priority.

- 13-11.** The Defendants' allegation that the third Defendant terminated the contract pursuant to Article 103 of the regulation on Administrative Contracts, does not apply to the case. The discussion carried out by the Defendants on a non-existent decision and a null decision is unfounded. The Plaintiff replied this issue in its memorandum submitted by Dr. Fathi Wali and Dr. Mahmoud Sharkawi.
- 13-12.** All memoranda of the Defendants are founded on an invalid legal basis, i.e., that the Plaintiff took over the plot of land free of occupancies and persons, which is an erroneous statement.
- 13-13.** The execution license requires the taking over of the land. The license to operate the project is issued at the beginning of project operation, and tax exemptions begin as of the date of receipt of said license.
- 13-14.** In its response to the Defendants' allegations in page 176 under the title 'absence of legal basis', the Plaintiff referred to page 12 of the statement of claim and to page 16 of its replication.
- 13-15.** The Plaintiff was unable to take judicial measures, given that it was dealing with the State and requested the latter to refrain from bringing a legal action or disturbing the quiet enjoyment. Therefore, the Plaintiff filed a criminal complaint and requested assistance from the administrative authority to enable it to take over the plot of land.
- 13-16.** The Plaintiff's right to apply the arbitration clause was not extinguished by prescription.
- 13-17.** The contracts were concluded by the Plaintiff to gain time, given that the land area and borders were known and the Plaintiff was waiting for taking over the land.
- 13-18.** The Defendants' statement that the Plaintiff violated Law No. 5 of 1997 on Investment and Law No. 7 of 2004 on Tourism, is erroneous. Furthermore, their statement that the requirements for applying the Unified Agreement for the Investment of Arab Capital in the Arab States were not met, is also erroneous, given that the Plaintiff invested funds in Libya and the contract did not stipulate the need to resort to conciliation prior to arbitration. However, the Plaintiff attempted to reach an amicable settlement prior to resorting to arbitration.

- 13-19.** The Plaintiff is entitled to seek compensation for the damages it incurred, given that it submitted the designs, studies, timetable and drawings several times, and its position is in conformity with good faith.
- 13-20.** The Plaintiff exerted serious efforts to execute the project. It did not stop project execution willingly and has spent amounts of money in preparation for project execution.
- 13-21.** During the first stage, the Plaintiff claimed compensation for losses in the amount of five million US Dollars. The Administration refused this offer which did not encompass the lost profits for the loss of the project. Following the refusal of the Administration, the Plaintiff resorted to arbitration. The expenses referred to by the Plaintiff following the cancellation of the project, were spent in return for commitments made prior to the cancellation. The administrative expenses for the years 2006 and 2007 are established by the records which are still existent.
- 13-22.** The Plaintiff then claimed compensation in the amount of fifty million US Dollars for lost profits as estimated by the administration of the company and not in accordance with a professional accounting estimation made by experts. The Plaintiff claimed compensation for legal fees given that it resorted to arbitration following the refusal of the Defendants to reach an amicable settlement.
- 13-23.** Concerning the third stage of compensation value estimation, the Plaintiff referred in this regard to its previous responses in pages 26 and 27 and to its statements provided in the statement of claim.
- 13-24.** Regarding the Defendants' allegations with regard to the claim for compensation, at the fourth stage, estimated at two billion fifty five million five hundred and thirty thousand US Dollars, the Plaintiff's claim for compensation was based on four reports and not on assumptions as alleged by the Defendants.
- 13-25.** The reports that deduced the value of compensation for lost profits calculated the net profits for eighty two and a half years. The reports built on hypothesis linked to market rules on supply, demand, security and legislation, therefore:
- 13-25-1.** The report submitted by expert Habib El-Masri stated that the Libyan authorities terminated the contract without any just cause. The report does not show partiality, but the truth. It built honestly and truthfully on the data



provided by the Plaintiff. The statements made by the Defendants are erroneous and merely aimed at discrediting the report.

**13-25-2.** It is pointless for the Defendants to argue that the report submitted by Ernst & Young indicated that the latter was not fully aware of the agreement on the relationship with the Tourism Authority given that all the exhibits as well as the relationship, with respect to the factual and legal aspects, were fully presented to this expertise firm. The report covered all these facts. The Defendants further stated that the firm mistakenly assumed that there was another contractual relationship and that there was an important document determining the true nature of the relationship that the firm of Ernst & Young was not made aware of. No such document exists; the Defendants would have introduced it in the hearing. The notions and principles set out by every specialized professional firm are based on the financial statements that are submitted to it.

**13-25-3.** The attempt made by the Defendants to discredit the report submitted by expert Ahmad Ghatour & Partners is baseless, given that its indication to the Plaintiff distinguished international position is fact and does not show any partiality.

**13-26.** The Defendants' allegations regarding the expenses mentioned in all the reports are erroneous, given that the amounts spent by the company fall within losses incurred, including the amount of 130 thousand US Dollars spent on service fees. All these amounts spent have turned into losses incurred as a result of the cancellation of the project without just cause.

**13-27.** Concerning the report submitted by Khaled El-Ghannam from Prime Global, the Defendants indicated that the Plaintiff failed to submit statements on investment financial contributions and that the report was drawn up despite the absence of a project that achieved financial surplus and accumulated cash flows. This is erroneous, given that there was a project which was cancelled and the surplus in the form of accumulated cash flows has been assumed on the basis of the whole period of existence of the project throughout the agreed upon period, in order to estimate the lost profits incurred by the Plaintiff Company in accordance with the Libyan law.

**13-28.** In conclusion, the Plaintiff stated that the allegations made by the Defendants were all erroneous and contrary to the law and the facts. It further reiterated its previous requests seeking the rendition of an award in its favor requiring the

Defendants to pay the amount of /\$2,055,530,000/ two billion, fifty five million, five hundred and thirty thousand US Dollars as compensation for financial losses, lost profits, moral damages, arbitration costs and attorneys' fees.

**Chapter Fourteen: On the Complementary Legal Opinion submitted by the Plaintiff on 20/2/2013 and prepared by Dr. Burhan Amrallah regarding the rejoinder submitted by the Defendants on 6/2/2013:**

Concerning the facts of the dispute, the Complementary Legal Opinion referred to the Legal Opinion in the original Report dated 3/1/2013 and added, with regard to the arguments made by the Defendants, the following:

**14-1.** The rejoinder submitted by the Defendants on 6/2/2013 failed to bring anything new regarding the opinion on the Defendants' plea to the inadmissibility of the arbitration case for premature filing. In this regard, the Complementary Report on the Legal Opinion referred to the original Report on the Legal Opinion on pages 7 to 11, adding that:

**14-1-1.** Given that the provisions of Article 29 of the contract dated 8/6/2006, stipulated as a condition for the referral of the dispute to arbitration the impossibility of reaching an amicable settlement, they should be interpreted in good faith and the impossibility of reaching an amicable settlement would be the refusal by one of the parties of the solution deemed acceptable by the second party.

**14-1-2.** The exhibits of the claim prove that the Plaintiff sought to reach an amicable settlement while the third Defendant maintained its refusal of the terms and conditions of the amicable settlement brought forth by the Plaintiff. The Plaintiff also refused to take over an alternative investment site and asserted its request to be handed over the plot of land specified in the contract, subject of the dispute. Therefore, both parties refused the conditions brought forth by the other party for an amicable settlement, thus rendering such settlement impossible. Accordingly, pleading for the inadmissibility of the arbitration case for being filed prior to exhausting the routes to an amicable settlement is irrelevant.

**14-2.** Pleading that the arbitration clause may not be invoked against the State of Libya and the Ministry of Economy is unfounded given that the scope of the arbitration

clause may be extended to the State and the Ministry, as stated in the grounds set out in pages 11 to 14 of the Report on the Legal Opinion dated 3/1/2013. The Complementary Report on the Legal Opinion added that:

**14-2-1.** As a rule, the scope of the arbitration clause is extended to the parties that intervened or participated directly in the conclusion, performance or termination of the contract that encompasses the arbitration clause. This is the case with the Libyan State and the Ministry of Industry, Economy and Trade concerning the Decision No. 203/2010 cancelling the investment approval, given that this decision is not independent from the contract and was issued within the supervisory prerogatives of the Secretary of the People's Committee for Industry, Economy and Trade over the application of laws, said decision was issued to enforce the decision issued by the General People's Committee (Council of Ministers) dated 30/12/2009. The State of Libya, represented by the Council of Ministers, authorized the People's Committee for Tourism (Ministry of Tourism) to allocate the lands and sign the lease contracts thereof.

**14-3.** Regarding the applicability of the substantive provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States, the Complementary Report on the Legal Opinion considered that the substantive provisions of this Unified Agreement apply to the current arbitration dispute, given that the subject of the contract is an investment project using the funds of an Arab investor. The Complementary Report further indicated that the refusal to transfer a part of the project's investment value came as a result of the dispute arising from the failure to hand over the plot of land and nothing in the contract or the law requires the Plaintiff to transfer the project's investment value or a part thereof without the handing over of the plot of land free of occupancies and persons. The letter of the third Defendant dated 2/2/2010 on coordinating between the parties regarding the effective taking over of the plot of land was irrelevant in terms of the effective taking over of the plot of land given its inability to hand over the land following the issuance of the decision of the General People's Committee (Council of Ministers) on the cancellation of all rights established on this plot of land.

**14-3-1.** The Defendants stated that the contract only referred to the rules related to the arbitral proceedings in the Unified Agreement for the Investment of Arab Capital in the Arab States and not to the substantive rules. The Complementary Report disagreed with the Defendants on this point given that Article 30 of the contract concluded on 8/6/2006 provided for the legal rules applicable to the subject matter of the dispute, including the legislation in force in the Jamahiriya

and the conventions ratified by the Libyan State. This article determined the rules applicable to the subject matter of the dispute.

**14-4.** The legal nature of contract No. 4 dated 8/6/2006 is a complex nature; said contract falls within the category of B.O.T. contracts. The Defendants' argumentation does not contribute in changing the perspective of the author of the Complementary Report. The latter concluded in the Report dated 3/1/2013 that the B.O.T. contract is a Private Law contract, even if the Administration was party thereto, given that said contract is not related to an activity of a public utility in terms of organization and operation and does not include highly unusual clauses uncommon in Private Law contracts.

**14-4-1.** The subject of the contract is the establishment of a touristic project not intended to serve the public interest or meeting public needs.

**14-4-2.** Characterizing the contract as a B.O.T. contract does not necessarily imply to be characterized as an administrative contract, given that the contracts concluded by the State with the investor are not all of one nature, and are not subject to one legal system. Some are administrative contracts, while others are Private Law contracts similar to the contract subject of the dispute given that said contract is not related to a public utility and does not include highly unusual clauses uncommon in Private Law contracts.

**14-4-3.** The International Law does not necessarily consider the contract concluded by the State as an administrative contract. The fact that the State is a party thereto does not characterize it as an administrative contract. International Law does not distinguish between administrative contracts and other types of contracts. There are no international legal rules specific to contracts deemed administrative according to the criteria of internal or national law. Furthermore, there are no international judicial authorities specialized in looking into disputes related to such contracts.

**14-4-4.** The contract dated 8/6/2006 can be characterized as an administrative contract, either because it is a Private Law contract or an international contract related to international trade. This contract was concluded as per the methods followed in Private Law contracts. The Administration did not resort to a call for bids or to public bids. This contract also included an arbitration clause and did not provide for the jurisdiction of the Administrative Courts to settle any dispute that might arise therefrom. The provision of Article 8 therein which provides that the third Defendant may clear the plot of land by way of administrative means is a

reiteration of the provision of the law on the Protection of the State Property in the event of its occupancy without any legal basis. This provision only applies following the termination of the contract, subject of the dispute. The provision of Article 11 of the contract on consideration given to the designs and general planning adopted for the region, is a reiteration of the conditions set out in the laws and regulations of the State on building permits irrespective of their owner. The arbitration clause set out in Article 29 of the contract reveals the parties' will to ensure that these permits are subject to Private Law rules. The arbitration clause further ensures equality between the two parties to the contract and ascertains that any disputes arising therefrom would fall outside the jurisdiction of the State courts.

**14-5.** On the contractual liability of the Defendants, the Complementary Report referred to the Report dated 3/1/2013, while stating its disagreement with the rejoinder submitted by the Defendants on 6/2/2013 which indicated that the minutes of handing over and taking over of the touristic investment site dated 20/2/2007 released the third Defendant of its obligation to hand over the project site, given that the contract aimed to enable the Plaintiff to control the site without any physical or legal impediments, a requirement which was not met. The letter of the third Defendant sent to the Plaintiff dated 2/2/2010, in which it requested coordination for the effective taking over of the site clearly proves that effective handing over did not take place prior to this date.

**14-5-1.** Article 7 of the contract, subject of the dispute, stipulated that the rent shall be due thirty days following the date of taking over of the plot of land. It was proven without any doubt that no effective handing over took place and therefore the rent cannot be considered due. The exhibits of the case do not indicate that the third Defendant requested the Plaintiff, prior to the dispute, to pay any amount of money in consideration of the alleged usufruct. Therefore, the Complementary Report disagrees with the position of the Defendants asserting that the Plaintiff failed to fulfill its obligation of paying the fees in consideration of the usufruct right.

In conclusion, the Complementary Report stated that the opinions mentioned therein reflect the views of the author of the Report, relying solely on his own knowledge and on documents provided to him.

## **Chapter Fifteen: On the statements of the Plaintiff in its final submission dated 20/2/2013 submitted by its counsel, Dr. Nasser El-Zaid in response to the rejoinder submitted by the Defendants on 6/2/2013:**

The Plaintiff started its final submission with a series of observations:

**First Observation:** The Libyan Investment Authority is the fifth Defendant to be joined as a party.

**Second Observation:** The rejoinder submitted on 7/2/2013 by the Defendants is similar to the “minutes of handing over and taking over” which title has been found inconsistent with their content.

**Third Observation:** The rejoinder submitted on 7/2/2013 is actually a repetition of the Defendants’ statement of defense submitted on 22/11/2012.

**Fourth Observation:** The final submission completely ignores all the evidence and exhibits submitted by the Plaintiff concerning the assaults against its workers when they attempted to enter the land, and of all the obstacles imposed by the Defendants to prevent the taking over of the project site.

**Fifth Observation:** The final submission is based on the “minutes of handing over and taking over of an investment site” and on which are founded 175 pages to say that the Defendants had handed over the land but the Plaintiff did not start the works, and therefore they are legally entitled to cancel the license, while they could have summarized their statements in two pages.

**Sixth Observation:** The Plaintiff considers that the Defendants are citing laws in dozens of pages pursuant to which they are allowed to cancel the license if the investor fails to execute the works on time, while completely ignoring replies with supporting evidence confirming its liability vis-à-vis the non-handing over of the land, which has delayed the execution.

**Seventh Observation:** Instead of answering the arguments raised by the Plaintiff, the final submission continues in affirming that the recreational touristic resorts of the project, including hotels, restaurants, movie theatres, etc... are public utilities established for the public interest.

**Eighth Observation:** The dozens of pages that list laws fail to answer the Plaintiff's arguments stated in its replication of 3/1/2013.

Ninth Observation: The Defendants have ignored the four experts' reports on the lost profits and only attacked the four experts, distorted some of their sayings, and attributed to them words that they have not said, without answering the expertise by any other expertise.

#### **15-1. On the jurisdiction:**

**15-1-1.** The Plaintiff has initiated a number of amicable endeavors over a period of five months aiming at settling the dispute with the Libyan Government, the Ministry of Economy and The General Authority for Investment and Ownership; however, all attempts have failed and consequently led to the application of the arbitration clause. This can be proved by the number of letters sent by the Plaintiff calling for a meeting with the Defendants to discuss the circumstances and reasons behind Decision 203 cancelling the project and the means for reaching a solution.

All these initiatives made by the Plaintiff cannot be described but as attempts to settle the dispute amicably. Nevertheless, the Libyan Administration, i.e. the Defendants, has from the very beginning, closed the door on any amicable settlement that could possibly be successful and applicable. Accordingly, the Defendants can no longer plead the inadmissibility of the arbitration case because it had been filed prematurely before resorting to an amicable settlement; knowing that the Defendants themselves had closed the door on these initiatives despite the Plaintiff's numerous endeavors in this regard.

In such a situation, the arbitral proceedings set forth in Article 29 of the lease contract dated 8/6/2006 have been respected. The Administration did not reply the letters sent by the Plaintiff about the reasons for issuing the decision cancelling the investment approval relating to the project; and despite the notice sent to the Defendants through the court bailiff dated 13/9/2010, the Plaintiff kept the door open for negotiating and finding an amicable settlement.

On 9/11/2010 a meeting between the Head of the Administration Committee of the General Authority for Investment and Ownership and the Company's attorney was held but did not reach any solution as the Defendants admitted that it had lost control over the land and thus declared its inability to hand over the land.

In light of all the established and accurate facts, it becomes clear that the Defendants did not originally want any settlement, let alone an amicable settlement of the dispute, and that all the efforts and endeavors initiated by the Plaintiff seeking an amicable settlement have been in vain due to the extreme indifference of the Defendants. Therefore, the current case has been filed in due

time pursuant to the procedures set forth in the arbitration clause and shall not be considered premature as claimed by the Defendants. And accordingly, the Defendants' plea to the inadmissibility of the arbitration case due to its premature filing and their request to stay the proceedings pending the initiation of the valid procedures relating to the amicable settlement of the dispute are, therefore, to be rejected since said procedures for amicable settlement have actually been carried out but never reached a solution and the arbitration case has been filed in due time.

**15-1-2.** The Plaintiff also confirms that the scope of the arbitration clause is extended to the Libyan Government, the Ministry of Economy, the General Authority for Investment Promotion and Privatization Affairs and the Ministry of Finance. The Plaintiff also requests in its final submission to join the Libyan Investment Authority as a fifth Defendant.

The Plaintiff Company does not deny that the Tourism Development Authority, signatory of the contract, enjoys the status of a legal person, yet it remains a governmental institution affiliated to the Libyan State, empowered by virtue of Article 2 of the General People's Committee Decision No.87 of 2006, to allocate the Libyan State properties registered in the name of the Libyan State as touristic regions to establish investment projects and conclude lease contracts with investors in accordance with general planning. This Institution constitutes an extension of the Libyan State and is totally subject to the direct control of the Minister.

The General People's Committee Decision No. 87 of 1375 a.P. (2007), establishing the General Authority for Tourism and Traditional Industries as a result of a merger of the Tourism Development Authority and the Traditional Industries Development Authority into the General Authority for Tourism and Traditional Industries, explicitly determines in Article 1 the nature of "the General Authority for Tourism and Traditional Industries" as having the status of a legal person and enjoying financial autonomy affiliated to the General People's Committee, which actually means the Libyan State. This is also confirmed in Article 9 of Decision No. 87/2007 which provides that the financial resources of the General Authority for Tourism and Traditional Industries include its share of financial allocations in the State Budget, which in itself is conclusive evidence that the General Authority for Tourism and Traditional Industries is the Libyan State. The Plaintiff continues its analysis by saying that pursuant to Article 15 of Decision No.87/2007, the powers delegated to the General People's Committee for Tourism related to investment and set forth in the aforementioned Law No. (7) of 1372 a.P. shall be transferred to the General Authority for Investment Promotion, and all contracts, rights, and obligations concluded in the touristic investment field by the General People's



Committee for Tourism and the Tourism Development Authority shall be transferred to the General Authority for Investment Promotion, and the latter shall replace them in their rights and obligations alike.

The General People's Committee Decision No. 150 of 2007 "on the reorganization of the General Authority for Investment Promotion" which was issued based on Decision No.87 of 2007 "on the establishment of the General Authority for Tourism and Traditional Industries", provides in Article 2 that the General Authority for Investment Promotion is a public authority having the status of a legal person and enjoying financial autonomy and is affiliated to the General People's Committee for Economy and Investment.

Article 4 of Decision No. 150/2007 provides that the General Authority for Investment Promotion is competent, inter alia, in implementing the general investment policy in the Great Jamahiriya.

By virtue of the Decision of the Council of Ministers No. 364/2012 amending Article 1 of Decision No. 89/2009 Heg. on the establishment of the General Authority for Investment and Ownership, the latter's name has become the "General Authority for Investment Promotion and Privatization Affairs" which is a legal person enjoying financial autonomy but affiliated to the Ministry of Economy, and is competent to organize and control investment and privatization affairs.

The principle of privity of the arbitration agreement is offset by the principle of the extension of the arbitration clause to third parties other than the signatory parties in order to maintain the effectiveness of arbitration.

In a recent decision rendered by the Court of Appeal in Paris on 17 February 2011 in Dallah case, the court considered that the arbitration clause extends to a third party that did not sign the contract based on the alter ego concept.

And even if the Legislator vested the head of one administrative unit with the authority to represent it, it shall be in the framework of the internal organization of the administrative unit and the distribution of functions therein. The head of the unit shall remain subject to the authority of the Minister, his hierarchical superior, and shall work under his supervision. Accordingly, despite the representation of the General Authority for Investment Promotion and Privatization Affairs by the Secretary of the Administration Committee before the courts, and in its relations with third parties, known as "procedural capacity", the Authority remains affiliated to the Ministry of Economy, as explicitly set forth in Article 1 of the Council of Ministers' Decision No.364 of 2012.

In light of the above, the Libyan State is a party to the arbitral proceeding whether it is mentioned that the plot of land is a public property or not, because the parties contracting with the Plaintiff Company are governmental institutions and constitute parts of the Libyan State.

Moreover, by virtue of Article 1 of the General People's Committee Decision No. 322/2007 amending a provision of the Regulation on the Budget, Accounts, and financial organizations and establishing other provisions, the State Budget shall include financial allocations for the enforcement of final judicial decisions rendered against the state-funded public entities. Among these entities funded by the Libyan State Budget is the General Authority for Tourism and Traditional Industries.

Therefore, it is conclusively proved that the General Authority for Tourism and Traditional Industries is the Libyan State.

The Libyan Ministry of Finance is bound by virtue of the Law on the State Financial System and the General People's Committee Decision No. 322/2007 to enforce the final judicial decisions rendered, inside and outside the country, against Libyan public entities funded by the Libyan State Treasury, hence the Plaintiff deems it right to join the Libyan Ministry of Finance as a fourth Defendant to the current case.

In addition, the Plaintiff would like to clarify to the Arbitral Tribunal that it is necessary to join the Libyan Investment Authority to the case as a fifth Defendant. The Plaintiff had indicated the reasons of the said requested joinder in the introduction of its final submission (first observation). The Libyan Investment Authority is a financial investment institution having the status of a legal person and enjoying financial autonomy; it is affiliated to the Secretariat of the General People's Committee, i.e. the Libyan State. The General People's Committee shall decide, on the proposal of the Council of Secretaries, to increase or decrease its capital. The said institution seeks to invest the funds allocated to it by the Secretariat of the General People's Committee, to ensure the development of these funds, achieve appropriate financial revenues, diversify the sources of national income, and consequently, and to support the State Treasury resources on an annual basis and curb the effect of income and oil returns fluctuations. The Libyan Investment Authority is responsible for managing and investing the funds of entities affiliated to the Libyan state, i.e. the funds of the Libyan State itself, and is empowered to amend the fundamental laws and decisions organizing the work of the entities managed by it as per Article 5 of Decision 205/2006.

**15-1-3.** The Plaintiff continues by emphasizing Article 29 of the contract stating that said article has been made in accordance and conformity with the express will and common intention of the parties. The subject of the arbitration clause is the interpretation and performance of the contract. And as the term "performance" necessarily covers the "non-performance", i.e. the obligation to resort to arbitration in the event of non-fulfillment of an obligation, similarly, said clause necessarily covers the effects of the non-performance, among which is the

claim for compensation, and therefore conferring jurisdiction on Arbitral Tribunals in this matter, should no amicable solution be reached.

International public policy forbids legal persons to have recourse to internal legal texts in force, whether in the positive law or the law governing the contract, to evade the arbitration clause. The arbitration clause shall therefore be considered valid and all the assertions of the Defendants on the need to annul the administrative Decision No. 203 before resorting to arbitration are null and as they contradict the principle of good faith and should be rejected. Decision No. 203 of 1378 a.P. cancelling the investment approval granted to the Plaintiff Company is an administrative decision that is not separate from the contract setting forth the arbitration clause and may be challenged before the Arbitral Tribunal.

The Libyan Supreme Court has established in a ruling issued on 5/4/1970 to empower the arbitrator to look into the reasons of terminating the contract in order to balance out the Administration's power to terminate the contract and the Contracting party's right to compensation. The principle of autonomy of the arbitration clause makes this clause applicable regardless of the termination or not of the contract stipulating it as a result of an administrative decision.

Moreover, Decision No. 203 of 1378 a.P. (2010 A.D.) is illegal as it contradicts the provision of Article 23 of Law No. 9/2010 on the Promotion of Investment, and the provision of Article 23 of Law No. 5/1426 Heg. (1997) on the Promotion of Foreign Capital Investment. By taking this arbitrary decision, The Defendants have initiated procedures that have the same effect of freezing and confiscating the investment project, in violation of an explicit provision of the Law on Investment prohibiting them from initiating such procedures unless by virtue of the law or judicial ruling, and against an immediate equitable compensation. Therefore, the Defendants have failed to meet their obligation to enable the Plaintiff from taking over the project site free of occupancies and impediments. By taking said decision to initiate procedures that have the same effect of confiscating and freezing the project, the Defendants have also violated the Libyan Law on Investment through submitting the project to procedures that have the same effects of freezing and confiscation.

Decision No. 203 of 1378 a.P. (2010 A.D.) is also illegal as it builds on Law No. 5 which was at the time abrogated, i.e. non-existent instead of building on the applicable Law No. 9.

**15-1-4.** The dispute is governed by the Libyan Law because both parties have agreed to apply this law and because Libya, by adhering to the Unified Agreement for the Investment of Arab Capital in the Arab States and signing it, has incorporated the said Agreement into the Libyan Legal System as an integral part

of the Libyan Law, whether the international or regional conventions prevail over the laws or the Libyan legal system itself. Article 3(2) of the Unified Agreement for the Investment of Arab Capital in the Arab States provides that the provisions of the Agreement shall have priority of application in instances where they conflict with the laws and regulations in the State Parties. Consequently, Libya's ratification of the Unified Agreement for the Investment of Arab Capital in the Arab States has made the Agreement binding and enjoying the force of any Libyan law.

The Unified Agreement for the Investment of Arab Capital in the Arab States shall totally apply to this arbitration whether its application is stipulated or not in the contract or in the arbitration clause; by applying the Libyan Law, the said Agreement shall be automatically applied.

The will of the parties stated in the arbitration clause in Article 29 of the contract expressly requires the application of the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States issued on 26 November 1980, including the provisions on the arbitral proceedings for the settlement of the dispute between the parties. Therefore, the Unified Agreement for the Investment of Arab Capital in the Arab States shall prevail in issues relating to Arab capital investment, whether the contract or the arbitration clause provides, or not, for referral to the Unified Agreement.

The compensation due to the investor shall be made in accordance with Article 10 of the Unified Agreement for the Investment of Arab Capital in the Arab States which provides that the Arab investor is entitled to compensation for damages which he sustains because of a State party or one of its public or local authorities or institutions, and in accordance with Article 224 of the Libyan Civil Code which provides for the evaluation of the damages that include the losses incurred by the creditor as well as his lost profits. Consequently, all the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States shall apply to settle the dispute.

**15-1-5.** Concerning the legal characterization of the contract, The Libyan Supreme Court has established three conditions that should be fulfilled in order to consider the contract as an administrative contract. The first condition requires one of the contracting parties to be a person of the Public Law; the second relates to the organization or operation of a public utility, while the third requires that the contract includes highly unusual clauses that are not common in Private Law contracts.

The first condition is satisfied since the Defendant is a legal person of Public Law. However, the Administrative court ruled in Challenge No. 870/5 J, dated December 9, 1956 that not every contract concluded by the Administration is

automatically considered an administrative contract. The administration often chooses to enter into contracts governed by Private Law.

Contrariwise, the second condition is not satisfied: the project of building a hotel and other lucrative recreational areas does not involve serving any public interest or performing any public service. Therefore, the public interest does not apply in this context.

As for the third condition requiring highly unusual clauses, it is also not satisfied. The preamble of the contract does not set forth any restriction prohibiting the Plaintiff from establishing other projects. The specific timeframe for the project execution cannot be considered as a highly unusual clause because the project is not related to one operation only, and this clause is found in the majority of civil law contracts for the purpose of expediting the execution. The prohibition of waiving or transferring rights and obligations to third parties without the approval of the Administration is nothing but an implementation of the *intuitu personae* whereby consideration is given to the person when choosing the contracting party based on his technical qualifications, financial capacity, and good reputation, which means that the contract is concluded *intuitu personae*, a characteristic found in Private Law contracts. Moreover, Article 8 of the contract requires the Administration to address a notice to the second party to pay within 30 days in case the latter fails to pay the fees in consideration of the usufruct in due time; Yet it **did not** empower it to terminate the contract without prior notice unless the second party fails to pay within the thirty day period. Also, Article 24 does not grant the Administration the right to terminate the contract unless the second party fails to start the project execution within three months following the receipt of the license to execute the project, and does not submit a written justification to avoid the termination of the contract. The same applies to the other highly unusual clauses mentioned in the Defendants' statement of defense, including establishing a project on a state-owned land, the technical control and supervision by the Administration, the use of local materials, tools, employment of national labor force, and the timely handing over of the project in an operational state without the possibility of claiming compensation against the amounts spent for the execution. None of the mentioned clauses may be categorized as highly unusual clauses, which pursuant to the doctrine, burden the contracting parties with obligations unlike those freely agreed upon by the contracting parties under the civil and commercial laws, or those usually not found in contracts concluded by individuals, considered null for violating the public policy, or considered null in the Private Law and which individuals cannot incorporate in their contracts. The disputed contract does not set forth but common clauses, freely agreed upon by the contracting parties under the civil and commercial laws.

Although a legal person of Public Law is a party to the contract, the contract neither involves a public interest nor includes highly unusual clauses as per the jurisprudence and doctrine position vis-à-vis the highly unusual clauses submitted in the Plaintiff's final submission. Thus, the contract is a Private Law contract concluded between parties of equal will and where the Libyan Administration has abandoned its privileges and powers, hence the equal standing of Defendants and Plaintiff; consequently, the contract-related-disputes shall be subject to Private Law.

The Defendants claim the administrative nature of the contract in view of its Article 30 referring to the provisions of Law No. 5 amended by Law No. 7 on the Promotion of Foreign Capital Investment. However the Plaintiff reiterates that Article 30 of the contract mentions the application of the Libyan law, including Law No. 5/1997 on the Promotion of Foreign Capital Investment and its executive regulations or Law No. 7/2004 on Tourism, along with its executive regulations, and other legislation in force, for issues not explicitly regulated by the contract.

Law No. 5 amended by Law No. 7 on the Promotion of Foreign Capital Investment has empowered the investor with rights that the laws in force have failed to grant, especially in terms of the investor's exemption from the income taxes for a period of 5 years and from the material import tax throughout the project execution and during the first five years of operation.

Thus this law has given the foreign investor a number of guarantees and privileges.

By simply submitting the contract signed by and between the Plaintiff and Defendants to Law No. 5 on Investment, it becomes even more evident that the disputed contract is not an administrative contract.

In fact, the contract is a BOT contract of special nature for the Plaintiff considers that the project does not serve a public interest, the disputed investment contract is not related to a public utility and is does not include any highly unusual clauses, its clauses being balanced and common. The project starts with a funding from the investor who leases a state-owned plot of land located in Tajura for a 90-year-usufruct period for the purpose of establishing the investment project and exploiting it for 83 years. The contracting Department shall, at its own expense and prior to the handing over of the land, help in providing access and services mentioned within a period not exceeding 6 months as of the contract date. Similarly, the Department shall help the Plaintiff Company in searching for the appropriate locations to accommodate its workers and store its equipment and guarantee the non-disturbance of possession throughout the contract period. The Plaintiff undertakes to hand over the project in its entirety to the Defendants in an operationally sound state at the end of the lease period.

**15-1-6.** Article 30 of Law No. 9/1378 a.P. (2010 A.D.) on the Promotion of Investment is by itself sufficient to consider that the guarantees decided for the project by virtue of Law No. 5/1426 Heg. are still valid; said Article provides that the executive regulations and decisions issued under the mentioned laws remain applicable without violating the provisions of this law.

**15-2- On the legal grounds of the arbitral proceedings initiated by the Plaintiff:**

**15-2-1.** The Defendant relies on the “minutes of handing over and taking over of an investment site” dated 20/2/2007 to assert that the Plaintiff Company has taken over the land. However, the title of the document is not consistent with the content thereof and is not even related thereto. The said minutes present information on the investment site and its delimitation. The Egyptian Court of Cassation has decided in two rulings issued on 22/6/1977 (Cassation, 28<sup>th</sup> year, page 1470 et seq.) and on 28/12/1971 (Cassation, 22<sup>nd</sup> year, page 1115) that “the criterion in characterizing the contracts relies in what the parties to these contracts have wished to express and not in the title they have attributed to them or in the terms they have included therein, if these titles or terms are found to be violating the reality inherent to the contract and the underlying intention of the contracting parties”... “The rule in characterizing a contract is the real intention of the parties to the contract which shall be determined by the court of merits, and whenever this court determines the true intention of the contracting parties, it shall be required to give the said intention the appropriate legal characterization independently from the characterization given by the contracting parties”. Thus, the Defendants have only considered the apparent intention of the minutes signatories (title of the minutes: “minutes of handing over and taking over of a touristic investment site”) without trying to seek their real intention (minutes of site inspection and borders delimitation).

**15-2-2.** The Defendants have failed to fulfill their obligation set forth in the contract concluded on 8/6/2006. They have not only failed to hand over the land, but also established in-kind rights thereon. The land was occupied by a number of containers, pipes, and equipment belonging to the Company for Building and Construction guarded by a group of individuals, in addition to a building consisting of a cafeteria under the name of Nakhle coffee shop owned by Ibrahim Abdel Salam Abu Zahir and Abdel Raouff Ahmad Akrim who claim that they hold a twenty-five year contract of usufruct concluded with Al Tahrir Sports and Cultural Club in Tajura. Furthermore, other citizens were claiming ownership of parts of the land. Therefore, the Defendants’ cynical question “Is it possible that a small cafeteria and a number of pipes and containers prevent a high caliber company

such as the Plaintiff Company renowned for its high professional expertise in the field from executing a touristic investment project including a five-star tourist hotel, a commercial center, residential units, restaurants, and recreational areas of an investment value amounting to USD 130 million, on a 240 000 sq m plot” cannot be but positively answered. The existence of the building, described by the Defendants as “small” is a blatant violation of its obligation to hand over the land free of occupancies. This statement confirms by the very words of the Defendants themselves that the Defendants have failed to perform their contractual obligations to hand over the land; they have instead imposed obstacles to prevent the Plaintiff from executing the project and remained passive towards these obstacles. It became evident to the Plaintiff, through the Department of Real Estate Registry records that a contract of sale of the land ownership and usufruct right had been deposited therein to the benefit of the Umma bank and that the plot is registered in the name of the said bank. The municipal guards also stopped the erection of a fence around the land despite that the license was valid, and the workers were assaulted and obliged to stop the erection of the temporary fence. The Defendants had even admitted (through the General Authority of Tourism) in its letter dated 12/11/2007 to the Office for the Implementation of Housing Projects and Facilities that the plot of land allocated to the Plaintiff Company contains special equipment for paving, illumination, and rain water draining projects... Hence, all of the above facts cannot but indicate the bad faith of the Defendants and their violation of the contract and of their obligation to hand over the land free of impediments.

**15-2-3.** In an attempt to disprove its violation of Law No. 5/1426 Heg. on the Promotion of Foreign Capital Investment (replaced by Law No. 9/1378 a.P. (2010 A.D.) on the Promotion of Investment), the Defendants relied on Article 1 (or Article 3 in Law No. 9/2010 A.D.) and Article 6 (or Article 6 in Law No. 9/2010 A.D.) of this law.

After careful perusal of the content of the two-abovementioned articles, the Plaintiff wonders how the Defendants have relied thereon to defend their illegal act of cancelling the investment approval after being granted to the Plaintiff, especially that these articles are intended to promote foreign capital investment for the purpose of establishing investment projects and to provide all possible means of attracting foreign capital.

The Defendants also referred to Article 3 of the law (or Article 1 in Law No. 9/2010 A.D.) to deny the presence of foreign capital. However, its analysis is erroneous because the purpose of Article 3 defining foreign capital and investment project is to clarify the meaning of the two terms and to establish the difference between them and local capital and non-investment projects. The



capital that the Plaintiff will invest in throughout the contract period is, as per the definition of Article 3 of the law, a foreign capital, whether transferred to the country or pending its transfer thereto.

**15-2-4.** The plea to the non-performance maintained by the Plaintiff is attributed to the Defendants' failure to fulfill their contractual or non-contractual obligations; it does not, in any way whatsoever, constitute an acknowledgement by the Plaintiff of the non-performance of its own obligations.

**15-3. On the legal and factual grounds of the Plaintiff's claim for compensation:**

The Defendants stated that it did not commit any fault that causes damages to the Plaintiff, and that it did not contradict any of the Libyan laws, especially Law No. 5/1426 Heg. on the Promotion of Foreign Capital Investment, Law No. 7/1372 a.P. on Tourism and its executive regulations, and law No. 9/1378 a.P. (2010 A.D.) on the Promotion of Investment.

As for Decision No. 203/1378 a.P. (2010 A.D.) cancelling the investment approval granted to the Plaintiff, the Defendants have stated that it has been issued in accordance with the Libyan laws applicable to the investment.

**15-3-1. On the contractual fault:**

The Plaintiff ascertains that the Defendants have committed a contractual fault by violating Article 5 of the contract which provides for the first party's (the governmental entity) obligation to hand over the investor a plot of land free of any occupancies and persons.

**15-3-2. On the delictual fault:**

**15-3-2-1. On the violation of the Libyan legal obligation to perform the contract in good faith:**

The Libyan Civil Code upholds, in Article 148, the principle of good faith in the performance of contracts. The doctrine and jurisprudence also underline the need for good faith in the fulfillment of the obligations arising from bilateral contracts, and consequently in the performance of the entire contract. Indeed, in the current case, the principle of good faith shall direct the Libyan State to abide by the provisions of the Public International Law, especially the international agreements, and particularly the provisions of the UN charter and the principles set out in Article 2 thereof: sovereign equality, fulfillment of obligations in good faith, develop friendly relations among nations based on economic, social, political, and cultural cooperation.

Therefore, the Defendants have violated this legal obligation by failing to enable the Plaintiff to take over the land free of occupancies, not to mention that the police and municipal guards have assaulted the Plaintiff's workers and prevented them from taking over the land and accessing it to initiate and expedite the execution of works. The Decision of the Minister of Economy annulling the decision granting approval to establish the investment project on the grounds that the Plaintiff did not initiate project execution, does not also reflect any observance of the principle of good faith but rather reveal a flagrant bad faith.

**15-3-2-2. On the violation of the Unified Agreement for the Investment of Arab Capital in the Arab States:**

By issuing the arbitrary decision cancelling the investment project license, the Defendants have violated the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States, particularly Article 2 thereof. The said arbitrary decision that is legally nonexistent, as it is based on a law cancelling the contract and which is also based on a contractual and delictual fault as it violates the Law on Investment, violates as well the Unified Agreement by failing to grant the necessary facilitations and guarantees to the investor (the Plaintiff in this case)... It has actually done the opposite by imposing obstacles and creating impediments that even the police and the municipal guards have assaulted the Plaintiff's workers when they attempted to enter the site to duly and legally prepare its taking over prior to the commencement of the works.

**15-3-2-3. On the violation of the Foreign Investment Law No. 5/1997 (replaced by Law No. 9/1378 a.P. (2010 A.D.) on the Promotion of Investment):**

The withdrawal of the license is subject to conditions (Article 19 of Law No. 5/1426 Heg. Corresponding to Article 20 of Law No. 9/1378 (2010 A.D.)). Therefore, the Libyan State is not free at all of its acts. There are conditions that govern the withdrawal of licenses and these conditions have not been satisfied, as the land was not even handed over at the first place to start the project execution.

By issuing Decision No. 203/2010, the Defendants have also violated Article 23 of the said law (corresponding to Article 23 of Law 9/1378 a.P. (2010 A.D.) on the Promotion of Investment), as they have adopted measures having the same effects of confiscating and freezing the investment project, which contradicts an explicit text of the Law on the

Promotion of Investment prohibiting the adoption of such measures. Thus, the Defendant – the governmental entity – has committed a delictual fault by breaching the law in addition to the contractual fault by breaching the contract.

**15-4- On the Plaintiff's position vis-à-vis the submission of the project final designs:**

**15-4-1.** In response to the letter of the Secretary of the General Authority for Tourism and Traditional Industries dated 1/7/2007, in which he underlines the requirement to submit a detailed timetable for the stages of the project execution in addition to the designs required for the project at the soonest possible, the Plaintiff has requested, on 1/8/2007, to be informed about a number of issues. It explains that the very short timeframe given for the project execution necessitates the concerted efforts of all relevant official authorities. Yet, the lack of cooperation from the side of the Defendants was the main reason behind the non-execution of the project.

**15-4-2.** In response to the letter of the Director of the Department for the Development of Touristic Areas at the General Authority for Tourism and Traditional Industries dated 11/7/2007, the Plaintiff has requested on 29/7/2007 from the Director of the Department for the Development of Touristic Areas to promptly inform it of the actual date of taking over the land in order to incorporate the date in the project timetable, and on 2/9/2007 the Plaintiff submitted the timetable explaining the course of the project execution and mentioning that it is contingent upon the handing over of the project land free of all occupancies.

**15-4-3.** In response to the letter of the Director of the Department for the Development of Touristic Areas and Head of the permanent working team at the General Authority for Tourism and Traditional Industries in which he mentions the meeting of 11/9/2007 and reiterates his request for the Plaintiff to submit the designs prior to 4/11/2007, the Plaintiff said that Paragraph 3 of the letter sets forth the requirement of preparing a scale model of the project only if the designs are final and approved. Consequently, and since the designs were yet to be finalized and approved for the above stated reasons, the Plaintiff has not violated the requirement set out in Paragraph 3 as alleged by the Defendants trying to mislead the Arbitral Tribunal. It is also worth noting in this context that the Plaintiff has completed whatever had been requested in all the other paragraphs of the letter.

**15-4-4.** In response to the letter of the Director of the Department for the Development of Touristic Areas and Head of the permanent working team at the General Authority for Tourism and Traditional Industries dated 12/11/2007 requesting the Plaintiff to submit the project designs in order to present them to the Technical Committee, the Plaintiff answered by addressing a letter to the Secretary of the General Authority for Tourism and Traditional Industries in which it informs him that the land is still occupied by a number of containers, pipes, and equipment, belonging to the Company for Building and Construction and guarded by a group of individuals, in addition to a small building consisting of a cafeteria under the name of Nakhle coffee shop owned by Ibrahim Abdel Salam Abu Zahir and Abdel Raouff Ahmad Akrim who claim that they hold a twenty-five year contract of usufruct concluded with Al Tahrir Sports and Cultural Club in Tajura. Furthermore, other citizens were claiming ownership of parts of the land. The Plaintiff Company mentioned that although the initial designs were ready, it has been unable to commence the execution of the project due to the above stated reasons, thus voicing its wish for intervention so as to enable it to take over the site free of all occupancies and start the project execution without delay since no positive measures were taken to remove the occupancies and impediments.

**15-4-5.** Concerning the license to execute the investment project, the license to operate the investment project and the establishment of the investment project, the Plaintiff considered the Defendants' allegation pertaining to the non-existence of the investment project due to the failure to satisfy the conditions of Article 7 of Law No. 9/1378 a.P. (2010 A.D.) and the failure to obtain a license to execute and to operate the project, as rejected; exhibit No.1 of the statement of defense confirms the approval of the Secretary of the General People's Committee for Tourism of the investment by Al-Kharafi Company to execute a touristic investment project, and the registration of the project in the Investment Registry (Decision No. 135/1374 a.P. (2006 A.D.) on the approval of the investment). This approval has generated a number of expectations in the favor of the investor that that law shall uphold; the conditions set forth in Article 7 of Law No. 9/1378 a.P. (2010 A.D.) and that are supposed to be either totally or partially satisfied have been actually satisfied: the project transfers the knowledge, modern techniques, and technical expertise to the country, uses the local raw materials, contributes to the development and improvement of remote areas, serves the needs of the national economy, and provides job opportunities for the Libyan citizens.

**15-4-6.** Concerning the issue of opening accounts in Libyan banks, the Plaintiff stated that the Defendants had personally declared that on 26/8/2006, the Vice President of the board of directors of the Plaintiff Company has opened an

account in his name at the Trade and Development Bank due to the existence of certain procedures requiring some time to get the approval of the Central Bank of Libya. The Defendants did not mention the fact that the bank account, opened in the name of the Vice President of the board of directors of the Plaintiff Company, was at the disposal of the latter, in order not to impede the process of transferring the funds necessary for the project execution. It should be noted here that the delay in opening the account in the name of the Plaintiff Company is strictly linked to the lengthy procedures required by the Central Bank of Libya, without the Plaintiff having any relation to this delay.

**15-4-7.** Concerning the transfer of the investment capital, it is indicated in Article 3 (6) of Law No. 5/1426 Heg. on the Promotion of Foreign Capital Investment and in Article 1 (5) of Law No. 9/1378 a.P. (2010 A.D.) on the Promotion of Investment, that the capital to be invested by the Plaintiff throughout the period of the contract is, according to Articles 1 and 3, a foreign capital whether it is already transferred to the country or pending its transfer thereto. Therefore, the non-existence of a foreign capital cannot be invoked.

**15-4-8.** Concerning the payment of fees in consideration of land usufruct, the Plaintiff stated that since it did not enjoy the use of the land by reason of the Defendants' violations and non-fulfillment of their contractual obligations, it shall be exempt from paying any fee in consideration of using and benefitting from the land that was never materialized. The Plaintiff had proved its good faith as it fulfilled its initial obligations required prior to the execution of the project, by paying 0.1% of the investment value, equivalent to USD 130 thousand, to the Treasury of the Libyan State.

**15-4-9.** Undoubtedly, the reasons that have prevented the Plaintiff from executing the project and starting the works are related to the violations committed by the Defendants especially after its own acknowledgement of all the issues preventing the initiation of the project execution (letter of the Director of the Department for the Development of Touristic Areas and Head of the permanent working team at the General Authority for Tourism and Traditional Industries dated 12/1/2009), the importance of the time factor, the reasons delaying the execution, and the duty of seeking a solution thereto.

#### **15-5- On compensation for direct damages:**

**15-5-1.** The Plaintiff requests compensation for material damages it had suffered. Material damages are the direct damages that actually and entirely occurred due

to the Defendants' deliberate and blatant contractual fault. The Defendants are liable by refraining from performing their obligations to achieve a certain result, i.e. handing over the land and enabling the Plaintiff Company to execute and manage its investment project and use it for 83 years as of the date of conclusion of the contract. Instead, the Defendants refrained from handing over the land, terminated the lease contract and canceled the investment approval despite the fact that the contract and the decision granting the investment approval were valid. The company was ready to execute and carry out all its subsequent obligations after performing the only obligation to be fulfilled in advance, i.e. paying 0.1% of the investment value (130 thousand US Dollars) to the Treasury of the Libyan State.

The Defendants' deliberate refraining from performing their obligations shall be considered a contractual fault that requires compensation to the Plaintiff Company for the direct damages it had suffered, given that the Defendants' fault was intentional, serious and tantamount to fraud, which grants the Plaintiff Company the right to claim compensation for direct damages. The Defendants' obligation is not only an obligation arising from a contract, but is also an obligation arising from tort because of this intentional fault, and that pursuant to Article 224 of the Libyan Civil Code which provides: "Compensation shall cover the loss incurred by the creditor as well as his lost profit provided that this is a natural consequence of the non-fulfillment of the obligation or the delay in its fulfillment".

**15-5-2.** The Plaintiff also requests compensation for moral damages it had suffered. Moral damages are the damages to the reputation and image of the trader. Any positive or negative rumor can affect the company's image and consequently its position in the commercial markets either for the worse or for the better.

**15-6.** The Plaintiff claims as well compensation for the lost profit as the lost profit is the profit that the creditor would have usually achieved if allowed to properly perform the contract. Lost profit (*lucrum cessans*) and actual damages (*damnum emergens*) are the two elements of compensation caused either by an offense or by the termination of the contract. This point of view is applied in both civil and administrative laws. International trade rules have recognized the creditor's right to obtain full and complete compensation for the damages suffered as a result of non-performance (Article 82 of the Uniform Law on the international sale of movable goods and Article 74 of the Vienna Convention on the International Sale of Goods in addition to Article 4.2.2 (1) of the Principles of International Commercial Contracts of the International Institute for the Unification of Private

Law (*Unidroit*) and Article 4.502 of the Principles of European Contract Law prepared by the Commission on European Contract Law). Compensation includes the loss incurred by the creditor and the profit lost. The Libyan Civil Code (Article 224) as well as a number of legal scholars and many Libyan and international jurisprudence recognize the right to compensation for the lost profit.

**15-7. On the payment of arbitration expenses and attorneys' fees:**

The Plaintiff considers that the Defendants are bound to pay arbitration expenses and attorneys' fees and that the Defendants' failure to pay their share of the arbitration expenses constitutes a violation of the contract, especially that the Plaintiff has already paid its share of the expenses. The Plaintiff has also stated that the Defendants have a history of violating the law and the contract, and they should not have mentioned this matter.

**15-8. On the reports submitted by accounting experts:**

The Plaintiff states that the Defendant claimed that these reports were based on assumptions, data and information provided by the Plaintiff Company, inferring that these information and data are not true and based on the client's assumptions, which leads to the invalidity of these reports. The Defendants also claimed that there was no investment project at first especially that the Plaintiff Company did not obtain a building permit, an execution license or a license to operate the project. The Plaintiff deems it necessary to reject all the allegations raised by the Defendants regarding the invalidity of the reports, and to consider the four reports submitted by international accounting experts to be fully valid. These four reports were submitted by internationally renowned expertise offices that analyze the lost profit through numbers and shall only be challenged by other experts who are able to discuss the exact numbers and figures contained in the reports and which the Defendants did not do.

**15-9. On the non-violation, by the Plaintiff, of Article 224 of the Libyan Civil Code relating to the obligation of preventing the aggravation of damages:**

The Plaintiff did not breach any of its contractual or legal obligations, including its obligation to exert reasonable efforts to prevent the damages. The various letters sent to the Defendants, in an attempt to reach an amicable solution to the issue of the impediments that have hindered the completion of the project, were to prevent direct, indirect or future damages, including material and moral damages and lost profit, for which the Plaintiff is seeking compensation in the current case. The element of damages is the same whether the contract is terminated now or after several years as it is

calculated on the basis of incurred loss and lost profit of the creditor for a period of 83 years of using and benefiting from the land.

**15-10. On the request to issue a summary final arbitral award to be immediately enforced:**

Due to the urgent nature of the present case that started nearly three years ago and the Plaintiff's rights still being ignored to date, the latter refers to Article 2 paragraph 8 of the Conciliation and Arbitration Annex of the Unified Agreement for the Investment of Arab Capital in the Arab States and Article 34 of the said Agreement which establish the final and binding nature of the arbitral award and of being immediately enforced.

Thus, the final arbitral award shall be in accordance with the Unified Agreement for the Investment of Arab Capital in the Arab States. The final arbitral award shall:

a- Not be subject to any means of recourse and therefore to annulment.

b- Be immediately enforced, i.e. it does not require a leave for enforcement but is enforceable in itself.

This arbitral award which is immediately enforceable does not require a leave for enforcement and any challenge thereto shall not stay the enforcement as long as the final award is final and not subject to any means of recourse.

The Libyan Code of Civil and Commercial Procedure established the principle of summary enforcement but limited it to the terms set out in Articles 379 et seq. Also, the Kuwaiti Code of Procedure established the principle of summary enforcement but limited it to the terms set out in Articles 195 to 198.

The Plaintiff reiterates that Libya and Kuwait are parties to the Unified Agreement for the Investment of Arab Capital in the Arab States, and said Agreement shall prevail when conflicting with the laws and regulations of the States Parties (Article 3, paragraph 2). Since Article 34 of the Unified Agreement for the Investment of Arab Capital in the Arab States does not conflict with the provisions of summary enforcement set out in the Libyan law (Articles 379 et seq. of the Code of Civil and Commercial Procedure) and in the Kuwaiti law (Articles 195 to 198 of the Code of Procedure). In case the abovementioned laws would conflict with the provisions of the Unified Agreement, priority shall be given to the provisions of the Agreement. Therefore, the arbitral award shall be issued as a summary award to be immediately enforced.

**15-11. On the requests of the Plaintiff:**

At the end of its submission, the Plaintiff requested that the five Defendants be compelled, *in solidum*, to pay by virtue of a summary final arbitral award immediately enforceable, the following:

1. An amount of 6.539.000 (six million five hundred and thirty-nine thousand Dinars) equivalent to 5.03.000 (five million and thirty thousand U.S. Dollars) according to the exchange rate traded on the same day at the Central Bank of



Libya, representing the value of losses and expenses of the Plaintiff Company's office that was opened in Tripoli following the issuance of Decision No. 135/2006. These losses are material damages reflected accurately through the budgets of the Plaintiff Company until the date of closing the office after more than four years, i.e. during 2006, 2007, 2008, 2009, 2010 as indicated in the statement of claim (exhibit 73 of the statement of claim).

**2.** An amount of 2,000,000,000 (two billion U.S. Dollars), representing an average of the lost profit of the company after taking into consideration the operation and management of the project during 83 years, according to the four financial reports annexed to the replication in response to the statement of defense (exhibits 30 – 31 – 32 – 33).

**3.** An amount of 50,000,000 (fifty million U.S. Dollars) in compensation of moral damages suffered by the Plaintiff Company for its reputation in the financial and business market in Kuwait and abroad. This amount is only symbolic given the reputation of the Plaintiff Company which is globally renowned, as indicated in the statement of claim (exhibit 72 of the statement of claim).

**4.** An amount of 500 thousand U.S. Dollars as reasonable estimated fees paid to the company's counsel since the start of the dispute and until the issuance of the arbitral award.

**5.** An amount determined by the Arbitral Tribunal equivalent to the arbitration costs and expenses paid by the Plaintiff in the present arbitral proceedings, especially that the Plaintiff had paid its share of the arbitration costs and expenses as well as the share of the Defendants that refrained from paying contrary to the requirements of the applicable rules of arbitration.

Thus, the total amount which the Plaintiff Company requests to be paid by virtue of a summary, final and binding arbitral award to be rendered against the five Defendants *in solidum*, shall be of 2,055,530,000 (two billion and fifty-five million five hundred and thirty thousand U.S. Dollars) as described previously.

**6.** Interests of these amounts at the applicable rate as of the date of the final and binding arbitral award until the date of payment and settlement.

**7.** The Plaintiff further requested the Tribunal to order the summary and immediate enforcement of the final and binding arbitral award in view of the urgent nature of the case and the gravity of the damage.

**Chapter Sixteen: On the Statements of the Defendants in their final submission dated 5/3/2013 to be submitted on 6/3/2013, in response to the Legal Opinion and memoranda submitted by the Plaintiff:**

The Defendants have submitted their final submission, in which they have stated that the Libyan Investment Authority was not a signatory party to the contract drafted on 8/6/2006 and therefore the arbitration clause may not be invoked against it in line with the personal scope of the arbitration clause as to the parties. Moreover, the Libyan Investment Authority did not directly contribute or participate in the conclusion or performance of the contract. It is an independent legal person and its functions are limited to investments outside Libya. The attempt to join the Authority as a party to the present arbitration case is unsubstantiated.

The Defendants reiterated its previous statements. Below is a summary of their final submission:

**16-1- Concerning the Jurisdiction:**

**16-1-1.** The Plea to the inadmissibility of the arbitration case raised by the Defendants for being prematurely filed is founded. The arguments presented in the Plaintiff's memoranda are unfounded, given that they confused between an amicable settlement and conciliation. The arguments made by the Defendants' Counsels are factually and legally founded, as well as the right interpretation given to the provision of Article (29) of the contract dated 8/6/2006 on the binding nature of this article relating to the amicable settlement, given that the use of this term is conclusive proof of the obligation of reaching an amicable settlement prior to arbitration which should only be the final recourse, following the impossibility of reaching an amicable settlement. The Complementary Report ascertains the obligation of reaching an amicable settlement and the documents referred to by the same are not related to any attempt to reach an amicable settlement. These documents do not include any conditions that have been submitted to the third Defendant for amicable settlement.

The Defendants have established that the Plaintiff Company retained the services of Counsel Rajab el-Bakhnug and sent a notice on 13/9/2010 to the third Defendant, thus ending all means to reach an amicable settlement. Furthermore, an amicable settlement is not reached by sending a notice, but through understanding and negotiations. Exhibits No. (59), (61), (62) and (30) of the docket submitted by the Plaintiff along with its statement of claim did not include any proof of any attempt to reach an amicable settlement. The third Defendant had

even suggested holding a meeting with its specialists to ensure the continuity of joint cooperation and investment.

In light of the above, the plea raised by the Defendants' Counsels regarding the inadmissibility of the arbitration case for being prematurely filed, is founded and based on factual and legal grounds. Article (29) of the contract provides for the intention of both parties to the dispute to seek an amicable settlement before resorting to arbitration. The will of both parties should not be violated in compliance with the principle of "*Pacta Sunt Servanda*". The Defendants maintained this plea yet again.

**16-1-2.** The Defendants' Counsels asserted that the arbitration clause stipulated in the contract dated 8/6/2006 may not be invoked vis-à-vis the State of Libya, the Ministry of Economy and the Ministry of Finance; this plea is well founded. Furthermore, this arbitration clause may not be invoked vis-à-vis the Libyan Investment Authority, given that it was not party to the contract. What is stated in the Complementary Legal Opinion on applying the rules of law governing all companies to administrative authorities enjoying the status of a legal person independent from the State is inadmissible. The present arbitration clause does not extend to the State given that it did not sign, contribute to the conclusion or termination of the contract dated 8/6/2006. The decision on cancelling the investment approval granted to the Plaintiff Company was not built on letter No. 11752. The said decision was issued in compliance with the Libyan Law on Investment which the Plaintiff Company had violated. Stating otherwise to invoke the arbitration clause mentioned in the contract dated 8/6/2006 against the Libyan State is in contradiction with the facts and the law, and aims to lay down an exception to a constant general rule without justification, i.e. the rule of the inadmissibility of extending the scope of the arbitration clause to the State in contracts concluded by a public administrative authority.

Furthermore, it may not be said that the decision cancelling the approval issued by the Ministry of Economy is a decision related to the investment approval decision No. 135/2006, to conclude that the arbitration clause extends to the Ministry of Economy as well. The contract and the arbitration clause stipulated therein are subject to the principle of the privity of contracts; i.e. the terms and conditions of the contract are only binding to the parties thereto. The decision cancelling the investment approval issued upon recommendation from the third Defendant ascertains that said decision is an administrative decision separate from the original contract and the arbitration clause stipulated therein. Stating that the arbitration clause extends to the Libyan State and the Ministry of Economy in Libya contradicts with the provisions of Article (152) of the Libyan Civil Code which provides that in the event the wording of the contract is clear, it is

inadmissible to deviate from its meaning by way of interpretation to identify the intention of the parties to the contract. Article (154) of the Libyan Civil Code also provides that the contract shall not impose obligations on third parties. Furthermore, not only does the arbitration clause not extend to the Libyan State and the Ministry of Economy, it also does not extend to the Ministry of Finance, given that it was not party to the contract in line with the personal scope of the arbitration clause as to the parties. Moreover, the General Authority for Investment and Ownership is not a public authority financed by the State Treasury and the Ministry of Finance is not concerned with the enforcement of final judicial judgments that might be issued against this authority. Additionally, the Libyan Investment Authority is not a signatory party to the contract drafted on 8/6/2006 and therefore, the arbitration clause may not be invoked against it. The Authority's functions are limited to the investment of funds in varied economic fields in a way that contributes to the development of national economy resources and achieves optimal financial returns in support of the resources of the Treasury.

**16-1-3.** On the substantive scope of the arbitration clause, the Defendants stated that the Complementary Legal Opinion failed to present any new argument on the matter, given that the arbitration clause concerns the interpretation and execution of any dispute arising between the two contracting parties during the validity period of the contract. The present dispute is related to compensation for damages resulting from the issuance of an administrative decision and this request cannot be settled without first addressing the issue of the legality of the decision, its review and evaluation, while knowing that this implies an action for annulment. The administrative decision was not annulled or withdrawn. Thus, the settlement of the dispute arising therefrom does not fall within the jurisdiction of the Arbitral Tribunal, knowing that in such cases, the Tribunal shall only have jurisdiction in the event of the annulment or withdrawal of the administrative decision.

**16-1-4.** Article (29) of the contract dated 8/6/2006 only refers to the arbitration rules in the Unified Agreement for the Investment of Arab Capital in the Arab States without referring to the substantive rules stated therein. This Agreement determined the substantive scope of its application with the notion of Arab capital and its investment. The Plaintiff did not transfer any capital to Libya, and there is no point in claiming that it did not transfer a part of the capital due to the dispute between the two contracting parties concerning the non-handing over of the plot of land. How can the Plaintiff claim to have spent sums of money to be invested in the field of economic development while it failed to even open a bank account in

the name of the investment project and did not apply for getting approval from the Central Bank of Libya to open an account before 14/3/2010? The Unified Agreement has a specific and precise definition for the invested capital and the terms of this definition were not fulfilled. Therefore, the Agreement does not apply to the present dispute.

The non-applicability of the Unified Agreement to the dispute makes the prevalence of said Agreement over laws and regulations in Libya and the application of its provisions irrelevant. The fact that the contracting parties adopted the rules of the Unified Agreement in Article (29) of the contract dated 8/6/2006 does not entail the application of the substantive rules set out in this Agreement, given that the subsequent article, i.e. Article (30), adopted the legislation in force in Libya as the applicable law, given the inapplicability of any international convention, even if it was in force in Libya, unless in such instances where said convention is automatically applicable.

**16-2.** In its response and commentary pertaining to the memoranda and the Legal Opinion submitted by the Plaintiff on the merits, the Defendants stated:

**16-2-1.** The Libyan law is the applicable law for settling the dispute in compliance with procedural order No. 1 issued by the Arbitral Tribunal. The Defendants characterized the contract as an administrative contract, as established in their statement of defense submitted on 22/11/2012.

**16-2-2.** The Defendants' characterization of the contract drafted on 8/6/2006 as being an administrative contract par excellence according to the Libyan law, is sound. Concerning the Complementary Legal Opinion and the memoranda submitted by the Plaintiff, the Defendants refer to their rejoinder submitted on 7/2/2013. They ascertain that the contract is an administrative contract according to the Libyan law which has a wider definition of this term than the one adopted in the French and Egyptian law, while knowing that the Libyan law is the only applicable law.

The contract drafted on 8/6/2006 combines all the elements required by the regulation on administrative contracts in force in Libya to be characterized as an administrative contract. Claiming that this contract is not an administrative contract is an unsubstantiated claim given that it violates the Libyan law applicable to the settlement of the dispute and to the characterization of all legal matters that arise during the settlement of this dispute. Stating that all administrative contracts concluded by Libyan departments require prior approval from the Council of Ministers does not change the fact that this contract is characterized as an administrative contract.

**16-2-3.** Characterizing the contract drafted on 8/6/2006 as a B.O.T. contract ascertains that the contract has the same characteristics of an administrative contract in accordance with the rules mentioned in the regulation on administrative contracts in force in Libya. The legal Opinion pointed out that the contract drafted on 8/6/2006 is a B.O.T. contract, which further confirms that the contract has the same characteristics of an administrative contract. The Characterization of the contract as a Public or Private Law contract made according to the doctrine is unsubstantiated given that the doctrinal characterization of the nature of B.O.T. contracts is not binding to the judge or to the arbitrator who shall be bound, when characterizing such contracts, by the law applicable to the settlement of the dispute. It is evident, according to the regulation on administrative contracts No. 153 of 1375 a.P. (2007 A.D.) and to its classification of the projects not funded by the State, that the Libyan legislator concluded that B.O.T. contracts are characterized as administrative contracts, i.e. Public Law contracts and not Private Law contracts.

**16-2-5.** Stating that the contract was concluded in a way similar to the conclusion of a Private Law contract has no effect on the fact that it is characterized as an administrative contract. An administrative contract is not only concluded by way of bids, but may also be concluded by mutual agreement. Conferring jurisdiction upon Administrative Courts does not require inserting a clause to that effect in the contract concluded between the parties. Furthermore, submitting the administrative contract to arbitration, as per the agreement of the contracting parties, does not deprive the contract of its administrative nature. When the State accepts the arbitration clause, this does not entail that the State is considered as an ordinary person.

**16-2-6.** Cancelling the investment approval granted to the Plaintiff was in conformity with the Libyan law which according to it the project, as defined by this law, does not exist. Cancelling this project is also in line with the provisions of Article (20) of the new Law No. (9) of 2010 on the Promotion of Investment and the provisions of Article (19) of Law No. (5) of 1426 on the Promotion of Foreign Capital Investment, given that there is no difference between the two articles, because the failure to initiate or complete project execution shall lead to the withdrawal of the project license. In both instances, failure to initiate project execution or a delay in project execution must be justified to avoid the cancellation of the project, given that both articles include the verb “may”. The difference between the two articles is thus in the wording. Therefore, the

cancellation of the approval granted to the touristic investment project is legitimate and the present case lacks legal and factual grounds.

- 16-3.** Given that the present case lacks legal and factual grounds, as established by the Defendants in their rejoinder submitted on 7/2/2013, the Plaintiff shall not have the right to plead the non-performance in order to justify the non-fulfillment of its obligations by stating that it is one of the principles of the legislation of the Member States of the Arab League and of the recognized principles in international law, i.e. the principle of the right of retention specified in paragraph (1) of Article (246) and article (161) of the Egyptian Civil Law not applicable to the present case. The Libyan law does not recognize the plea to the non-performance or the right of retention. The Plaintiff did not refer to the provisions of the Libyan law in this regard.

Furthermore, asserting non-performance is considered as an acknowledgment from the Plaintiff Company that it did not fulfill its obligations. The principle of good faith in the performance of contractual obligations prevents the Plaintiff from raising this plea. Additionally, the Plaintiff cannot plead non-performance under the pretense of facing physical impediments. The Plaintiff should have carried out the necessary procedures to fulfill its obligations whether on the administrative, technical, and legal levels. Had it fulfilled its obligations, it would have been released of any negligence related to the establishment of the touristic project and would have been able to raise the plea to the non-performance, given that physical impediments do not prevent the initiation of project execution, and they only represent a small part of the land area. Furthermore, the contracting party with the Administration may not cease to fulfill its obligations or plead non-performance, given that said plea does not apply with regard to administrative contracts. It is established that the Plaintiff had ceased to fulfill its obligations and has thus committed a contractual fault, which justifies the implementation by the Administration of Article (28) of Law No. (9) of 1983 on tenders and bids granting said Administration the right to terminate or perform the contract at the expense of the contracting party. Given that the Plaintiff violated its contractual obligations, its request for compensation for any alleged damages incurred should be disregarded and rejected.

- 16-4.** On the absence of legal and factual grounds for the Plaintiff's request for compensation, the Defendants stated that it had handed over the investment site given that the minutes dated 20/2/2007 did not cover the examination of the borders. The correspondence of the Plaintiff Company, in which it stated that Engineer Saad Salem shall be its authorized representative for the purpose of taking over the plot of land to enable it to initiate project execution, ascertains

that the handing over took place in accordance with Article (5) of the contract drafted on 8/6/2006. The Plaintiff's statement that it has requested the handing over of the project land for four years to no avail is legally and factually unfounded.

The Plaintiff may not state that the Libyan State allocated the land to the Umma Bank and that the third Defendant has violated Article (28) of the contract dated 8/6/2006, given that the real estate certificate for State property confirms that the plot of land was occupied by the Plaintiff and that the rights established thereon were not annulled until the issuance of the decision cancelling the investment approval. Considering that the third Defendant and the other Defendants committed no fault, they are therefore not obligated to compensate for any damages incurred.

**16-4-1.** The Plaintiff had violated its contractual obligations, and that was the fault of the aggrieved party, given that it failed to submit the project's final plans. The documents to which it referred to claim that it submitted final plans conclusively prove the contrary.

**16-4-1-1.** The Plaintiff Company failed to obtain a license to execute the investment project or a license to operate the project. It failed to submit a timetable, technical approvals, project drawings, project financial evaluation or an opening budget and has admitted that it failed to obtain a license. The memorandum submitted by the Plaintiff through its Counsel, Dr. Nasser el-Ghanim, mentioned that Decision No. (135) of 2006 on the investment approval granted the Plaintiff a license to execute the project and a license to operate said project in accordance with the provisions of Articles (22) and (23) of the executive regulation of the Law on the Promotion of Investment. This is an inaccurate statement, given that the approval granted to the investment project was issued in accordance with the terms and conditions stated in Law No. (5) of 1997.

**16-4-1-2.** The Plaintiff failed to obtain an investment project building permit. It failed to submit the necessary applications, which prompted municipal guards to stop the work of the contractor and seize the equipment, following the erection of a cement fence, given that said fence is considered as part of the building works and requires a building permit.



**16-4-1-3.** The Plaintiff Company failed to open a bank account in the name of the project and claimed that the Vice President of the Board of Directors did not obtain a visa to open an account and that the delay was due to circumstances outside its control.

**16-4-1-4.** The Plaintiff Company failed to transfer any amounts of money to state that there was an investment capital within the meaning specified by Libyan Law No. (5) of 1997. It alleged in the memorandum submitted by its Counsel Dr. el-Ghanim that the failure to transfer the capital came as a result of the annulment of the investment approval decision and of the violation by the Defendants of Law No. (9) of 2010 on the Promotion of Investment. The Defendants refuse to comment on such allegations.

**16-4-1-5.** The Plaintiff Company failed to pay any fees in consideration of using and benefitting from land and there is no significance in asserting that the third Defendant did not request the collection of these fees.

**16-4-1-6.** The Plaintiff Company unilaterally ended project works without the approval of the third Defendant.

**16-4-1-7.** The Plaintiff failed to submit the timetable clarifying the course of project execution by the specified date, and finally submitted it on 2/9/2007, thus violating the provisions of Article (110) of the regulation on administrative contracts which stipulates that the contractor shall submit a timetable for project execution within fifteen days following the date of contract signature.

**16-4-1-8.** The Plaintiff Company has not taken any serious steps towards fulfilling its contractual obligations, as established by the slow pace in concluding contracts relating to the project. Up until 13/2/2008, it had not yet signed the design and planning service contract agreement and the feasibility study contract had only been drawn up on 1/2/2008, whereas the necessary testing of the soil's hydrologic and engineering characteristics and the determination of the border points took place on 2/7/2008.

**16-4-2.** The grounds set forth by the Plaintiff Company to claim compensation are false. The Defendants highlighted the shortcomings of the report submitted by

the specialized German company Rodle Middle East as well as the shortcomings of other reports submitted by the Plaintiff Company.

**16-4-2-1.** The Allegations of the Plaintiff are worthless, i.e. that the reports were issued by specialized expertise firms, given that most material presumptions may be refuted by contrary evidence, as established in the rejoinder submitted by the Defendants on 7/2/2013. Given that the reports submitted by the Plaintiff to cover lost profits lack credibility, the Defendants saw no need to resort to specialized experts to study the apparent shortcomings of these reports.

**16-4-2-2.** The Plaintiff Company is not entitled to any compensation, valued at fifty million US dollars, for moral damages incurred given the lack of evidence. The third Defendant did not attribute any malicious trait to the Plaintiff such as fraud, deceit or manipulation, which negates the occurrence of moral damages. The allegations of the Plaintiff are worthless, i.e. that it will appear to the outside world as if it had failed to fulfill its contractual obligations.

**16-4-2-3.** The Defendants are not obligated to pay arbitration costs, given that the Plaintiff chose to prematurely resort to arbitration and should therefore cover its expenses. The Defendants are not obligated to pay said fees estimated by the Plaintiff at 500,000 US Dollars.

**16-4-2-4.** The Plaintiff Company failed to prove its right for compensation. Furthermore, the Plaintiff is not entitled to compensation in compliance with the rules of law adopted in the Libyan law, mainly the principle of preventing the aggravation of damages.

**16-4-3.** The Plaintiff Company violated its contractual obligation by failing to prevent the aggravation of damages. Article (224) of the Libyan Civil Code provides that the creditor shall not be entitled to compensation if the damage was incurred as a result of the failure to exert reasonable efforts to avert it. The standard is the same that applies to a reasonable person being in the same legal position as the aggrieved party. The Plaintiff has violated its obligation by failing to prevent the aggravation of the damages it claims it has sustained. The Plaintiff also failed to exercise due diligence as stipulated by the Libyan law. Accordingly, the legal basis of the Plaintiff Company's request for compensation is non-existent and the case should thus be dismissed.

**16-4-3-1.** The Plaintiff's invokes in its defense regarding compensation for lost profits, the potential damages that did not occur. The Plaintiff asserted its right to compensation for hypothetical potential damages. This request is unsubstantiated according to the Libyan law. The case should thus be dismissed for lack of legal and factual grounds.

**16-5.** At the conclusion of its final submission, the Defendants reiterated their previous requests concerning jurisdiction, adding the inadmissibility of invoking the arbitration clause stipulated in Article (29) of the contract drafted on 8/6/2006 against the Libyan Investment Authority and requested, on the merits, the dismissal of the case for lack of legal and factual grounds.

**Chapter Seventeen: on the statements of the Plaintiff in its oral argument during the two hearings dated 9 and 10 of March 2013, and submitted by its Counsel Mr. Rajab El-Bakhnug on 13/3/2013 and due to be submitted in writing on 17/3/2013 as per the procedural order No. 22.**

Following the oral argument of the Plaintiff's Counsel Mr. Rajab El-Bakhnug on the hearings set on 9 and 10 of March 2013, Mr. Bakhnug submitted a written submission of the oral argument, reiterating the allegations of the Plaintiff set out in the statement of claim and the memoranda in reply to the memoranda submitted by the Defendants, adding what can be summarized as follows:

**17-1.** The Arbitral Tribunal has jurisdiction to examine the case. When Decision No. 203 of 2010 was issued cancelling the approval, it was issued following a request by the Plaintiff to reach amicable solutions. In his capacity as the Counsel representing the Plaintiff Company, he had sent the third Defendant a letter offering that an amicable solution to the dispute be reached, and the notice sent through bailiff included as well the request for amicable solutions.

The Plaintiff stated it had sent letters to the second and third Defendants as well as to the Governor of the Central Bank requesting amicable solutions. As such, the phase of amicable solutions to the dispute had been exhausted, and the Plaintiff had the right to resort to arbitration as per the Unified Agreement for the Investment of Arab Capital in the Arab States. The Plaintiff is the Arab investor, and both Libya and Kuwait had signed the said Agreement stipulating that it is not mandatory to resort to amicable solutions prior to arbitration; the contract

between the parties refers directly to arbitration without any mentioning of amicable solutions.

**17-2.** The Plaintiff has the right to initiate arbitral proceedings against the Defendants, the General Authority for Investment Promotion and Privatization Affairs being an administrative unit. The decision-making authority for tourism investments was previously held by the Ministry of Tourism while it is currently held by the Ministry of Economy which is the sole party responsible for planning and implementing economic policies in Libya. This has entitled the latter to issue the decision cancelling the project of the Plaintiff Company. The Ministry supervises and controls the acts of the third Defendant which, despite having the status of a legal person, remains an integral part of the Ministry of Economy, affiliated to it, and is funded by the Libyan State Treasury.

Furthermore, the decision of the General People's Committee (Council of Ministers) No. 322 of 2007 explicitly committed the Ministry of Finance to pay the amounts due for the enforcement of final judgments issued domestically or abroad against Libyan public entities funded by the Libyan Treasury. The third Defendant's liability is legally founded. The Plaintiff requests that the Arbitral Tribunal rules that the Defendants will be obliged to pay *in solidum*, given that it is permissible to institute arbitral proceedings against them.

**17-3.** At the substantive level, the arbitration clause contained in Article 29 of the contract signed between the Plaintiff and the third Defendant is applicable, and the Plaintiff's requests fall within the substantive scope of the said clause.

The third Defendant ordered that the drawings and a timetable be drafted. It also requested that the Plaintiff takes part in the Investment Fair held in Libya. Therefore, it has been established that the contract had entered the phase of performance by all parties thereto.

The Defendants reiterated in their final submission that the land had been handed over to the Plaintiff, despite the fact that the third Defendant had recognized that no such handing over had been made, that impediments, occupancies and persons were occupying the land, that the land was also subject to legal and physical disturbances, by third parties, of enjoyment of the site, and that an in-kind right had been established on said site for the Umma Bank and the fact that the transfer of 10% of the project value hinges on the nature of that project.

**17-4.** The Plaintiff's is contractually and legally liable, since the General Authority for Investment Promotion and Privatization Affairs had violated the contract signed with the Plaintiff who continued to claim the handing over of the land, but the

said land was sold to the Umma Bank. The Plaintiff has acted in good faith and notified the third Defendant of having commenced the drawings and studies and submitted the project timetable on 2/9/2007. It also filed the drawings on 24/10/2007, and they were adopted by the General Authority for Tourism on 12/11/2007. The Plaintiff resubmitted them on 14/2/2008, and spent more than USD six million over four years.

The Plaintiff added that when it attempted to erect a fence along the marked lines delimiting the site, it was subject to many violations, its workers assaulted and ousted, and the fence ruined. It filed a complaint to the police, and despite that, saw it best for the sake of the project to take part in Al-Fateh real estate investment Exhibition, for which it received a thank you letter from the head of the General Authority for Tourism who was Minister of Tourism back then in which he commended the Plaintiff's loyalty and professionalism.

The Defendants' violations are but a clear, explicit and deliberate breach of the terms of the lease contract concluded on 8/6/2006. The third Defendant had admitted its failure to hand over the land, and had thus violated its obligations. These breaches were the sole and direct cause behind the damage sustained by the Plaintiff, and are in violation of Articles 147, 148, 209, 563, 570 and 573 of the Libyan Civil Code agreed upon to be applied. Accordingly, the relation of cause and effect between the third Defendant's fault and the damage sustained by the Plaintiff is legally established. In addition, the third Defendant's conduct is a violation to Articles 1, 6 and 15 of Law No. 5 of 1997 that was replaced by Law No. 9 of 2010. Its conduct is also a violation to Articles 2, 9/1, 10/a and b of the Unified Agreement for the Investment of Arab Capital in the Arab States.

The violations perpetrated by the third Defendant caused urgent damages to the Plaintiff of a value amounting to five million and thirty thousand US dollars, as well as urgent moral damages to the reputation of the Plaintiff Company on the global market estimated at fifty million US dollars. The Plaintiff has also incurred damages caused by its loss of the anticipated profits resulting from 82 years and a half as noted in the experts' reports. The Plaintiff reiterates that these reports be adopted by the Arbitral Tribunal. The Libyan law guarantees the Plaintiff's right to claim compensation for these two types of damages.

Since compensation covers direct damages, it shall also cover unforeseeable damages, as the second and third Defendants' fault is deemed a serious and flagrant fault even if it was not considered fraud.

- 17-5.** The Plaintiff stated that it is untrue to say that its request for compensation does not fall within the substantive scope of the arbitration clause under the pretense that it is irrelevant to the contract interpretation and performance. The Defendants' statement that the contract concluded on 8/6/2006 is an

administrative contract is inaccurate. The said contract is a Civil Law contract because its subject matter, nature and characteristics differ from that of administrative contracts, and because it encompasses an interest for the Plaintiff, and because the regulation on administrative contracts has strictly listed the types of administrative contracts in Libya. Moreover, this contract does not comprise any of the highly unusual clauses often included in administrative contracts. In addition, this contract does not bear any reference to the regulation on administrative contracts in Libya, and does not entitle the third Defendant to impose an obligation unilaterally as is the case in administrative contracts. Furthermore, this contract has not been concluded in line with the procedures set forth in the regulation on administrative contracts; it is a lease contract entered into willingly by the two parties from the beginning.

Moreover, the allegation of the Defendants that the arbitration case is prematurely filed and should therefore be rejected is legally unfounded; in fact, an amicable settlement of the dispute was not stipulated as a condition in the contract, and the Plaintiff's direct recourse to arbitration does not invalidate such recourse. In addition, the third Defendant forms part of the Libyan Ministry of Economy and the State of Libya intervened in the performance of the contract, while the Tourism Development Authority and the General Authority for Investment Promotion and Privatization Affairs are funded by the Libyan State Treasury.

The Ministry of Finance is bound to pay the amount decided upon against the Libyan public entities by virtue of the Libyan law. The jurisprudence of the Libyan Supreme Court allowed the initiation of legal proceedings against the State and the Ministry of Economy since the autonomy of an administrative unit is not absolute. This unit forms part of the Central Administration in the Libyan State, which made the litigation department in charge of the defense of the Defendants on par with the State and any ministry thereof pursuant to Law No. 87 of 1971 on the litigation department. The Plaintiff added that the subject of the dispute is the failure to handover the land free of all occupancies, impediments and persons. The officials representing the third Defendant admitted that the land was not handed over and was occupied. The Plaintiff handed over the drawings three times, and opened two bank accounts, one in its name in the Gulf Bank, and one in the name of its director for the project. The failure to obtain the execution license is due to the failure by the third Defendant to submit the drawings to the Urban Planning Department, while the failure to obtain the license to operate the project is due to the fact that the construction works were not completed and the operation of the project was not initiated, which signifies that granting such license is still premature.

The statement made by the Defendants that the Plaintiff failed to pay the rent fees of the land is true as the Plaintiff has not yet been handed over the land while the third Defendant failed to claim the rent fees. The Plaintiff Company exists as per the certificate of the commercial register and is legally considered in Libya as a subsidiary of Al-Kharafi Company based in Kuwait.

The Plaintiff concluded that it had offered an opportunity for amicable solutions. The Defendants' statement that the Plaintiff requested to be exempted from the project's timely execution is untrue, since the Plaintiff meant that the execution date will be delayed as it did not take over the land. The Plaintiff used an excavator to dig the land in depth and took soil samples thereof. It did not commit any violation to say that Decision No. 203 of 2010 was in conformity with the law. The Plaintiff did not breach the provisions of Decision No. 135 of 2006 issued by the Minister of Tourism. Decision No. 203 of 2010 was issued upon the third Defendant's recommendation, as it was, according to the Libyan law and Law No. 9 of 2010, the sole available means enabling the third Defendant to annul Decision No. 135 of 2006. The Plaintiff reiterated all its previous requests.

## **Chapter Eighteen: On the statements of the Plaintiff in its oral argument during the two hearings dated 9 and 10 of March 2013, and submitted in writing on 14 March 2013 by its Counsels Dr. Fathi Wali and Dr. Mahmoud Samir El-Sharkawi:**

### **18-A: Concerning the pleas:**

In their oral argument before the Arbitral Tribunal and in their written submission of the oral argument, the counsels of the Plaintiff Company, Dr Fathi Wali and Dr. Mahmoud El-Sharkawi referred to the rejoinder and final submission filed on 7/2/2013 and 21/2/2013, and to the two Legal Opinions submitted by Dr. Burhan Amrallah.

The last written submission was limited to the issues raised in defense during the hearing and to the commentary thereon. The plaintiff stated the following:

**18-A-1.** We have confirmed in our oral argument that Article 29 of the disputed contract requires the resort to amicable settlement prior to any referral to arbitration and not to conciliation, knowing that amicable settlement is different from conciliation. Accordingly, the referral to conciliation in Article 2 of the Arbitration and Conciliation Annex of the unified Agreement cannot be relied

upon to plead the inadmissibility of the case for being filed prematurely. Referencing the 2007 Law on Arbitration proves irrelevant since it only concerns conciliation, not amicable settlement.

**18-A-2.** The Defendants' Counsels allege that they wished to reach an amicable settlement as shown in the letter sent on 20/10/2010. This is disproved in the Defendants' position expressed during the negotiations session that was held after the date of the said letter between the two parties on 19/11/2010, during which they maintained that the Plaintiff should agree to the execution of the project on a land different than the one agreed upon in the disputed contract, and that it should not claim any compensation for the losses it may consequently sustain. Such is an opinion confirmed by the Defendants in their letter sent to the Plaintiff Company on 6/2/2011, thereby thwarting any attempt for an amicable settlement.

**18-A-3.** Although the contract was not signed by the Libyan State and the Ministry of Economy, its scope extends to them as the said entities are part of the contract formation or performance. The State owns the disputed land, and the contract could not have been concluded without the State's will and approval. The State grants the privileges and exemptions set forth in the contract to the project, and the State was the party that disposed of the land in favor of the Central Bank of Libya, thereby hindering the project execution. As for the Minister of Economy, he cancelled the license to establish the project subject of the dispute.

**18-A-4.** The Tourism Development Authority only granted the license upon the delegation of the government and upon the government's approval as stated in the preamble of the disputed contract. It is inaccurate to state that the decision of the Minister of Economy to cancel the project is not related to the performance of the contract during its validity period. In fact, how can one say that a decision to cancel the license of a given project is a decision that was not issued during the contract validity period, if that decision terminated the contract? The termination only occurs during the contract validity period. Extending the scope of the arbitration agreement to non-signatories, whether they intervened in the conclusion of the contract or in its performance, does not depend on the signatories' will, nor on the will of the persons to whom the scope of the arbitration agreement is extended. In fact, it depends on the Prima Facie theory.

**18-A-5.** The extension of the scope of the arbitration clause set out in the contract, subject of the dispute to the State is confirmed by the fact that the contract stipulates that arbitration shall be carried out in line with the Annex to



the Unified Agreement for the Investment of Arab Capital in the Arab States. This Agreement was concluded between signatory states, one of which was the State of Libya. Thus, the arbitration clause referred to, not only binds the signatory institution but also the State to which said institution is affiliated, since the State is bound by the terms of the Unified Agreement.

**18-A-6.** The Defendants stated that the scope of the arbitration clause set out in Article 29 does not extend to the disputes relating to the non-performance of the contract, nor to the disputes arising from issues that are not related to the contract, and therefore does not extend to the request for compensation resulting from the issuance of the administrative decision that cancelled the project license. Such a statement is untrue because the interpretation in the field of international commercial arbitration should be wide, since this arbitration is the usual means of settling private disputes of an international aspect; this wide interpretation should not be hindered by the principle of "*pacta sunt servanda*". The present case relates to a request for compensation resulting from the issuance of an administrative decision cancelling the project. Assuming it is an administrative decision then it shall be closely linked to the disputed contract. It is the expression of the will of one of the contracting parties not to perform the said contract, a will that is expressed in an administrative decision.

**18-A-7.** The Defendants' statement that the claim for compensation resulting from the issuance of an administrative decision cannot coexist or be consistent with arbitration is untrue. In fact, arbitration is not permitted in matters relating to the legality of the administrative decision; however, the financial rights inherent to this decision may be arbitrable, since conciliation in such case is permitted, and arbitration is permitted in matters susceptible to conciliation. This is confirmed by the doctrine, as mentioned by Dr. Mustafa Al Jammal and Dr Akkasha Abdel Aal in their book entitled "Arbitration in International and Internal Relations", by stating that resorting to arbitration is permitted with regard to the compensation resulting from the issuance of an administrative decision.

**18-A-8.** The decision issued by the Minister of Economy cancelling the license is not deemed an administrative decision. It is a procedure that implies the violation of one of the contracting parties, to a contractual obligation that falls upon the State according to a contract between the State and the investor. In the arbitral award rendered in the Cairo Regional Center on 29/2/2012, case No. 704/2010, the Arbitral Tribunal ruled explicitly that arbitration is permitted with regard to the compensation resulting from the issuance of an administrative decision.

**18-A-9. Concerning the joinder of the Ministry of Finance and the Libyan Investment Authority**, the Plaintiff stated that it relies in its request to join them to the arbitral proceedings on two grounds. The first is that with the extension of the scope of the arbitration clause to the State of Libya, the State of Libya shall be deemed a party to the arbitration. Accordingly, the Plaintiff may, in its capacity as party to the contract, initiate proceedings before the Arbitral Tribunal not only against the Libyan government representing the State of Libya, but also against all ministries, departments and institutions affiliated to the State and related to the contract that comprises the arbitration clause or the performance thereof, even if they have the status of a legal person. The second ground is based on the fact that it has been well established that the State's funds are all deposited with the Treasury, i.e. the Ministry of Finance and that the Libyan Investment Authority invests the funds allocated to it by the government (Article 15 of Law No. 13/2010). The Ministry of Finance and the Libyan Investment Authority are entrusted with the State's funds whether available as funds in the Treasury or as investments. Therefore, the Plaintiff has legal interest to join each one of them to the arbitral proceedings in order to enforce the arbitral award by using the State's funds deposited with the Treasury and the Libyan Investment Authority. The Counsels of the Plaintiff Company quoted in this regard the jurisprudence of the Egyptian courts, among which a ruling rendered by the Civil Court of Cassation (1<sup>st</sup> of March 2007 – challenge No. 1562/1374 J).

**18-A-10.** In response to the Defendants' allegation on the admissibility of joining the Libyan Investment Authority to the arbitral proceedings since it invests its funds outside the Libyan territories and does not hold any investments inside Libya, the Plaintiff said that this allegation should be rejected for two reasons: the first reason being that it is a blatant violation to the provisions of Law No. 13 of 2010; Article 5 of said law provides: "It (the Libyan Investment Authority) may invest part of its funds in Libya upon the approval of the General People's Committee". The second reason is that even if the Authority's investments are all performed outside the Libyan territories, the Plaintiff's interest in joining the Authority to the proceedings shall not be influenced since the arbitral award rendered in the current proceedings may be enforced against the Authority with regard to the funds it owns inside or outside Libyan territories. The joinder of the Libyan Investment Authority does not constitute a breach of its right of defense should it be allowed to defend itself, nor does it require increasing the number of the Arbitral Tribunal members, since the Libyan Investment Authority's interest in the arbitration case concurs with that of the other Defendants.

## **18-B. Concerning the merits of the dispute:**

**18-B-1.** According to the decision of the Arbitral Tribunal and upon the Defendants' approval, the Unified Agreement for the Investment of Arab Capital in the Arab States shall be applicable to this case along with the Libyan law. In fact, international conventions and agreements to which the State is party, form part of its internal legislation and even prevail over the latter. The referral in Article 29 is a general referral to the Unified Agreement and not to its annex on arbitration rules.

**18-B-2. The contract, subject of the dispute, concluded** on 8/6/2006 is a civil law lease contract governed by the rules set for lease contracts in the Libyan Civil Code. Had the contract been characterized as administrative, no need would have arisen for an explicit resolutive clause therein.

The elements of an administrative contract are not fulfilled. It is required: that one of the contracting parties be a legal person of Public Law; that the contract relates to the operation of a public utility, and that it encompasses highly unusual clauses. In the event any of the three elements was not met, the contract would no longer be considered an administrative contract.

Notwithstanding the fact that one of the contracting parties is a legal person of public law, the contract, subject of the dispute does not relate to the operation of a public utility, but to the lease of a plot of land to establish a touristic investment project thereon. The plot of land, subject of the contract, falls within the private property of the Libyan State. In addition, the contract does not comprise highly unusual clauses uncommon in private law, and all its provisions make a reference to the legal tools cited in the Civil law even with respect to the contract termination issue. The two Counsels representing the Plaintiff quoted in this regard some opinions of the doctrine, specifically the opinions of Scholar Sanhoury and some jurisprudence confirming their arguments. They insisted on the observations of Scholar Sanhoury specifically with regard to the applicability of the Civil law to the acts of the State relating to its private property, even when the contract is characterized as administrative contract because it does not mean that the contracting administrative authority shall have full authority to annul or terminate the contract without committing to compensate the other contracting party. The Plaintiff noticed that the Defendants' Counsels based themselves on legislation that were already abrogated in 2010, and that when they found it ineffective to characterize the contract as administrative contract, they argued that it is a BOT contract and stated that BOT contracts are always regarded as administrative contracts.

The two Counsels concluded by citing the Legal Opinion of Dr Hani Sarie-Eldin to indicate that BOT contracts are considered as private law contracts even if they revolved around basic infrastructure projects that are funded by the private sector. The criterion depends on whether the BOT contract is related to a public utility or not, noting that touristic projects do not fall within this category.

**18-B-3.** On the violation by the Defendants of their legal and contractual obligations, the two Counsels representing the Plaintiff considered that the most important violation was the violation of the principles governing the International Trade Law, mainly the principle of good faith in performing contracts referenced in all international trade conventions. It is worth mentioning that exhibit No. 20 submitted by the Defendants and annexed to their statement of defense is a unequivocal proof of their bad faith. It shows that the Council of Ministers in Libya had previously decided, before 30/12/2009, to cancel the Plaintiff's project and to allocate its land to the Libyan Local Investment and Development Fund. The Counsels representing the Plaintiff also considered that the Defendant had breached their obligation to warrant against legal and physical disturbances of enjoyment of the site, because for four years starting on 22/6/2006 and ending on 19/4/2010, the Plaintiff Company repeatedly requested, for about twenty times, the handing over of the land subject of the contract, but to no avail. Moreover, a number of violations were committed, mainly by the Umma Bank who registered before the Department of Real Estate Registry the right of usufruct of the land. Besides, the Tahrir club (or Tajura club) had leased the said land to third parties, and acted as an owner would. The same goes for the owners of the coffee shop built on the land, and the General Company for Building and Construction.

The two counsels also invoked the request submitted by the Plaintiff Company to the Department of Real Estate Registration to obtain a certificate clarifying the third party's in-kind rights established on the leased land. The certificate shows a sales contract of the usufruct right in favor of Umma Bank. The Defendants remained unable to fulfill their main obligation of the contract, to hand over the leased property free of any occupancies and persons, and to guarantee the absence of any legal or physical impediments hindering the initiation of the project execution. On 2/2/2010, i.e. more than three and a half years after the due handing over of the land, the Secretary of the General Authority for Investment and Ownership acknowledged in his letter sent to the Plaintiff Company his failure to carry out the obligation to hand over the land. The most flagrant violation by the Defendants of their contractual obligation occurred when the Minister of Economy issued Decision No. 203 of 2010 to cancel the project, four years after the contract was concluded even though the Plaintiff Company had honored all its obligations.

**18-B-4.** On the legal grounds of the Defendants' liability, the two Counsels representing the Plaintiff stated that the Defendants had breached their contractual obligations arising from the lease contract (handing over and warrant against any disturbance of enjoyment of the site). The Defendants also breached the provisions of the Libyan Civil Code (Article 563: to hand over the land *in a* state which is appropriate to the use it has been leased for; Article 570: to warrant against disturbances, by the lessor or third parties, of enjoyment of the site). They have also violated what is stipulated in the contract: that the lessor acknowledges that the leased project land is free of any in-kind rights. Moreover, the Defendants violated the Libyan laws on Foreign Investment, among which for instance Law No. 5/1997 (On the promotion of Investment), Law No. 7/2004 on Tourism, Law No. 9/2010 on the Promotion of Investment which had entered into force as of 28/4/2010 abrogating Law No. 5/1997, as well as Article 10 of Law No. 7/2004, and every provision in contravention of the provisions of the new Law (M23) stipulating that this new law shall apply to all investment projects and relevant facts and acts in line with the laws mentioned in the said article on the date of promulgation of this law, which means that this law shall govern the project, subject of the dispute, since the abrogation took place on 10/5/2010.

In response to the Defendants' allegation that the Plaintiff committed a violation, the two Counsels representing the Plaintiff said this allegation is unfounded. Article 20 of Law No. 9/2010 set forth that the project may not be cancelled nor withdrawn unless its execution was not initiated or it was not handed over on time without any justification thereof.

The two Counsels representing the Plaintiff considered that the Defendants had breached the provisions of Articles 2 and 3, i.e. the principle of prevalence of international agreements and conventions over domestic laws, and Article 9 of the Unified Agreement for the Investment of Arab Capital in the Arab world. One of the major principles and objectives of the Unified Agreement is good faith and honoring and performing contracts.

**18-B-5.** On the non-existence of the administrative decision No. 203/2010, the two counsels representing the Plaintiff stated that they did not confuse nullity and non-existence. The non-existence lies upon Articles 20 and 23 of the Law on the promotion of Investment that was in force when the non-existent decision was issued. Article 20 differs from Article 19/1 of the abrogated Law No. 5/1997, since the new text limited the Administration's right to terminate the contract by requiring that the failure to initiate or finalize execution on time be unjustified. As for the project, subject of the contract, there is no reason that could justify its

cancellation by the administrative authority, which means the decision is effectively non-existent.

**18-B-6.** Concerning the grounds for compensation and its assessment, the two Counsels representing the Plaintiff asserted that the compensation claimed in this arbitration case is based on the provisions relating to the contractual liability, the elements of which, i.e. the fault, the damage and the causal relationship between them, had been met. It is established that the Plaintiff Company had honored its contractual obligations and is therefore entitled to receive the compensation it requested by virtue of Article 10 of the Amman Agreement for the Investment of Arab Capital in the Arab States, and of Article 224 of the Libyan Civil Code which sets out the elements of the compensation assessed by the judge when no agreement thereon is reached in the contract, and which include the losses incurred by the creditor as well as his lost profits, regardless of whether the damages were foreseeable or unforeseeable in the event the debtor committed fraud or a serious fault, which is established in this case. The Plaintiff's Counsels quoted the Scholar Sanhoury and the jurisprudence of the Court of Cassation in Egypt (hearing held on 13/2/2006 – challenge No. 5175/4 J).

The two Counsels representing the Plaintiff stated in their oral argument that the Plaintiff Company had been deprived of future profits that should have been realized from the investment of the project, which project the plaintiff was not able to carry out due to the faults of the Defendants that caused the loss of the opportunity of making those profits. Article 225 of the Civil Code provides that compensation shall also cover the moral damages suffered by the creditor.

Concerning the compensation, the Plaintiff Company filed five auditing reports prepared by some of the most internationally renowned Auditing and Accounting firms; these firms have gave testimony before the Arbitral Tribunal.

At the end of their oral argument, the two Counsels representing the Plaintiff reiterated their previous requests.

## **Chapter Nineteen: On the statements of the Defendants in their oral argument submitted in writing by their Counsel Dr. Hisham Sadek on 14/3/2012 (due to be submitted on 17/3/2013):**

Without addressing in details the points of the dispute raised before the Arbitral Tribunal, the oral argument of the Defendants reviewed the efforts exerted by multiple

legal experts in the Arab world to study all Arab international agreements and their entry into force, as well as the agreements relating to Arab economic cooperation, upon the request of His Excellency the Secretary General of the League of Arab States.

It was mentioned in the oral argument that the specialized committee had drafted a report including amendments to the Charter of the Arab League so as to activate its political and economic role. It is within this context that the Plaintiff Company, which initiated this dispute by claiming compensation estimated at five million US dollars, had increased the amount to fifty five million US dollars and finally requested more than two billion and fifty five million US dollars, arguing that it is the reasonable compensation for the damages it sustained and the profits it lost during the investment period. In the event the Libyan entities had refuted in their defense the request for compensation for lack of legal and factual grounds, examining the facts reveals a bitter rivalry between two parties, one being the Plaintiff that enjoys high professionalism and expertise, and the other being Libyan public entities that do not lack good faith even if their conduct did not prove to be of high global professional standards.

Dr. Sadek added that he trusts that the fairness of judgment of the chairman of the Arbitral Tribunal will make him rule on the dispute as he deems right and in conformity with the law and equity. He therefore requested the Tribunal to take the following observations into consideration:

1. The plaintiff company is a pioneering and renowned Arab company which was among the first to be established and is the most capable of undertaking investment projects that yield benefit for the region. It is therefore not in its best interest to be viewed as violating the rules of good faith when fulfilling its obligations in other Arab countries, or contributing to faults that lead to the aggravation of the damages related to such fulfillment.
2. Libya is no longer the Libyan Jamahiriya after the Revolution. Its national interests demand further economic and investment cooperation with its Arab brethren. It is not in the best interest of the two parties to the dispute to create any impediments to any potential future cooperation.
3. We are totally convinced of the correctness of the legal arguments relied upon by Dean Hafiza El-Haddad in her oral argument to seek the rejection of the claim for compensation for lack of legal and factual grounds. Notwithstanding the opinion of the Arbitral Tribunal, it is not in the best interest of any of the parties to the dispute to render an award that hinders any future cooperation between the Plaintiff and the Defendants.

4. The Chairman does not preside over one of the ordinary State courts in line with the laws applicable to the dispute. He was entrusted to preside over this judicial, international and ad hoc Tribunal pursuant to the arbitration rules set forth in the Unified Agreement for the Investment of Arab Capital in the Arab States. This consideration shall not prevent in line with the provisions of the applicable law and in light of the considerations of justice from granting each party its right, however, the provisions of the law in this case are not sufficient and should be interpreted as understood by this ad hoc judiciary. The interpretation of the provisions aims, in our case, at furthering joint Arab economic cooperation in the future and not stifling such nascent cooperation.

## **Chapter Twenty: on the statements of the Defendants in their oral argument submitted in writing by their Counsel Dr. Hafiza El-Haddad on 16/3/2013 (due to be submitted on 17/3/2013:**

**20-a.** The Defendants began their oral argument submitted in writing by declaring that they are submitting the present written submission of the oral arguments in response to the oral argument presented by the Plaintiff on 9/3/2013, and that all parties to the dispute approved of the content of procedural order No. (22) issued by the Arbitral Tribunal. The Defendants stated that they are replying to the Plaintiff's oral argument dated 9/3/2013 as they did on 10/3/2013, and indicated that they are commenting on the Plaintiff's statements and on the witnesses' testimony in the hearing held on 9/3/2013.

**20-a-1.** In response to the oral argument presented by the Plaintiff relating to jurisdiction, the Defendants reasserted yet again all the pleas they have previously brought forth, mainly:

**20-a-1-1.** The inadmissibility of the present arbitration case given that it was filed prematurely in accordance with Article (29) of the contract concluded on 8/6/2006. The Plaintiff's oral argument failed to deliver any new evidence in this regard.

**20-a-1-2.** Contrary to what the Plaintiff stated, the necessity to initiate an amicable settlement is the obligation falling upon the parties who failed to carry out due diligence to fulfill this obligation. The Plaintiff hurriedly initiated the legal proceedings and resorted to arbitration. The



Defendants asserted the inadmissibility of the case given that it was filed prematurely, a plea which is founded. It also constitutes one of the procedural pleas related to the procedural public order filed before international arbitral tribunals prior to addressing the merits of the case. Thus, the said tribunals would still have jurisdiction and the dispute is referred again to them after having carried out the proper procedures for an amicable settlement, the subject of the plea of inadmissibility.

**20-a-1-3.** The Defendants have established that all the documents to which the Plaintiff referred in its oral argument, failed to prove that the latter made any effort to reach an amicable settlement. The Plaintiff only requested clarification of the reasons behind the issuance of the decision cancelling the investment approval.

**20-a-2.** The Defendants' plea according to which they asserted that the arbitration clause stipulated in the contract concluded on 8/6/2006 may not be invoked against the State of Libya, the Ministry of Economy, the Ministry of Finance and the Libyan Investment Authority, is founded. The correct interpretation of the provision of Article (29) of the present contract leads to the conclusion that the arbitration clause may not be invoked against non-signatories of the contract in light of the texts of the Libyan Civil Code.

**20-a-2-1.** The Plaintiff Company raised, in its oral argument, new arguments which are also irrelevant. On one hand, the letter of the General People's Committee dated 20/12/2009 cannot be considered as a decision where the Libyan State expressed its will to contribute to the termination of the contract. On the other hand, the party entitled to terminate the contract concluded on 8/6/2006, in accordance with the provision of Article (8) of Decision No. 194/2009 issued by the General People's Committee, is the third Defendant and not the Libyan State. This is further confirmed by the letter of the Administration Committee of the Department of Socialist Real Estate Registration and Documentation, where the said Committee requested from the third Defendant to carry out the necessary procedures to terminate the contract. Finally, this letter was received by the third Defendant on 27/4/2010 and the minutes of the fourth meeting of the Administration Committee of the General Authority for Investment and Ownership were drawn up on 19/4/2010, before the third defendant was informed of the content of this letter, which further confirms that it did not rely on this letter in its recommendation for the annulment of the decision granting

the investment approval. Said decision was founded on Article (19) of Law No. (5) of 1997 and not on the letter No. 11752 dated 30/12/2009. Moreover, the decision that annulled the investment approval was issued in accordance with the Libyan law which was violated by the Plaintiff. Transferring the ownership of the land back to the Libyan State was done after the cancellation of the investment approval granted to the Plaintiff, which was a decision of implementation issued in accordance with the Libyan investment law. This proves that the Libyan State did not participate in the conclusion of the contract dated 8/6/2006 and did not contribute to its termination. It is not permitted to violate the rule of the inadmissibility of extending the scope of the arbitration clause stipulated in the contract concluded with a public entity, to the State. Therefore, how can it be permissible to extend the scope of the clause to other public entities affiliated to the State if the Libyan State had not signed the contract that encompassed the arbitration clause? The state courts that promote arbitration and seek to internationalize it refuse to extend the scope of the arbitration clause signed by the State to its administrations affiliated to it.

**20-a-2-2.** The Defendants proceeded by saying that the Libyan State is not party to the contract concluded on 8/6/2006, given that the contract was concluded with the Tourism Development Authority, currently known as the General Authority for Investment Promotion and Privatization Affairs, which is a public institution having the status of a legal person independent from the State, and the arbitration clause stipulated in the contract is subject to the principle of the privity of contracts.

**20-a-2-3.** The Plaintiff justified the joinder of the Ministry of Finance and the Libyan Investment Authority by stating that it has an interest in joining them to the case to be able to impose attachment on funds they retain. However, this justification must be rejected, given that it cannot be brought before arbitral tribunals. What is applicable before state Courts may not be applicable before arbitral tribunals. Arbitration is a private judicial system. The Arbitral Tribunal derives its jurisdiction from the will of the parties which determine the scope of the dispute. Safeguarding arbitration can only be achieved through the strict implementation of this system in all its mechanisms, mainly the non-extension of the scope of the arbitration clause to non-signatories of the contract.

**20-a-3.** On the substantive scope of the case, the Defendants stated that the plea to the inadmissibility of the arbitration case is founded given that the decision cancelling the investment approval is an administrative decision independent from the contract concluded on 8/6/2006 and from the arbitration clause stipulated therein.

**20-a-3-1.** The memoranda submitted by the Plaintiff Company prove that it did not deny this characterization and sought to claim that the cancellation decision was non-existent or illegally issued. A reply was previously given in this regard.

**20-a-3-2.** The Defendants' Counsels reassert that the provision of Article (29) of the contract expressly determines that the parties attributed the Arbitral Tribunal jurisdiction over any dispute that might arise during the contract validity period. This article has thus excluded from the scope of the arbitration clause any other dispute and subsequently any dispute related to a request for compensation for any damages that the Plaintiff claimed to have incurred as a result of the decision cancelling the investment.

**20-a-3-3.** The allegations raised by the Plaintiff Company in its oral argument concerning the admissibility of resorting to arbitration with regard to the financial rights resulting from the issuance of an administrative decision cannot be sustained. Such resort to arbitration cannot be accepted unless a judgment is previously issued annulling or withdrawing this decision. The Administration shall be responsible for administrative decisions in the event of the existence of a fault, i.e. the administrative decision is illegal, the existence of a damage caused by this decision and the existence of a causal relationship between the fault and the damage. Knowing that the cancellation decision was neither annulled nor withdrawn, the Arbitral Tribunal shall not have jurisdiction over requests for compensation. The conclusions of the Plaintiff Company in the present case show that it is merely requesting compensation resulting from the issuance of an administrative decision, and considered to be explicitly recognizing the validity of the characterization brought forth from the beginning by the Defendants' Counsels. Therefore, the Defendants' plea to the inadmissibility of the present arbitration case, given that it does not fall within the substantive scope of the arbitration clause, is founded.

**20-a-4.** The Defendants rightly maintained that Article (29) of the contract concluded on 8/6/2006 only refers to the arbitration rules of the Unified Agreement for the Investment of Arab Capital in the Arab States without referring to the substantive rules stipulated therein.

**20-a-4-1.** The Unified Agreement has limited the substantive scope of its application to Arab capital as shown in Articles one, six and seven stipulated therein. The company failed to provide any funds to the Libyan State for the purpose of investing in the fields of economic development, and therefore, the substantive provisions stipulated in this Agreement cannot be applied to the present arbitration case. This opinion is in line with the practice in the application of an international convention, the Washington Convention. The Plaintiff cannot allege that the failure to transfer a part of the project investment value came as a result of the dispute arising from the non-handing over of the plot of land, given that it was proven that the land was handed over to the Plaintiff.

**20-a-4-2.** The Plaintiff claimed in the oral argument hearing that it has provided investment funds. However, this claim is refuted by both the facts and the law, given that the Plaintiff had failed to open a bank account in the name of the project and had not sought for several years to submit an application for approval to the Libyan Central Bank to open a bank account in the name of the project.

**20-a-4-3.** The Plaintiff claimed that it has paid investment funds, estimated at one hundred and thirty thousand US dollars. However, this amount is not related to the investment of capital according to the rules of the Agreement, given that it has paid this sum for the promotion of the project in international forums. The Plaintiff company failed to transfer any capital to Libya and therefore, it failed to achieve any economic development and provide any benefits to the Libyan economy.

**20-a-4-4.** Following the inapplicability of this Agreement to the dispute, talking about its prevalence over laws and regulations of the State Parties is unsubstantiated given that the terms and conditions for its application remain unfulfilled. The Plaintiff Company failed to establish the presence of these conditions and terms in its oral argument. The arrangement on the form of Articles (29) and (30) of the contract

concluded on 8/6/2006 is no indication to the applicability of the substantive provisions of the Agreement. The adoption of the contracting parties of the arbitration rules of the Unified Agreement for the Investment of Arab Capital in the Arab States in Article (29) of the contract dated 8/6/2006 does not necessarily entail the applicability of the substantive rules set out therein, given that the subsequent article, i.e. Article (30), adopted the legislation in force in Libya as the applicable law.

**20-b.** Concerning the grounds invoked by the Defendants in their oral argument regarding the subject matter of the dispute, the Defendants' Counsels stated the following:

**20-b-1.** The Libyan law is the applicable law for the settlement of the dispute and the determination of the nature of the contract. The Defendants also referred in this regard to what was stated in their previous memoranda.

**20-b-2.** The contract concluded on 8/6/2006 is an administrative contract par excellence. Article (3) of the People's Committee Decision No. 563/2007 on the promulgation of the regulation on administrative contracts provides that an administrative contract is any contract concluded by any of the authorities mentioned in the previous article for the purpose of executing or supervising the execution of one of the projects approved in the development plan or the budget, provided that said contract encompasses highly unusual clauses that are uncommon in Civil Law contracts and aims to achieve the public interest. Contracts for the execution of projects not funded by the Public Budget are also considered as administrative contracts.

**20-b-2-1.** The administrative contract has a wider definition than the one adopted in the French and Egyptian law. The Libyan law is the only applicable law. The contract was concluded by a legal person of Public Law for the purpose of establishing a touristic investment project within the tourism regions supervised by the State to achieve the objective of developing a plot of land owned by the State for the improvement of its touristic resources and achievement of the public interest. The contract concluded on 8/6/2006 encompassed highly unusual clauses uncommon in Private Law contracts.

**20-b-2-2.** The administrative nature of the contract concluded on 8/6/2006 is not affected by the Plaintiff's oral argument, in which it

stated that the contract, subject of the dispute, was concluded on 8/6/2006, while the regulation on administrative contracts was promulgated in 2007. The General People's Committee Decision No. 563 on the promulgation of the regulation on administrative contracts stipulated in the first article of this regulation that its provisions shall apply to administrative contracts already concluded at the time of its promulgation. Article three of the old regulation as well as the new one provided the same definition for the term "administrative contract" and the contracts for the execution of projects not funded by the Public Budget are also considered as administrative contracts. There is no value in what the Plaintiff Company stated in its oral argument that the contract did not stipulate that the provisions of the Libyan regulation on administrative contracts shall be an integral part of the provisions of the contract, nor did the preamble of the contract refer to its provisions. However, according to Article four of the regulation on administrative contracts promulgated by virtue of the General People's Committee Decision No. 563/2007, the provisions of this regulation are considered as an integral part of any administrative contract. It is also known that the rules laid down in the regulation on administrative contracts are mandatory rules that cannot be excluded by the contracting parties through the express or implicit language of the contract, nor through the explicit, implicit or presumed intention of the parties.

**20-b-3.** the characterization of the contract concluded on 8/6/2006 as a lease contract is inaccurate. The provisions of Articles 557 and 562 of the Libyan Civil Code relating to these contracts do not, in any way, apply to the contract concluded on 8/6/2006, given that the present contract is not a lease contract as determined by the Libyan Civil Code. It is an administrative contract where all the elements of an administrative contract are fulfilled by virtue of the Libyan law.

**20-b-3-1.** The preamble of the contract included that the plot of land is part of the State owned lands and that the signatory party to the contract is entitled to allocate the lands located among the touristic areas owned by the State to enhance the level of touristic services and operate a touristic investment project on this plot of land.

**20-b-3-2.** Article (8) of the contract stipulated that the plot of land shall be cleared through administrative means if the Plaintiff fails to pay the rent fees. Article (11) referred to the requirements of the general plan adopted for the region. Article (12) specified the necessary building

permits to be issued in accordance with the timetable adopted by the first party. Article (14) stipulated that the second party shall not be permitted to waive the contract, in whole or in part, to third parties without a written approval from the first party. Article (15) referred to the strict supervision of the first party. Article (16) stipulated that the reports and observations submitted by the first party should be implemented and performed by the second party in accordance with their content. Article (21) stipulated the employment of the Libyan labor force. Article (24) stipulated the right to terminate the contract if execution does not commence within three months unless a written justification is submitted. Article (30) of this contract signed between the third Defendant and the Plaintiff stipulated the implementation of Law No. (5) of 1997, in the absence of stipulations in the contract. The aforementioned articles prove that this contract is not a lease contract and the characterization of the contract concluded on 8/6/2006 as an administrative contract is substantiated.

**20-b-4.** The characterization of the contract concluded on 8/6/2006 as a B.O.T. contract confirms that this contract has the same characteristics of an administrative contract in accordance with the rules laid down in the regulation on administrative contracts in force in Libya.

**20-b-4-1.** It is known that the opinions given by the doctrine and the doctrinal characterization of the nature of B.O.T. contracts are not binding to the judge or arbitrator. However, what is binding when characterizing these contracts, in light of the clarity of the legislative text, the law applicable to the settlement of the dispute.

**20-b-4-2.** The definition provided by the regulation on administrative contracts in classifying the projects not funded by the Public Budget proves that the Libyan legislator characterized them as administrative contracts, i.e. as Public Law and not Private Law contracts.

**20-c.** On the absence of legal and factual grounds for the Plaintiff Company's request for compensation, the Defendants' Counsels proceeded by stating the following:

**20-c-1.** The Plaintiff Company is not entitled to request any compensation, given the absence of legal and factual grounds for such a request. The Defendants have demonstrated that they committed no fault and therefore no compensation can be awarded, given that the Plaintiff failed to prove that it incurred any damages.

**20-c-1-1.** it is established through the minutes of handing over and taking over of the touristic investment site which was drawn up on 20/2/2007 that the site delivery committee at the Tourism Development Authority handed over the investment site to the Plaintiff Company.

**20-c-1-2.** The letter of the Plaintiff Company dated 13/9/2006 confirms the taking over of the land, and the referral, in this letter, to Article five of the contract indicates that what happened on 20/2/2007 was not merely a site inspection for the delimitation of the border points. Article (6) of the present contract clearly proves that these minutes are the minutes of handing over and taking over and not of site inspection.

**20-c-1-3.** what conclusively proves that the Plaintiff Company took over the plot of land physically and legally, its letter sent to the Assistant Secretary of the General Authority for Investment Promotion on 1/8/2007, where it requested a permit for the erection of a temporary fence around the allocated investment site in Tajura, on one hand, and the approval granted by the latter on 22/8/2007 for the erection of the fence, on the other hand.

**20-c-1-4.** In addition to the letter sent by the Plaintiff Company to the Director of the Department for the Development of Touristic Areas and head of the permanent working team on 1/11/2007, where it was proven that the contractor entrusted with the erection of the temporary fence around the project found in the morning, upon his arrival to the site, that the fence was destroyed.

**20-c-1-5.** Also, the letter sent on 31/12/2007 from the Vice-President of the Board of Directors of the Plaintiff Company to the Secretary of the General Authority for Tourism and Traditional Industries indicated that the contractor was entrusted on 22/10/2007 with the task of erecting a fence around the site.

**20-c-1-6.** And finally, the letter sent by the Plaintiff Company to the Director of the Department for the Development of Touristic Areas on 8/1/2009 encompassed the phrase "following the taking over of the site".



**20-c-1-7.** The Defendants' Counsels proceeded by stating that the letter of the Plaintiff sent on 2/2/2010 and which included the phrase "coordinating with the Authority for the effective taking over of the site", does not evidence the non-taking over of the land in light of the request submitted by the Plaintiff Company for a permit for the erection of the fence, and the contracts concluded with the concerned companies.

**20-c-1-8.** The Defendants' Counsels added that the municipal guards stopped the works of the contractor and seized the equipment as a result of the failure of the Plaintiff Company to obtain a building permit or an approval from urban planning for the execution of these works. Furthermore, the Plaintiff Company decided unilaterally to suspend project execution as of 21/1/2009. Following the third Defendant's correspondence on 4/7/2009 regarding the percentage of the work achieved so far on the project, the Plaintiff Company invoked again the existence of impediments and occupancies that prevented it from commencing project execution.

**20-c-1-9.** In its correspondence dated 11/3/2010, the Plaintiff sought to re-take possession of the plot of land to eliminate the faults from its part. The Defendants' Counsels wondered why the Plaintiff did not seek to terminate the contract during that period if it had not truly taken over the plot of land.

**20-c-2.** Regarding the absence of any proof establishing the commitment of a fault on the part of the third Defendant, given the invalidity of the claim that it did not hand over the plot of land, subject of the contract concluded on 8/6/2006, to the Plaintiff Company, the Defendants stated that the real estate certificate relating to the State-owned lands ascertains that the plot of land, subject of the contract concluded on 8/6/2006, was occupied by the Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trading, Contracting, and Industrial Structures by virtue of a lease contract for 90 years and that the rights established thereon were not cancelled and its ownership was not transferred back to the State until 7/6/2010 and following the Decision No. 203 of 1378 a.P. (2010 A.D.) issued by virtue of Article (19) of Law No. (5) of 1426 Heg. on the Promotion of Foreign Capital Investment that authorized the withdrawal of the project license or project liquidation in the event of the failure to initiate project execution [...]

**20-c-2-1.** While ascertaining the validity of the decision cancelling the approval granted to the investment project, the Defendants stated that, pursuant to the provisions applicable to the dispute, and if the Administration has the right to issue the approval for the investment in the event it fulfills the required conditions, it also has the right to cancel the approval in the event of failure to fulfill the same. The investment project was only granted approval to ensure the achievement of the common interest of the national economy and the investor, owner of the project, which is not a project independent from the purpose for which it was established. Therefore, the approval granted to the project is not deemed to be a final approval; the Administration examines if the project is being effectively executed or not [...]

**20-c-2-2.** The Defendants' Counsels proceeded by saying that the sound characterization of the Plaintiff Company's requests, given that it is a compensation claim for damages that the Plaintiff Company claims to have incurred, leads to the applicability of the specific legal rules of the Libyan law applicable to the dispute on which Decision 203/2010 was based in a way that makes it in conformity with the law, and that in light of the provisions of Article (8) of the General People's Committee Decision No. 194 of 1377 a.P. (2009 A.D.).

**20-c-2-3.** The administrative decision cancelling the approval granted to the investment was issued in accordance with the applicable legal texts. The Plaintiff Company is not entitled to request any compensation, given that the decision – in addition to being issued in accordance with the provisions of the Libyan law applicable to the settlement of the dispute – was issued as a result of the violations committed by the Plaintiff Company.

**20-c-3.** Regarding the fact that the Plaintiff Company violated its obligations (fault of the aggrieved party), the Defendants ascertained in their oral argument that the Plaintiff Company failed to fulfill its obligations, as follows:

**20-c-3-1.** The Plaintiff Company did not give the "Sidi al Andalusi Tourism Complex project" a legal form as required by the Libyan law.

**20-c-3-1-1.** The Plaintiff Company's statement in its final submission presented by Dr. Fathi Wali and Dr. Mahmoud Samir El-Sharkawi on 21/2/2013, (p. 10), that the project took

on the form of a joint-stock company is unsubstantiated, which is further confirmed by the report drawn up by the external auditor of the Plaintiff Company, Salah Eddin El-Turki.

**20-c-3-1-2.** When asked by the Defendants' Counsels about the legal form of the company, the witness Salah Eddin Mohamed Malek failed to provide an answer. However, the Plaintiff Company's Counsels, in response to the previous question, stated that the Sidi al Andalusi Tourism Complex project took on the form of a foreign company branch, which is unsubstantiated, given that the exhibits of the present arbitration case provided no proof of that.

**20-c-3-2.** On the submission of the final designs of the project, the Defendants' Counsels stated that the following facts are proof that the Plaintiff Company failed to submit the necessary project designs for approval.

**20-c-3-2-1.** The letter sent on 8/10/2007 (reference 6-6-6884) by the Director of the Department for the Development of Touristic Areas and head of the permanent working team at the General Authority for Tourism and Traditional Industries indicates that a meeting was held at the headquarters of the Authority on 11/9/2007 A.D. The Plaintiff Company was requested to submit the different project designs, and to personally attend the meeting with the project consultant. The request for the submission of designs was reiterated in other letters sent on 12/11/2007 by the Director of the Department for the Development of Touristic Areas and head of the permanent working team at the General Authority for Tourism and Traditional Industries, and on 4/7/2009 by the Secretary of the Administration Committee of the General Authority for Investment and Ownership who also requested to be informed of the project's current execution status along with a timetable. Had these designs been submitted, the Plaintiff would have obtained a project execution license.

**20-c-3-2-2.** The Plaintiff Company have failed to submit the designs by 24/10/2007 is further ascertained by the fact that

at the time it had not yet contracted engineer Adel Mukhtar to carry out project designs, planning and architecture.

**20-c-3-3.** On the failure of the Plaintiff Company to obtain a license for the execution of an investment project, the Defendants stated the following:

**20-c-3-3-1.** Following referral to the extract of the Tourism Investment Registry, we find that it did not provide any data in the column relating to the project execution license. Furthermore, there was no mention in the said extract of any payment made by the Plaintiff Company of any percentage of the investment project capital, which means that it had failed to fulfill the prerequisite obligations which are essential conditions for obtaining this license. This is sufficient reason to confirm that the decision cancelling the approval granted for the establishment of the investment project is valid.

**20-c-3-3-2.** It cannot be said that the decision of the Secretary of the General People's Committee for Tourism which approved the execution of a touristic investment project, granted at the same time the license for the execution of an investment project, given that the legislator differentiated, in the Law on the Promotion of Investment and its executive regulation, between the investment approval decision on the one hand and the execution license on the other hand, which is issued by the Committee upon the request of the investor.

**20-c-3-4.** To further ascertain that the Plaintiff Company failed to obtain a building permit for the investment project and in response to the oral argument presented by the Plaintiff Company where it stated that "the decision issued by the Secretary of the General People's Committee for Tourism granting approval to the investment also granted it a building permit", the Defendants asserted that this claim is unsubstantiated, which is confirmed by the fact that the Plaintiff submitted on 1/8/2007 a request for obtaining a permit to erect a temporary fence with sheets of corrugated tin.

**20-c-3-5.** The Defendants stated that the Plaintiff did not open bank accounts in the name of the project in Libyan banks. For years following

the issuance date of the investment approval decision, the Plaintiff made no attempt to submit an application for approval to the Central Bank of Libya to open a bank account in the name of the project until 14/3/2010; the same account which the report drawn up by the external auditor of the Plaintiff Company Salah Eddin El-Turki ascertains that it has zero balance.

**20-c-3-6.** Regarding the transfer of the required amounts that should be transferred to assert the existence of an investment capital within the meaning determined by the Libyan law, the Defendants stated the following:

**20-c-3-6-1.** The Plaintiff Company acknowledged that it failed to transfer any amounts in its letter sent to the third Defendant, where it wondered whether it was logical to transfer 10% of the project investment value while the project land was not handed over to the company and knowing that the project cannot have a cost, even an estimated one, without the land.

**20-c-3-6-2.** In response to the Plaintiff Company's allegation in oral argument that the foreign company failed to transfer foreign capital as a result of the annulment of the investment approval decision, the Defendants stated that the obligation of the Plaintiff Company to transfer foreign capital to Libya and open bank accounts in the name of the project precedes the decision cancelling the investment approval granted to it.

**20-c-3-7.** Concerning the failure of the Plaintiff Company to pay the fees in consideration of using and benefitting from the land, the Defendants stated that no value can be given to the argument of the Plaintiff Company according to which the reason behind the failure to pay the fees came as a result of the non-handing over of the land. Furthermore, no value can be given to the Plaintiff's statement that the third Defendant did not request the payment of these fees. It has therefore violated the principle of good faith in fulfilling the contractual obligations.

**20-c-3-8.** The Defendants proceeded by stating that the suspension of project execution happened of the plaintiff's own accord and without

the approval of the third Defendant, as of 22/1/2009, and this is proven by the following:

**20-c-3-8-1.** On 4/7/2009, the Secretary of the Administration Committee of the General Authority for Investment and Ownership sent a letter to the Plaintiff Company, in which he requested the project's current execution status and the exact work progress along with the timetable for the completion of the execution process and the date expected to launch the project.

**20-c-3-8-2.** The Plaintiff Company alleged that it had prepared economic feasibility studies and project technical designs on 24/10/2007. However, this is an unfounded allegation, given that these studies were not yet drawn up on that date. Contracts to that end were concluded on 1/2/2008 while the contract relating to the project designs, planning and architecture was concluded on 13/2/2008, which further proves that the Plaintiff was not serious about fulfilling its obligations.

**20-c-4.** After reviewing the position related to pleas, and following its reply to the Plaintiff's position on this matter, the Defendants invoked the invalidity of the grounds on which the Plaintiff Company relied in its request for compensation. In this regard, it stated the following:

**20-c-4-1.** Following the testimony of experts Habib El-Masri and Khaled El-Ghannam, it was proven that they both acknowledged that the estimates mentioned in their reports relied on a number of assumptions, data and information provided by the Plaintiff Company, while knowing that said assumptions, data and information were not reviewed by the experts themselves, which is impermissible in accordance with the agreed upon principles of proof.

**20-c-4-2.** The Plaintiff Company is not entitled to any compensation, a fact which is ascertained by its inability to establish the occurrence of any actual loss it has incurred, and therefore, how can it determine losses that it might have incurred in the future?

**20-c-4-3.** The element of moral damages is non-existent and the Plaintiff Company is therefore not entitled to any compensation for moral damages. The Defendants referred to the established jurisprudence of the High Administrative Court of Egypt in this regard.

**20-c-4-5.** The Defendants proceeded by stating that since they are not liable for any compensation, they *are a fortiori* not liable to pay arbitration costs, given that the Plaintiff Company chose to resort to arbitration prematurely and must therefore cover its costs. As for lawyers' fees, that is a private concern between the Plaintiff Company and its Counsels and it shall therefore be the only party responsible for paying said fees.

**20-c-5.** To further demonstrate the liability of the Plaintiff, the Defendants stated that the Plaintiff Company violated its obligation by failing to prevent the aggravation of damages, on the grounds that:

**20-c-5-1.** The delay in terminating the contract, based on the assumption of the non-taking over of the plot of land, constitutes a violation of the obligation on the part of the Plaintiff Company by virtue of the provision of Article (224) of the Libyan Civil Code on preventing the aggravation of damages. The normal course would have been the request of the termination of the contract. The Plaintiff Company also violated its obligation to prevent the aggravation of damages when it refused the third Defendant's offer of an alternative plot of land. The Defendants cited the ruling of the High Administrative Court of Egypt on this matter.

**20-c-5-2.** In response to the defense of the Plaintiff Company and the testimony of the two experts, the Defendants stated that the defense of the Plaintiff regarding compensation for lost profits speaks of potential damages that did not occur, damages which were estimated based on assumptions provided by the Plaintiff Company that were not subject to review given that these assumptions and estimates relate to the future and not the present. The Defendants cited the ruling of the Libyan Supreme Court (Challenge No. 50/33 J – Hearing of June 4, 1978). The Defendants concluded their oral argument by reiterating their requests on jurisdiction and adding to them that the arbitration clause set out in Article (29) of the contract concluded on 8/6/2006 may not be invoked against the Libyan Investment Authority, and requested, on the merits, the dismissal of the case for lack of legal and factual grounds.

## **PART THREE: SETTLEMENT OF THE DISPUTE**

In the light of Part One describing the circumstances of the dispute, the arbitration clause and the arbitral proceedings, and Part Two explaining the positions of the two parties, the Arbitral Tribunal dedicates Part Three to the settlement of the dispute through the settlement of the below matters:

**First: On the jurisdiction of the Arbitral Tribunal**

**Second: Was the plot of land handed over and taken over in accordance with the “minutes of handing over and taking over of a touristic investment site” dated 20/2/2007?**

**Third: On the legal nature of the disputed contract and the applicable law**

**Fourth: On the liability**

**Fifth: On the request to issue a summary award to be immediately enforced**

**Sixth: On the compensation due to the Plaintiff Company at the discretion of the Arbitral Tribunal**



## **First: On the jurisdiction of the Arbitral Tribunal**

**Section 1: Is the project covered by the lease contract of a land plot an investment project governed by the Unified Agreement for the Investment of Arab Capital in the Arab States?**

**Section 2: The competence-competence principle: The competence of the Arbitral Tribunal to rule on its own competence.**

**Section 3: Attempts to settle the dispute amicably prior to resorting to arbitration. Was the case filed prematurely?**

**Section 4: Personal scope of the arbitration clause as to the parties: Extension of the arbitration clause to the State of Libya and to the Ministry of Economy.**

**Section 5: The substantive scope of the arbitration clause.**

## **First: On the jurisdiction of the Arbitral Tribunal**

### **Section 1: Is the project covered by the lease contract of a land plot an investment project governed by the Unified Agreement for the Investment of Arab Capital in the Arab States?**

The Defendants consider that (Page 33 et seq. of the statement of defense submitted on 22/11/2012) the reference made in Article 29 of the contract to the Unified Agreement for the Investment of Arab Capital in the Arab States:

***“... is strictly limited to the adoption of arbitration set out in this Agreement as a means for dispute resolution excluding all other rules mentioned therein. The referral, by the parties, or their mentioning of the arbitration provided for in an international agreement is common, yet it remains limited to the rules of said arbitration notwithstanding any other texts mentioned in the Agreement, so long as the contracting parties have not expressly stipulated the adoption and integration of such texts in their contract, particularly when the provisions of such Agreement cannot be applied ex officio, which is the case here”.*** (Emphasis by underlining added)

The Defendants add that ***“this Agreement has limited the substantive scope of its application to the Arab capital and Arab capital investment”***, which was not fulfilled, ***“given that no transfer of Arab capital has been made from the State of Kuwait to the State of Libya for investment therein”***. (Emphasis by underlining added)

(Page 34 et seq. of the statement of defense dated 23/11/2012 and pages 198-199 of the rejoinder dated 7/2/2013)

As to the Plaintiff, it considers that the Unified Agreement for the Investment of Arab Capital in the Arab States:

***“...is part of the legislation referred to in Clause 30 of the lease contract considering it is the law of the contract.”***(Page 19 of the replication submitted by Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trade, Contracting, and Industrial Structures “The Plaintiff” against 1- The Government of the State of Libya, 2- The Ministry of Economy in the State of Libya, 3- The General Authority for Investment and Ownership in Libya “The Defendants” (Plaintiff represented by Dr. Fathi Wali and Dr. Mahmoud Samir El-Sharkawi).

That is because:

***“The Libyan law does not only include legislation and regulations of purely national origin, but also and certainly international conventions in effect in Libya, among which the Unified Agreement for the Investment of Arab Capital in the Arab States. The Libyan State had signed the said Agreement on the day of its ratification on 26/11/1980, and submitted the documents of its adherence thereto on 4/5/1982, and the State of Kuwait - State of the Plaintiff Company - was also a signatory of the Agreement”.***

(Page 18 of the replication submitted by Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trade, Contracting, and Industrial Structures “The Plaintiff” against 1- The Government of the State of Libya, 2- The Ministry of Economy in the State of Libya, 3- The General Authority for Investment and Ownership in Libya “The Defendants” (Plaintiff represented by Dr. Fathi Wali and Dr. Mahmoud Samir El-Sharkawi).

The Plaintiff adds:

***“It is worth mentioning here that Article 24 of Law No. 5 of 1997 on the Promotion of Foreign Capital Investment has made the international conventions in effect in Libya supersede the national legislation by stating that:***

***“Any dispute arising between the foreign investor and the State, either by action of the investor or as a result of measures taken against him by the State shall be submitted to the courts in ... Libya..., unless there is a bilateral agreement between ... Libya... and the State to which the investor belongs, or multilateral agreements to which ... Libya... and the State of the investor are parties, that includes provisions for conciliation or arbitration, or a special agreement between the investor and the State containing an arbitration clause”.***

**(Page 19 of the replication submitted by Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trade, Contracting, and Industrial Structures “The Plaintiff” against 1- The Government of the State of Libya, 2- The Ministry of Economy in the State of Libya, 3- The General Authority for Investment and Ownership in Libya “The Defendants” (Plaintiff represented by Dr. Fathi Wali and Dr. Mahmoud Samir El-Sharkawi).**

In response to the allegations that no transfer of any Arab capital has been made from Kuwait to Libya, the Plaintiff contends that:

***“The facts of the dispute confirm that the Plaintiff has transferred part of its funds to Libya and has paid to the companies it concluded contracts with for the execution of its investment project in Libya”.***

**(Page 20 of the replication submitted by Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trade, Contracting, and Industrial Structures “The Plaintiff” against 1- The Government of the State of Libya, 2- The Ministry of Economy in the State of Libya, 3- The General Authority for Investment and Ownership in Libya “The Defendants” (Plaintiff represented by Dr. Fathi Wali and Dr. Mahmoud Samir El-Sharkawi).**

The Plaintiff also confirms that no legal or contractual obligation binds it to transfer 10% of the project investment value, and that the only obligation imposed thereon is the one provided for in Article 3 of Decision No. 135 of 1374 a.P. (after the Prophet), corresponding to 7/6/2006 (Exhibit no. 6 of the statement of claim), pertaining to the deposit of 0.1% (one per thousand) of the investment value in the account of the Tourism Authority. The Plaintiff also confirms having paid the said percentage. (Page 13 et seq. of the replication submitted by the Plaintiff on 3/1/2013 and 21/2/2013).

**Therefore,**

In order to settle this matter, the Arbitral Tribunal refers to the Libyan Investment Law, i.e. Law No. 5 of 1426 Heg. (1997 A.D.) on the Promotion of Foreign Capital Investment, amended by Law No. 7 of 1371 (2003 A.D.) and its executive regulations, and to Law No. 9 of 1378 a.P. (2010 A.D.) on the Promotion of Investment, which has abrogated the aforementioned Law No. 5 of 1997. Consequently, the provisions of Law No. 9 of 2010 have become applicable to all investment projects, facts and acts relating thereto existing at the time of promulgation of this law, without prejudice to the privileges and exemptions granted before its promulgation (Article 30 of Law No. 9 of 2010).

Law No. 9 of 2010 was promulgated on 28/1/2010 and Article 31 thereof provides that it will enter into force as of the date of its publication in the “Moudawinat Al-Tachri’at” (Libyan Official Gazette). The law was effectively published in Issue No. 4 thereof on 28/4/2010.

Consequently,

The settlement of the dispute should be made in the light of Law No. 5 of 1997 and Law No. 7 of 2003. The Arbitral Tribunal will examine Law No. 9 of 2010 for comparison purposes.

**Whereas Article 3 of the old Law No. 5 of 1997 defined the foreign capital, the investment project and the investor as follows:**

*“Foreign Capital: Total financial value entering ... Libya... whether owned by Libyans or by foreigners for the performance of an investment activity.*

*Investment Project: Any economic enterprise established in accordance with the Law which activity is the production of a commodity for final or intermediary consumption,*

*the production of investment commodities, or the export or provision of services or any other enterprise approved by the Secretariat of the General People's Committee.*

*The Investor: Any natural or artificial person, national or foreign, who invests in accordance with the provisions of this Law."*

**Whereas Law No. 9 of 2010 defined in Article 1 the foreign capital, the investment project and the investor as follow:**

*"Foreign Capital: The monetary value, evaluated in one of the foreign currencies, of liquid assets and real property brought into the country, either owned by Libyans or foreigners, for the performance of an investment activity.*

*Investment Project: Any investment activity that meets the conditions provided for in this Law, regardless of their legal form.*

*The investor: Any natural or artificial person, national or foreign, who invests in accordance with the provisions of this Law."*

**Therefore,**

The Arbitral Tribunal considers that the project covered by the lease contract is an investment project pursuant to the law in force at the time of conclusion of the contract, i.e. Law No. 5 of 1997, and pursuant to Law No. 9 of 2010. The investment project has the status of a legal person and enjoys financial autonomy (Article 13 of Law No. 5 of 1997 and Article 12 (1) of Law No. 9 of 2010 providing for the investor's right to open bank accounts for his project, in the local currency and in foreign currencies, with one of the banks operating in the country).

The project is executed under the supervision of the Tourism Development Authority (Article 6 of Law No. 5/1997). Mohamed Abdulmohsen Al-Kharafi & Sons Company should make the feasibility study (Article 6(2) of Law No. 5/1997 and Article 6(2) of Law no. 9/2010). It should exploit and use locally produced materials and machines necessary for the execution and operation of the project, and employ Libyan national manpower (Articles 4 and 7 of Law No. 5/1997, and Articles 4 and 7 of Law No. 9/2010. The project enjoys exemptions and privileges (Article 10 of Law No.5/1997 and Article 10 of Law No. 9 of 2010) as well as additional privileges and exemptions (Article 14 of Law No. 5/1997, and Article 15 of Law No.9/2010) if it contributes to achieving food security, uses equipment that would achieve savings in electricity or water, contributes

to the protection of the environment, or contributes to the development of the area). The contracting authority has the right to withdraw the license issued for the project if the Plaintiff fails to commence the execution of the project within 3 months as of the date of receipt of the license (Article 19 of Law No. 5/1997, and Article 20 of Law No. 9/2010).

The Arbitral Tribunal notes that the General People's Committee for Tourism is the authority who approved the execution of the investment project on 7/6/2006 in accordance with the terms and provisions of Law No. 5/1997 on the Promotion of Foreign Capital Investment and Law No. 7/2004 on Tourism and their executive regulations (as per Article 9 of Law No. 5/1997 providing that the Authority grants the license for investment of foreign capitals after the Secretary issues the decision approving the investment. Article 9 of Law No. 9/2010 provides that the permission to erect, manage and operate the investment project should be granted by means of a decision issued by the Secretary to which is affiliated the administrative entity in charge of the implementation of the provisions of this Law. This entity has the exclusive jurisdiction to issue all the licenses and approvals necessary for the investment project).

Furthermore, the Arbitral Tribunal notes that the Kuwaiti capital was actually transferred and used.

Consequently, the Libyan Investment Law applies to the investment subject matter of the arbitration dispute because it is an investment that is in conformity with said law (Article 2(1) of Law No. 5/1997, and Article 2 of Law No. 9/2010 which provides that the present law applies to the national, foreign, or mixed capital invested in the areas targeted by this Law), in the meaning of an **investment of foreign capital "owned by Libyan Arab citizens and nationals of Arab and foreign States in investment projects"**. The disputed project is an investment "in one of the fields of economic development i.e. in the field of tourism" (Article 8 of Law No. 5/1997 and Article 8 of Law No. 9 of 2010 providing that the investment should be made in all production and service fields) **in order to achieve benefit from the execution and operation of the project in the future**, as stated in the Law on the Promotion of Investment.

**Accordingly,**

It is established to the Arbitral Tribunal from referral to Decision No. 135 of 1374 a.P., corresponding to 7/6/2006 (Exhibit No. 6 of the statement of claim), that none of the provisions of said Decision approving the investment imposes as a condition the transfer of a part of the project capital prior to the taking over of the project's land, but that said Decision has only imposed as a condition, in its Article 3, the deposit of 0.1% of the

investment value to the account of the Tourism Authority. The transfer of the said percentage, 0.1%, was indeed made as established.

However, the transfer of 10% of the project investment value to the account that the Plaintiff had opened in the Libyan banks prior to the taking over of the project's land, even though it is not contractual, as neither Decision No. 135 of 1374 a.P. (corresponding to 7/6/2006) nor the land lease contract provide for such transfer, is impractical and illogical prior to the taking over of the land and the commencement of the works, especially that 10% of the project investment value (estimated at 130 million USD) is equivalent to 13 million USD. Moreover, the payment of said percentage is not a legal obligation, contrary to the allegations of the Defendants who maintain in the "final submission" dated 6/3/2013 (page 306) that the correspondence addressed by the third defendant to all companies investing in Libya and governed by the Investment Law confirm the necessity to provide the latter with the required documents including an acknowledgement of deposit of 10% of the capital value, in cash, in the project account from the date of receipt, by said companies, of the investment approval Decision. This obligation to pay 10% of the project investment value is considered as one of the legal and administrative procedures necessary for the project establishment (Exhibits No. 36, 37, and 38 of the Defendants' final submission dated 6/3/2013).

After examination of exhibits n° 36, 37, and 38 of the Defendants' final submission dated 6/3/2013, the Arbitral Tribunal finds that the third defendant has based its request of payment, by the companies to which it addressed the correspondence, of 10% of the project investment value, as well as other procedures and conditions, on Article 27 of the executive regulations of Law No. 5/1997 A.D. on the Promotion of Foreign Capital Investment and its amendments.

After examination of Article 27 of said executive regulations, the Arbitral Tribunal finds that it provides as follows:

***"Obligations of the Investor:***

*The investor who was granted the license for investment shall abide by the following: -*

*1- To execute the project within six months from the date of being informed of the approval to erect it in accordance with the provisions of these Regulations.*

*The People's Committee for the Authority may, for objective reasons, permit, if necessary, the extension of this period for a further suitable period.*

*2- To execute the project in accordance with the request submitted on the basis of which the license was issued.*



3- To keep the accounting registers and books provided for in the Libyan Commercial Law, and to annually submit the financial statements and budget of the project, certified by an auditor, to the Tax Department and the Authority.

4- To provide the Authority with annual reports on the project activities and any expansions or developments thereof.

5- To give priority to national manpower whenever the required qualifications for filling the positions or jobs required by the project are equal.

The People's Committee for the Authority may raise a recommendation to the Secretary of the General People's Committee for Economy and Trade to withdraw or cancel the decision of approval or to completely cancel the project in any of the following cases:

a) Non-completion of the execution of the project within the period specified in the license, and expiry of the additional period granted to the investor.

b) If it transpires to the Authority that the investor is not serious in the execution of the project or is incapable of continuing its execution at the financial or technical level.

c) If the investor violates any of the obligations provided for in this Article or violates any of the provisions set out in Law No. (5) of 1426 Heg. and these regulations.

The People's Committee for the Authority shall notify the investor of the necessity to complete the execution of the project according to the specified timetable by virtue of an official notice served thereon at the address indicated in the request for approval of the investment project.

In case of withdrawal of the decision, the investor shall sell the properties and lands he might have purchased for the project. He may as well be asked to remove any constructions or additions made to the lands he was allowed to use for the project purposes, and to restitute them to their original condition and form at its own expenses. The investor shall be informed thereof by registered letter with acknowledgement of receipt.

Upon withdrawal of the decision for any of these reasons, the investor shall pay the customs duties and taxes or any other fees on the imported machinery, equipment and transport means, from which he might have been exempted by virtue of the provisions of the mentioned Law No. (5) of 1426 Heg. , in case of disposal thereof by sale or assignment, without prejudice to any compensation, if any, provided for by the Law."

Consequently,

The Arbitral Tribunal finds that Article 27 of the executive regulations of Law No. 5/1997 A.D. on the Promotion of Foreign Capital Investment and its amendments does not provide for any legal obligation to pay part of the investment capital, whether 10% of

the investment capital or any other percentage. Consequently, the Arbitral Tribunal rejects the allegations of the Defendants in this regard.

Whereas, in any case, the non-transfer of part of the project investment value was the result of a dispute between the Plaintiff and the Defendants about the failure to hand over the land covered by the contract; whereas no text in the contract or provision in the law obligates the Plaintiff to transfer all or part of the project investment value without the project land being handed over free of impediments and persons; and whereas no contractual or legal provision obligates the Plaintiff to transfer part of the capital invested in the disputed land in spite of the issue of the decision of the Libyan Council of Ministers cancelling the allocation of the land to the Plaintiff and cancelling all rights established thereon (Exhibit No. 20 of the Defendants docket - Page 4 of the "Complementary Report on a Legal Opinion - Judge Burhan Amrallah - February 2013").

**Therefore,**

Pursuant to Law No.5/1997, Law No.7/2004, and Law No. 9/2010 which abrogated Law No.5/1997 and repealed Article 10 of Law No. 7/2004 on Tourism,

The Arbitral Tribunal considers that the provisions of the Libyan Investment Law apply to this foreign capital investment project which constitutes a series of activities leading to a specific result within a determined budget and timeframe, and allocating a certain amount of resources to generate a productive energy expected to yield benefit in the future. Accordingly, the disputed project is an investment project pursuant to the definition and concept of investment set out in the Libyan law.

On the other hand, the State of Libya signed the Unified Agreement for the Investment of Arab Capital in the Arab States on 4/5/1982 preceded by the State of Kuwait that signed it on 1/4/1982. As a result, the Agreement became an integral part of the Libyan legal system: the mere adherence by Libya to the Unified Agreement for the Investment of Arab Capital in the Arab States made the said Agreement binding and having the same force of any Libyan law. (Emphasis by underlining added)

Said Agreement has consolidated the provisions of the Libyan Investment Law and became part of the Libyan legal system, pursuant to Article 3(2) of the Unified Agreement for the Investment of Arab Capital in the Arab States which provides that:

***"The provisions of the Agreement shall have priority of application in instances where they conflict with the laws and regulations in the States Parties".***

Article 24 of Law No.5/1997 provides that:

***“Any dispute arising between the foreign investor and the State, either by action of the investor or as a result of measures taken against him by the State shall be submitted to the competent courts in... Libya..., unless there is a bilateral agreement between... Libya... and the State to which the investor belongs, or multilateral agreements to which ... Libya... and the State of the investor are parties, that includes provisions for conciliation or arbitration, or a special agreement between the investor and the State containing an arbitration clause.”*** (Emphasis by underlining added)

In the same context, Article 24 of the new Investment Law No. 9/2010 provides that:

***“Any dispute arising between the foreign investor and the State, either by action of the investor or as a result of measures taken against him by the State shall be submitted to the competent courts in the State, unless there is a bilateral agreement between the State and the State to which the investor belongs, or multilateral agreements to which the State and the State of the investor are parties, that includes provisions for conciliation or arbitration, or a special agreement between the investor and the State containing an arbitration clause.”***

For these reasons, and pursuant to Article 24 of Law No.5/1997 A.D. on the Promotion of Foreign Capital Investment and Article 24 of Law No. 9/2010 on the Promotion of Investment,

And whereas the transfer of the investment amounts is, in any way, related to the performance of the investment contract terms, and has no relation whatsoever with the terms of application of the substantive provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States (**Page 4 of the “Complementary Report on a Legal Opinion – Judge Burhan Amrallah - February 2013”**),

**The Arbitral Tribunal decides to:**

- 1- Reject the Defendants’ allegations;**
- 2- Consider the Unified Agreement for the Investment of Arab Capital in the Arab States as part of the Libyan Law in the meaning of Article 24 of the Law on the Promotion of Investment referring to bilateral or multilateral agreements that include arbitration clauses to settle any dispute arising between the foreign investor and the State.**

**Therefore,**

Whereas the Unified Agreement for the Investment of Arab Capital in the Arab States is a multilateral agreement ratified by the State of Libya (host country of investment/Defendants) and the State of Kuwait (country of investor/ Plaintiff),

And whereas the Unified Agreement for the Investment of Arab Capital in the Arab States includes a special annex on arbitration,

**Consequently,**

The Unified Agreement for the Investment of Arab Capital in the Arab States is applicable in the present case pursuant to the Libyan law and Article 24 of the Law on the Promotion of Investment.

Article 1 of said Agreement has defined in paragraphs 5, 6, and 7 respectively the concepts of Arab capital, Investment of Arab capital, and Arab investor as follows:

***“5- Arab capital: assets owned by an Arab citizen comprising any material and immaterial rights which have a cash valuation, including bank deposits and financial investments. Revenues accruing from Arab assets shall be regarded as Arab assets, as shall any joint share to which this definition applies.***

***6- Investment of Arab capital: the use of Arab capital in a field of economic development with a view to obtaining a return in the territory of a State Party other than the State of which the Arab investor is a national or its transfer to a State Party for such purpose in accordance with the provisions of this Agreement.***

***7. Arab investor: an Arab citizen who owns Arab capital which he invests in the territory of a State Party of which he is not a national.”***

**Therefore,**

The Arbitral Tribunal finds that the Unified Agreement for the Investment of Arab Capital in the Arab States applies;: 1) because the parties have made explicit reference to the application of the provisions of said Agreement, without any discrimination, in the arbitration clause set out in Article 29 of the contract, which means that they have made reference to all the provisions of the Agreement, especially that Article 30 of the contract specifies the legal rules applicable to the subject matter of the dispute among which are the legislation in force in Libya, including conventions ratified by the Libyan State. In other words, Article 29 of the contract determines the procedures of

settlement of a potential dispute arising between the two parties, while Article 30 of the contract specifies the rules that should be applied to the subject matter of the dispute (Page 5 of the “Complementary Report on a Legal Opinion – Judge Burhan Amrallah - February 2013); 2) because said Agreement has become an integral part of the Libyan law and prevails over all the Libyan laws in force. Therefore, the Unified Agreement applies to the investment of Arab capital whether or not the contract or the arbitration clause referred thereto, given that the entire Libyan law is applicable and the Unified Agreement constitutes part thereof.

**Based on the above,**

**The Arbitral Tribunal:**

- 1- Considers the disputed project an investment project pursuant to the definition and concept of investment in the Libyan law;**
- 2- Deems that, in application of Article 2, paragraph 6, of the “Conciliation and Arbitration” annex of the Unified Agreement for the Investment of Arab Capital in the Arab States, “the Arbitral Panel shall decide all matters related to its jurisdiction and shall determine its own procedure”.**

## **Section 2: The competence-competence principle: The competence of the Arbitral Tribunal to rule on its own competence**

Whereas the Arbitral Tribunal’s competence to rule on its own competence shall be determined in the applicable arbitration rules,

Whereas the arbitration rules applied in this case are, as mentioned earlier, the arbitration rules of the Unified Agreement for the Investment of Arab Capital in the Arab States which annex entitled “Conciliation and Arbitration” is an integral part thereof,

Whereas Article 2(6) of the annex “Conciliation and Arbitration” provides that ***“the arbitral panel shall decide all matters related to its jurisdiction...”***,

**Accordingly,**

The Arbitral Tribunal finds that it is competent to rule on its own competence and on the scope of extension of the arbitration clause to the claim for compensation of the damages incurred as a result of the decision of the Minister of Economy annulling the decision of the Minister of Tourism approving the investment and leading to the conclusion of a contract entitled ***“Lease contract of a land plot for the purpose of establishing a touristic investment project.”***

On the other hand, the Arbitral Tribunal finds that its competence extends to the characterization of the litigants’ claims and of the case in accordance with the Libyan jurisprudence, given that it is established in the case law of the Libyan Supreme Court that the court ruling on the merits of the case (or the Arbitral Tribunal in arbitration cases) has a discretionary power when it comes to the characterization of the case and the application of the appropriate articles of law that it deems applicable to the relationship between the two litigants. In this context, the Arbitral Tribunal refers to the decisions of the Libyan Supreme Court, the principles laid down thereby being considered as legal provisions, in accordance with Article (36) of Law No.17/1982 on the Supreme Court, including the principles mentioned in the present arbitral award.

***“The well-established case law of the Supreme Court recognizes that the court ruling on the merits of the case has the power to characterize the case, to apply the appropriate legal provision to the relationship between the two parties to the action for damages and to apply it to the case at hand (...).”***

**(Libyan Supreme Court, Civil Challenge No. 154/ 50J,  
dated 29/1/1374 a.P. (2006 A.D.))**

**Moreover,**

***«Whereas the court ruling on the merits of the case has the power to characterize the claims of the litigants and rectify them in such a manner to be in conformity with the facts brought before it and the claims and pleas that might be submitted thereto, thus exercising its right to give the appropriate characterization to the case and determine what the litigants mean in their claims in order to be able to apply thereon the applicable legal provisions».***

**(Libyan Supreme Court, Civil Challenge No. 668/ 51J,  
dated 4/6/1374 a.P. (2006 A.D.))**

And,

*"The factor that should be taken into consideration for the legal characterization of the case is the intention of the plaintiff and the purpose behind his claims. If the plaintiff requires the expulsion of the defendant from the property he unrightfully seized and exploited as a passage, the case he files will be characterized in accordance with his personal right as recognized by the law, given that what is important here is the confirmation of the original right established by the law. The first-instance judgment, upheld by the contested ruling, characterized the case according to the claims of the plaintiff and to the legal basis upon which it was founded."*

(Libyan Supreme Court, Civil Challenge No. 230/ 51J, dated 27/6/1374 a.P. (2006 A.D.))

By the same token,

*«The comprehension of the facts of the case falls under the jurisdiction of the court ruling on the merits of the case, without control from the Court of Cassation, whenever the findings of the ruling are valid and based on what is established in the exhibits. Said court will have to decide based on its conviction and on what it deems well-founded. »*

(Libyan Supreme Court, Civil Challenge No. 40/ 53J, dated 4/6/1374 a.P. (2006 A.D.)).

For these reasons,

The Arbitral Tribunal considers that it is competent to rule on its own competence and on the scope of extension of the arbitration clause to the claim for compensation of the damages incurred as a result of Decision No. 203/2010 issued by the Minister of Economy annulling Decision No. 135/2006 issued by the Minister of Tourism approving the investment and leading to the conclusion of a contract entitled *"Lease contract of a land plot for the purpose of establishing a touristic investment project."*

### **Section 3: Attempts to settle the dispute amicably prior to resorting to arbitration. Was the case filed prematurely?**

Whereas the dispute here, as indicated in Part Two of the arbitral award, revolves around knowing whether or not the Plaintiff made attempts to settle the dispute amicably, as required by Article 29 of the contract, prior to filing the arbitration case, given that the Defendants claim that the Plaintiff notified the General Authority for Investment and Ownership, through the court bailiff, of the need to choose, within a period of 30 days, between the annulment of the Decision of the Minister of Economy annulling the Decision of the Minister of Tourism, or the payment of compensation, thus closing the door to the amicable settlement before it even started; whereas the arbitration case was filed prematurely because no attempts to settle the dispute amicably were made as required by the contract, and whereas the will of the contracting parties should not be violated in application of the *pacta sunt servanda* principle,

Whereas the Plaintiff claims having made several attempts to settle the dispute amicably prior to resorting to arbitration,

**Therefore,**

**The Arbitral Tribunal will examine the allegations of the Plaintiff pertaining to the attempts and efforts invoked to know whether or not they constitute attempts to reach an amicable settlement of the dispute.**

The Plaintiff asserts, relying on documents, that:

1. It made, over a period of five months, several attempts to settle amicably the dispute with the Libyan Government, the Ministry of Economy and the General Authority for Investment and Ownership, but all attempts have failed thus prompting the Plaintiff to invoke the arbitration clause (Page 25 et seq. of the replication to the statement of defense).
2. It sent a letter, on 17/6/2010 (Exhibit No. 59 of the statement of claim), to each of the Secretary of the General People's Committee for Industry, Economy and Trade, the Governor of the Central Bank of Libya, the Secretary of the Committee of the Department of Socialist Real Estate Registration and Documentation, the



Department of Real Estate Affairs, the Director of the Office for Legal Affairs, the Director of the Office for Committee Affairs, and the Secretary of the Administration Committee of the General Authority for Investment and Ownership, requesting that a date be fixed for a meeting to discuss the reasons behind the issuance of Decision No. 203 cancelling the project, and the means to remove all obstacles from the land and handing it over free of impediments. Furthermore, the Plaintiff asserts that this request was left unanswered.

3. It sent a letter, on 29/6/2010, to the General Authority for Investment and Ownership seeking to know the reasons behind the issuance of Decision No. 203 (Exhibit No. 60 of the statement of claim).
4. It sent a letter, on 8/7/2010, to the Libyan General Authority for Investment and Ownership and to the Central Bank of Libya requesting to know the reasons behind the cancellation of the project and to let them know that in the event of non-reply from their part, Al-Kharafi Company will find itself obliged to move from the phase of cooperation and investment to the phase of arguments and disputes. That phase was considered as a cooperation phase without any objection from the concerned parties. (Exhibit No. 61 of the statement of claim).
5. The counsel for the Plaintiff Company sent, on 4/8/2010, a letter to the Secretary of the Committee of the General Authority for Investment and Ownership requesting an answer to the last three letters of the Plaintiff Company dated 17/6/2010, 29/6/2010, and 8/7/2010 respectively, whereby the company seeks to know the reasons behind the project cancellation. The counsel concluded the letter by voicing his hope for cooperation in order to reach a fast amicable solution. The said letter was delivered on 5/8/2010. (Exhibits No. 61 and 62 of the statement of claim).
6. The counsel for the Plaintiff Company sent, on 29/10/2010, a letter to the Secretary of the Administration Committee of the General Authority for Investment and Ownership in response to the Committee's letter dated 11/10/2010, making reference to his previous letter in which he states that the cancellation of the project will entail considerable damages and financial losses. He also made reference to the notification sent through the court bailiff, in which he states that the General Authority for Investment and Ownership has breached the law and failed to fulfill its legal and contractual obligations to hand over the project land free of impediments and persons, and provide protection for the Company throughout the process of erecting the fence. The Plaintiff also asserted that it had enclosed with said letter statements of the expenses so far incurred for the project. The Plaintiff concluded its letter by expressing its wish to hold a meeting within one week to discuss the issue

and reach an amicable solution (Exhibit No. 67 of the statement of claim). Furthermore, the Plaintiff asserts that said letter was left unanswered by the Libyan party.

7. The Defendants replied with a letter sent by the Secretary of the Administrative Committee of the General Authority for Investment and Ownership dated 11/10/2010 (Exhibit No. 30 of the statement of defense). The letter reads as follows:

***“... the persons who issued this decision (i.e. Decision No. 203/2010 cancelling the approval of the project granted to the Company) did not have the intention to eliminate any role that the Company could have in the future in the investment sector in Libya. It only aims at the implementation of an existing legislation. In view of the Company’s good reputation, we hereby reiterate the Authority’s willingness to assist you once again in finding a location to establish the project you deem appropriate...”***

In its letter to the Plaintiff, the Libyan Administration expressly stated its willingness to provide assistance:

***“We hereby reiterate the Authority’s willingness to assist you once again...”***

The Plaintiff asserts that the abovementioned shows the Defendants’ several rejections of repeated invitations by the Plaintiff to hold discussions, consultations, or dialogue in order to find a solution that would enable the latter to start the execution of the project which approval thereon had been granted by the Authority. The expression *“to assist you once again”* expressly means that there are no ways for discussing the current project. The Authority has even ignored the Plaintiff’s letters by virtue of which it inquires about the reasons behind the cancellation of the approval, thus closing the door to any possible settlement through the negotiations and clarifications that the Defendant could have presented to find an amicable solution, should the justifications given by the Authority have any sound and serious foundations.

8. In acting as it did, the Libyan Administration, i.e. the Defendants, is the one who closed the door to any amicable settlement that could have been successful and implemented before it even started.
9. On 9/11/2010, a meeting for which no minutes were kept was held between the Director of the Administration Committee of the General Authority for Investment and Ownership and the counsel for the Plaintiff Company. No solution was reached

during the meeting as the Defendants admitted having lost control over the land, and thus acknowledged their inability to hand over the land, hence the suggestion of an alternative land to the Plaintiff. (Page 9 of the statement of claim).

10. It sent, on 12/1/2011, a letter to the Secretary of the Administration Committee of the General Authority for Investment and Ownership, following the notification and prior to the initiation of the arbitral proceedings, hoping that the Defendants would appreciate the fact that the Plaintiff Company never wished and never wishes to enter into litigation with them or seek enrichment at their expense, but finds itself obliged to protect the funds of the company stakeholders and fulfill all the project-related obligations that the managing board of the Company had committed vis-à-vis third parties. By virtue of this letter, the Plaintiff requested the Authority to expeditiously reconsider its position (position of the Defendants) and allow it to execute the project on the same land and site prior to the commencement of the arbitral proceedings so that the Plaintiff would stop and cancel the arbitration (Exhibit no. 68 of the statement of claim).

11. All of the abovementioned initiatives occurred before the Plaintiff requested, on 26/3/2011, from the Secretary General of the League of Arab States, his approval on the initiation of the arbitral proceedings. This proves that the Plaintiff has endeavored to find an amicable solution for the dispute and was ready to stop the already-initiated arbitral proceedings should the Authority respond to its requests. However, the Authority failed to respond to the Plaintiff's endeavors.

**Therefore,**

In light of all the correspondence submitted before it, the Arbitral Tribunal considers that both parties have made amicable endeavors prior to filing the arbitration case, however without leading to any solution.

Consequently, the present case was filed in due time in accordance with the procedures provided for in the arbitration clause and is not premature. The Defendants' allegations in this regard shall be rejected.

In any case, the Arbitral Tribunal refers to the opinion of Judge Dr. Burhan Mohammed Tawhid Amrallah, Doctor of Law and Appellate Judge (AD-HOC) at the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA), and the Secretary General of the Arab Union for International Arbitration, who submitted in this case a "Legal Opinion Report", an opinion that is well-founded.

In his report, Judge Amrallah affirms that *“concerning the pre-arbitration amicable endeavors, and in the light of the facts and correspondence exchanged between the parties, **this plea** was based on Article 29 of the disputed contract which provides for the resorting to arbitration after failure of the attempts to settle the dispute amicably, and which clarifies that the amicable settlement is a method of dispute settlement that should be resorted to prior to resorting to arbitration. However, the Plaintiff did not attempt to settle the dispute amicably; consequently, the request for arbitration it submitted is inadmissible because it is premature.”*

The Judge Amrallah adds:

*“Whereas Article (29) of the disputed contract dated 8/6/2006 provides that: *“In the event of a dispute between the two parties arising from the interpretation or performance of the provisions of the present contract during its validity period, such a dispute shall be settled amicably. Failing that, the dispute shall be referred to arbitration pursuant to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States adopted on Nawar (November) 26, 1980 A.D.”.**

Whereas it appears from the paragraph above that **the two parties**, despite agreeing to refer any dispute that may arise between them to arbitration in the event where no amicable solution could be reached, **have neither determined the means, nor set forth any procedures to reach such an amicable solution; whereas, in addition, they have not determined a period of time for such settlement and have not provided for the participation of specific persons in the settlement;** whereas said Article 29, which provides for the amicable settlement of the dispute, did not specify the conditions of its implementation, in such a manner that it can only be understood if its main goal is to **express** the parties’ intention to endeavor to reach an amicable solution prior to resorting to arbitration; whereas the parties may not be obliged **to enter into fruitless negotiations that would only delay the orderly settlement of the dispute;** whereas it is established from the documents submitted by the two parties to arbitration that the Plaintiff has endeavored to settle the dispute amicably before submitting the request for arbitration, and has, for this reason, appointed in writing its attorney M. Rajab Al Bakhnoug who sent several letters to the third defendant seeking amicable settlement; whereas the Plaintiff has also communicated to the third defendant, in writing, its conditions concerning the settlement, namely the annulment of Decision No. 203/2010 and the handing over of the land covered by the contract free of impediments and persons so that the Company can benefit therefrom, or the compensation of the damages and lost profits incurred by the Plaintiff Company; whereas **the firm position of the Defendant was the rejection of all suggestions and the insistence** - in more than one letter submitted in the case - on denying its responsibility for the termination of the contract and the annulment of the approval Decision No. 135/2006; whereas the latter

decision was issued in implementation of the law as a result of the Plaintiff's delay in starting the actual execution of the project and refusal to return the disputed land; whereas it is established from the letter of the Department of Real Estate Registration dated 27/4/2010 (Exhibit No. 20 of the Defendants' docket) that the mentioned land was the subject of letter No. 11752 dated 30/12/2009 addressed by the General People's Committee to said Department delegating it to take the appropriate measures for cancelling rights established thereon; whereas it is clear that the date of the mentioned delegation precedes that of Decision No. 203/2010 issued by the General People's Committee for Industry, Economy and Trade on 10/5/2010; whereas it is established from the aforementioned letter of 27/4/2010, that the disputed land was allocated to the Libyan Local Investment and Development Fund; whereas, based on all the above, **the amicable settlement - albeit essentially required - has become impossible and to no avail**, therefore it cannot be invoked to oblige the parties to engage in fruitless negotiations or to delay the orderly settlement of the dispute through arbitration. It is established in **the international arbitration jurisprudence that the fulfillment of the procedural requirements in the arbitration agreement are not considered as a prerequisite of the Arbitral Tribunal's jurisdiction**. This is for example what was adjudicated in the final arbitral award in case No. 8445-ICC whereby the Arbitral Tribunal ruled that **the clause requiring efforts to reach amicable settlement, before commencing arbitration, are primarily expression of intention and should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute**.

(Gary B. Born, *International Commercial Arbitration*, W. Kluwer, Netherlands 2009, vol. I, pp. 842-844 "Clause requiring efforts to reach amicable settlement, before commencing arbitration, are primarily expression of intention" and "should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute".)

(In the same meaning: Dr. Hamza Ahmad Haddad, *Arbitration in Arab Laws*, Al Halabi Law Publications, Beirut 2007, Volume One, Issue 42-43, Pages 45-46).

In Egypt, the jurisprudence of the Cairo Court of Appeal clarifies that the non-resorting to the conciliation imposed by the arbitration agreement prior to the commencement of the arbitral proceedings is not considered a ground for annulment of the arbitral award. **(Ruling of Division 91 at the Cairo Court of Appeal in Case No. 103/121J - Arbitration dated 27/7/2005, and Ruling of Division (7) at the same Court in Case No. 78/121J, dated 4/1/2005).**

It is also worth noting that Article 2 of the annex “Conciliation and Arbitration” of the Unified Agreement for the Investment of Arab Capital in the Arab States cannot be used as a basis to reject the arbitration case for being filed prematurely, because there was no violation of said article, given that the two parties to the contract did not initially agree to resort to conciliation prior to the initiation of the arbitration.” End of the legal opinion of Judge Burhan Amrallah.

**Based on the above,**

**The plea of inadmissibility of the arbitration case because it was filed prematurely is irrelevant.**

## **Section 4: Personal scope of the arbitration clause as to the parties: Extension of the arbitration clause to the State of Libya and to the Ministry of Economy**

Whereas the Plaintiff has submitted its statement of claim against: *“The Government, the Ministry of Economy and the General Authority for Investment and Ownership in Libya”, followed on 3/1/2013 by the replication whereby it clarified that the General Authority for Investment and Ownership (the Third Defendant) has become “the General Authority for Investment Promotion and Privatization Affairs, and requested the joinder of the Ministry of Finance in Libya as a fourth defendant; furthermore, in its final submission dated 21/2/2013, the Plaintiff requested the joinder of the “Libyan Investment Authority” as a fifth defendant;*

Whereas the contract is concluded with the General People’s Committee for Tourism and the Tourism Development Authority,

Whereas the Defendants allege that the “State of Libya” is not party to the contract concluded on 8/6/2006 as the “Tourism Development Authority”, the third defendant, who signed the contract and was initially replaced in 2007 by the “Authority for Investment Promotion”, then in 2009 by the “General Authority for Investment and Ownership”, enjoys a legal personality independent from the Libyan State and the Ministry of Economy; therefore, the General Authority for Investment Promotion and Privatization Affairs is the only party that may be litigated in the arbitration case given that the arbitration agreement is a civil law contract subject to the rule of the privity of contracts and is only binding on the parties thereto; whereas the Defendants consider that although the General Authority for Investment Promotion and Privatization Affairs (third defendant) is affiliated to the Minister of Economy, this shows that the Plaintiff is mixing between the “principle of privity of the arbitration agreement”, considering it a civil law contract, and the “principle of capacity” as a requirement for the admissibility of the case before the administrative courts; whereas in this case only the Secretary of the Administration Committee of the General Authority for Investment Promotion and Privatization Affairs, and not the concerned Minister, represents the said Authority before the courts and in its relation with third parties; therefore, and in accordance with these same reasons, the Libyan Ministry of Finance cannot be joined to the case as a party because it is not a party to the contract concluded on 8/6/2006, and is not involved in the enforcement of the final judicial rulings that might be rendered against the General Authority for Investment Promotion and Privatization Affairs. The Defendants replied to the Plaintiff’s allegation regarding the extension of the arbitration

clause to all parties who intervened in the contract conclusion or performance by relying on Article 154 of the Libyan Civil Code which provides that ***“A contract does not create obligations binding upon third parties”***.

In all cases, the Arbitral Tribunal has thoroughly presented the allegations of both parties in this regard, in Part Two of the arbitral award.

**Therefore,**

The Arbitral Tribunal will have to decide whether the “Tourism Development Authority”, which signed the contract and was replaced by the “General Authority for Investment and Ownership”, is a governmental authority that constitutes part of the Libyan State, or is independent and does not bind the State by its own obligations, and whether the State of Libya, the Ministry of Economy, the Ministry of Finance in Libya and the Libyan Investment Authority are parties to this case.

Whereas the Plaintiff has submitted, on 3/1/2013, a replication to the statement of defense that the Defendants submitted on 23/11/2012 seeking to increase the relief sought to two billion, fifty five million and five hundred and thirty thousand American dollars, and requesting the issue of a summary final arbitral award; whereas the Plaintiff clarified in said replication that the third defendant has become the “General Authority for Investment Promotion and Privatization Affairs” thus replacing the General Authority for Investment and Ownership (formerly known as the “Authority for Investment Promotion” and earlier the “Tourism Development Authority” that initially signed the contract with the Plaintiff);

Whereas the Plaintiff also requested the joinder of the “Libyan Ministry of Finance” as a fourth defendant given that the Ministry of Finance is bound to enforce the final judicial rulings rendered inside the country and abroad against Libyan public entities funded by the Libyan State Treasury; whereas the Plaintiff maintains that by virtue of Article 1 of the General People’s Committee “Decision no. 322 of 2007 amending a provision of the “Regulation on the budget, accounts and financial organizations” and establishing other provisions”, Article 171 of the same Regulation was amended to read as follows:

- a- ***“The public budget of the State shall include financial allocations for the enforcement of final judicial rulings rendered against public entities funded by the State Treasury (...)”***.



*b- "The General People's Committee for Finance shall disburse the funds due for the enforcement of the final judicial rulings rendered against public entities funded by the State Treasury (...)"*.

[Exhibit No. 4 of the replication to the statement of defense]

Therefore,

**Whereas the Arbitral Tribunal obliged the Plaintiff to notify the Ministry of Finance of all documents pertaining to the arbitration case, and verified the occurrence of said notification,**

**The Arbitral Tribunal decides to approve the Plaintiff's request for joinder of the Libyan Ministry of Finance as fourth Defendant.**

Subsequently, the Arbitral Tribunal resumes consideration of the question of extension of the arbitration clause to the Libyan State, to the Ministry of Economy and to all the other authorities mentioned in this arbitration case. The Arbitral Tribunal notes the following:

**First Point: The land covered by the contract is owned by the Libyan State:**

After perusal of the contract signed on 8/6/2006, the Arbitral Tribunal notes the following:

- 1- The object of the contract is a plot of land defined in the contract preamble as follows: "the plot of land covered by this contract is a State-owned real estate".
- 2- Article 2 provides that the First Party (i.e. the General Peoples' Committee for Tourism and the Tourism Development Authority) leases to the Second Party (Plaintiff Company) the plot of land located in Shabiyat Tripoli (administrative district) having an area of 240000 square meters (two hundred and forty thousand square meters).
- 3- Article 3 of the contract provides that the period of usufruct of the plot of land is (90) ninety years from the date of taking over of the plot of land covered by this contract.

The Arbitral Tribunal notes as well that the Libyan party, i.e. the "General People's Committee for Tourism" and the "Tourism Development Authority", is the party who leased the land and granted the Plaintiff the right of usufruct of said land that is owned

by the Libyan State. The Arbitral Tribunal considers, prior to examining the extension of the arbitration clause set out in the contract to the Libyan State and to the Libyan Ministry of Economy, that the lease of the Libyan site covered by the contract and the establishment of usufruct rights on a State-owned property cannot be made but by a Libyan governmental body because one cannot give what he does not own.

**Second Point: On 7/6/2006, one day prior to the signature of the contract, the Secretary of the General People's Committee for Tourism (Minister of Tourism) issued a Decision approving the investment of the Plaintiff Company. This Decision reads the same as the contract signed on the next day:**

The license decision is related to a tourist investment project (a five-star tourist hotel, a service commercial center, hotel apartments, restaurants, recreational areas, etc.), which is in conformity with the contract signed the next day.

The location of the site is in Tajura (Sidi Al Andalusi), the project's area is 24 hectares, the execution period is seven and a half years, and the investment period is ninety years. All the aforementioned is conform to the contract signed on 8/6/2006.

**Therefore,**

**The Arbitral Tribunal finds that the contract signed between the Plaintiff and the Libyan party was preceded by a license from the Libyan Minister of Tourism, which gives the parties participating in the contract a clear governmental character that reinforces the Arbitral Tribunal's conviction regarding the intervention of Libyan government bodies in the contract conclusion, performance, and termination.**

**Third Point: The rights and obligations of the "Tourism Development Authority" who signed the contract were transferred to the Authority for Investment Promotion:**

Article 15 of Decision No. 87 of 2007 of the General People's Committee on "*the establishment of the General Authority for Tourism and Traditional Industries*" provides the following:

***“The powers delegated to the General People’s Committee for Tourism related to investment provided for in the aforementioned Law No. (7) of 1372 a.P. will be transferred to the Authority for Investment Promotion.***

***All contracts concluded, and all rights and obligations contracted in the tourist investment field by the General People’s Committee for Tourism and the Tourism Development Authority will be transferred to the Authority for Investment Promotion which will replace them in the rights and obligations relating thereto.”***

**[Exhibit No. 8 of the replication to the statement of defense]**

Whereas it was the General People’s Committee for Tourism that signed the contract with the Plaintiff, consequently, by virtue of this Decision issued in 2007, the investment-related powers of the General People’s Committee for Tourism were transferred to the “Authority for Investment Promotion”.

Decision No. 150 of 2007 on “the reorganization of the Authority for Investment Promotion” provides that the Authority has an independent budget (Article 8) and is affiliated to the Ministry of Economy pursuant to Article 2 which provides that “the Authority for Investment Promotion is a public body that has legal personality and financial autonomy, and is affiliated to the General People’s Committee for Economy, Trade and Investment” (i.e. it is affiliated to the Ministry of Economy). [Exhibit No. 10 of the replication to the statement of defense]

**Fourth Point: The Authority for Investment Promotion, who now assumes the rights and obligations of the General People’s Committee for Tourism and the Tourism Development Authority, is responsible for “implementing the public investment policy... in Libya...”:**

Whereas the rights and obligations of the General People’s Committee for Tourism and the Tourism Development Authority were transferred to the Authority for Investment Promotion, the Arbitral Tribunal notes that the latter Authority, which is affiliated to the Ministry of Economy, is the one in charge, pursuant to Article 4 of the aforementioned Decision No. 150/2007, of “implementing the public investment policy... in Libya...”, and thus is responsible for the Libyan State investment policy **(Emphasis by underlining added)**,

Whereas the General People’s Committee issued Decision No. 89 of 2009 on “the establishment of the General Authority for Investment and Ownership” which Article 12 provides the following:

***“The Authority for Investment Promotion and the General Authority for the Ownership of Public Companies and Economic Units will be merged into the Authority established by virtue of this Decision. All their rights and obligations will be transferred to said Authority which will perform all their functions and assume all their competencies (...),***  
**[Exhibit No. 2 of the replication to the statement of defense]**

Whereas in 2009, the General Authority for Investment and Ownership replaced the Authority for Investment Promotion,

Whereas the General People’s Committee Decision No. 194/2009 has, after the “introduction of some provisions concerning real estate investment”, indicated in its Article 6 the following:

***“The General Authority for Investment and Ownership is in charge of issuing the licenses and other documents necessary for the investment project. It is also in charge of the allocation of State-owned lands to the bodies mentioned in Article 2 of the present Decision, the conclusion of usufruct contracts relating thereto and the collection of their rent (...).”***

Whereas the abovementioned Article 2 specified the companies investing in the real estate field, which include the “foreign companies”,

**[Exhibit No. 13 of the replication to the statement of defense]**

Whereas in 2012, the Council of Ministers issued Decision No. 59 “adopting the organizational structure and powers of the Ministry of Economy and organizing its administrative system”,

Whereas Article 4 of said Decision provides that:

***“The following bodies are affiliated to the Ministry of Economy:***  
***(...)***

***4. General Authority for Investment and Ownership”***

**[Exhibit No. 12 of the replication to the statement of defense]**

**Accordingly,**

The Arbitral Tribunal considers that the General Authority for Investment and Ownership is a governmental body affiliated to the Ministry of Economy.

This is also confirmed in the Council of Ministers' Decision No. 364 of 2012 "amending Decision No. 89/2009 A.D. on the establishment of the General Authority for Investment and Ownership".

Article 1 of said Decision reads as follows:

***"Article 1 of the General People's Committee's aforementioned previous Decision No. (89) of 2009 was amended as follows:***

***Article 1:***

***"A general authority called the "General Authority for Investment Promotion and Privatization Affairs" will be established and will have legal personality and financial autonomy. Said Authority will be affiliated to the Ministry of Economy and will have the necessary powers to organize and manage the investment and privatization affairs".***

[Exhibit No. 2 of the replication to the statement of defense]

**Therefore,**

The Arbitral Tribunal considers that the third defendant, which became the "General Authority for Investment Promotion and Privatization Affairs" is a governmental authority that is affiliated to the Ministry of Economy in Libya.

**Fifth Point: The binding principles of the Libyan Supreme Court consider that the independence of the administrative units and their having legal personality and financial autonomy does not mean that they are independent from the State and that they can be litigated without the involvement of the State:**

Whereas the jurisprudence of the Libyan Supreme Court has determined the matter relating to administrative units with independent legal personality and financial autonomy by considering that this does not mean they are totally independent from the State but that the latter exercises a supervisory control over them, then these administrative units cannot be separated from the State before the courts:

***“The established case law of this Court recognizes that, having regard to the fact that the State enjoys a legal personality and should, as a general rule, be represented by each secretary with regard to the affairs of his secretariat since he supervises it and implements the public policy of the State, the fact that some administrative units, which are supervised by one of these Secretariats, are endowed with legal personality and have delegates empowered to represent them before the courts and in their relation with third parties does not mean that they are totally independent from the State but they remain under its supervision and control. Accordingly, it cannot be claimed that only the administrative unit should be litigated because it has a financial autonomy and legal personality without involving the body that supervises it”.***

**(Supreme Court - Challenge No. 123 of 43J, dated 18/2/2000)**

**Moreover,**

***“Whereas the first ground is rejected given that it is established in the case law of this Court that the State is endowed with a legal personality and should, as a general rule, be represented by each minister with regard to the affairs of his ministry - when the action is filed - and that some of the administrative units supervised by the General People’s Committee enjoyed - at that time - a legal personality, therefore, the victim of an illegal action attributable to the State who files an action against the secretary of the Specialized General People’s Committee and against the representative of the administrative unit that enjoys legal personality, considering that it is directly***

*responsible for the wrongful act, should not be considered as having filed the case against entities who do not have capacity, given that the independence of some administrative units from the State and their legal personality do not mean they are totally independent from the State but remain under its supervision and control. Accordingly, it cannot be claimed that only the secretariat or the administrative unit should be litigated because it has a financial autonomy and legal personality without involving the General People’s Committee (the Arbitral Tribunal adds: i.e. the Council of Ministers) or the Specialized General People’s Committee (the Arbitral Tribunal adds: i.e. the concerned Ministry) that supervises them”.*

**(Emphasis by underlining added)**

(Supreme Court – Seventh Civil Circuit - Civil Challenge No. 1387/ 56J - Public hearing of Saturday 5 Rajab 1433 Heg. (corresponding to 26 May 2012 A.D.) held at the seat of the Supreme Court in Tripoli)

Furthermore:

*“The State enjoys a legal personality and, as a general rule, it should be represented by each minister (secretary) with regard to the affairs of his ministry. The same applies to some administrative units, supervised by the Ministry, who enjoy a legal personality and whose directors are authorized to legally represent them before courts and third parties. Therefore, the aggrieved party who files an action against the concerned Minister, the Council of Ministers, and the representative of the administrative unit deemed to be directly responsible for the incurred damage, should not be considered as having filed the case against entities who do not have capacity, as the independence of some administrative units from the State and their legal personality do not mean they are totally independent from the State but remain under its supervision and control. Accordingly, it cannot be said that the decision to bind the entities considered not to have capacity by the petitioners included an implementation of the provisions of the contractual and tortious liabilities on the same fact, because the reason behind the ruling rendered against these entities is not the damage caused to the aggrieved party but their quality as guarantors of the enforcement of the ruling since they are in charge of the public funds on the one hand, and their quality as the supervisors on the contracting party on the other hand as established earlier”.*

**(Emphasis by underlining added)**

(Libyan Supreme Court, Civil Challenge No. 144, 56J, dated 19/3/2012)

**Consequently,**

Whereas the Litigation Department at the Ministry of Justice is defending the five defendants and is authorized, by virtue of Article 43 of Law No. 87 of 1971, to represent the public bodies and institutions before the courts in legal proceedings filed by or against them,

**Therefore,**

**The mere fact that the Litigation Department at the Ministry of Justice is defending the five defendants in this arbitration case constitutes an acknowledgement by the second and third defendants of their governmental capacity, of the validity and legality of the Arbitral Tribunal's jurisdiction, and of their relation to the present dispute.**

**Sixth Point: The letters exchanged between the below mentioned governmental bodies and the Plaintiff company regarding the performance of the disputed contract confirm the governmental character of the investment and of the disputed contract signed on 8/6/2006:**

The Plaintiff Company and various governmental bodies exchanged several letters relating to the execution of the investment project and the performance of the disputed contract, most notably:

- 1- The letter of the Secretary of the General Authority for Tourism and Traditional Industries dated 1/7/2007 in which he requests that a detailed timetable of the various phases of the project execution and the required designs be sent expeditiously.
- 2- The letter of the Director of the Department for the Development of Touristic Areas at the General Authority for Tourism and Traditional Industries dated 11/7/2007.
- 3- The letter of the Director of the Department for the Development of Touristic Areas and Head of the Permanent Working Team at the General Authority for Tourism and Traditional Industries in which he refers to the meeting held on 11/9/2007 and reiterates his demand to receive the drawings prior to 4/11/2007.
- 4- The letter of the Director of the Department for the Development of Touristic Areas and Head of the Permanent Working Team at the General Authority for



Tourism and Traditional Industries dated 22/11/2007 requesting the designs in order to submit them to the Technical Committee.

- 5- The letter drafted on 30/10/2007 where the Plaintiff mentions an incident that will happen on 31/10/2007.
- 6- The letter dated 8/1/2009 in which the Plaintiff requests from the Director of the Department for the Development of Touristic Areas to be exempted from the obligation of delivering the project within the specified time limit.
- 7- The Letter of the Director of the Department for the Development of Touristic Areas and Head of the Permanent Working Team at the General Authority for Tourism and Traditional Industries dated 21/1/2009 suggesting to the Plaintiff Company to choose an alternative site for the execution of the project while keeping the site until the impediments are dealt with.
- 8- The letter of the third defendant dated 2/2/2010 relating to the transfer of a part of the investment project capital estimated at 130 million American dollars.
- 9- The letter dated 26/4/2010 addressed by the Secretary of the Committee of the Department of Socialist Real Estate Registration and Documentation to the Secretary of the Administration Committee of the General Authority for Investment and Ownership requesting him to take the necessary measures for the termination of the lease contract.

**Therefore,**

**All these exchanged letters and the intervention of multiple government bodies and public institutions as well as ministries in the contract performance or termination reinforce the conviction of the Arbitral Tribunal that the contract and the investment project have a governmental character.**

**Seventh Point: Extension of the arbitration clause to the parties who intervened in the contract conclusion, performance and termination:**

In the replication submitted by the two counsels and international arbitrators Dr. Fathi Wali and Dr. Mahmood Samir Al Sharkawi (page 9 et seq. of the Plaintiff's replication set to be submitted on 7/1/2013), the Plaintiff argues that even if the general rule provides that the arbitration clause is only binding on the parties to the original contract containing said clause, it is well known that the arbitration clause extends to any party that has intervened in the contract conclusion or performance, which is established by the doctrine, case law and arbitral awards.

The international arbitration case law consider that the effects of the arbitration agreement extend to the parties who intervened or participated directly in the contract performance so far as their positions or actions implied that they had knowledge of the existence of the arbitration agreement as well as of its limits and scope... The extension of the arbitration clause as aforementioned attributes jurisdiction to the tribunal vis-à-vis all parties with regard to the original contract. (Dr. Burhan Amrallah: Commentary on the ruling of the Paris Court of Appeal dated 7/12/1994, *World Journal of Arbitration - Beirut*, Issue 3, 2009, p.824). Furthermore, whoever clearly intervenes in the negotiation or performance of the contract containing the arbitration clause creates a factual situation justifying being bound by the arbitration clause in application of the prima facie theory (Ahmed Ouerfelli: *Arbitration in Corporate Disputes – Arbitration Journal - Issue 14 - Item 51*, pp.181-182). In a ruling rendered by the Egyptian Court of Cassation, the Court decided to use the intervention in the contracts' performance as a criterion to bind one of the parties by the arbitration clause (Egyptian Commercial Cassation, dated 22 July 2004, in the two challenges No. 4729 and 4735/72J). Furthermore, in an arbitral award issued on 11/3/1999 in Case No. 109 of 1998, an Egyptian arbitral tribunal composed in accordance with the Cairo Regional Centre for International Commercial Arbitration (CRCICA) Arbitration Rules declared the arbitration case admissible against the parent company although said company was not a party to the disputed contract. The arbitral tribunal relied on the participation of the parent company in the contract preparation and performance. It was even the parent company that terminated the disputed contract by virtue of a letter. The Plaintiff adds, in the replication submitted by the two counsels and international arbitrators Dr Fathi Wali and Dr. Samir El-Sharkawi (page 10 et seq. of the Plaintiff's replication set to be submitted on 7/1/2013), that it is evident that the State of Libya and the Ministry of Economy intervened not only in the conclusion of the contract but also in its performance. The object of the lease contract is a plot of land that is owned by the State (preamble of the contract and Article 4 of the contract). The Tourism Development Authority only signed the contract in implementation of Decision No. 87 of 1374 a.P. issued by the General People's Committee and this General People's Committee was the equivalent of the Council of Ministers in the Libyan Jamahiriya, i.e. the State of Libya. Article 22 of the contract provides that the investment project carried out by the second party shall enjoy the exemptions and privileges granted pursuant to Law No. 5 of 1426 on the promotion of foreign capital investment and its executive regulations (which is also provided for in Article 30 of the contract). According to the contract, these obligations are incumbent on the State of Libya thereby making the latter a party to the contract and to its arbitration clause. The letter sent by the Plaintiff on 22/7/2007 to the Libyan Department of Real Estate Registry to register its right of usufruct of the land allocated for the project confirms the intervention of the State of Libya and of the Libyan Ministry of Economy in the contract performance until its termination. The relevant civil servant

mentioned on said letter that “there exists in the site, which is plan No. 796 under the name of the State of Libya, File No. 16813, and a contract of assignment of a right of usufruct in favor of the Bank of Libya was deposited; the real estate is currently registered under the name of a Libyan bank” (Exhibit No. 19 of the Plaintiff’s docket attached to the statement of claim). This means that the State of Libya, despite having previously concluded a contract with the Plaintiff Company, disposed of the plot of land it owns through the Public Property Authority in favor of the Libyan Umma Bank, thereby violating the disputed lease contract allocating the plot of land to the Plaintiff Company. On the other hand, the Libyan Minister of Industry, Economy and Trade, after the General Authority for Investment and Ownership that is specialized in foreign investments was affiliated to his Ministry, issued Decision No. 203 of 2010 annulling Decision No. 135 of 2006 authorizing the Plaintiff to establish the project (Exhibits No. 57 and 58 of the docket attached to the statement of claim). Therefore, it has become clear that the State of Libya is the party that has offered the project land and is the one that has disposed of the land in favor of the Libyan Umma Bank, thereby depriving the Plaintiff of the establishment of the project, in addition to the fact that the General Authority for Investment and Ownership, the public successor to the Tourism Development Authority that signed the disputed contract, is affiliated to the Ministry of Economy, and that the Minister of Economy was the one who issued Decision No. 203 of 2010 annulling the authorization given to the Plaintiff company. Accordingly, the arbitration clause included in the disputed contract is extended to the State of Libya and the Ministry of Economy given that their intervention in the conclusion, performance and termination of the contract was confirmed. The Plaintiff concluded by saying, in the replication submitted by the two counsels and international arbitrators Dr. Fathi Wali and Dr. Samir El-Sharkawi (page 12 et seq. of the Plaintiff’s replication set to be submitted on 7/1/2013), that all this confirms that the arbitration clause contained in Article 29 of the disputed contract provides that the dispute will be referred to arbitration in accordance with the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States. Article 10 of this Agreement provides that the Arab investor will be entitled to compensation for damages which he sustains due to the undermining, by a State Party or one of its public or local authorities or institutions, of any of the rights and guarantees provided for the Arab investor in this Agreement or any other decision issued pursuant thereto by a competent authority. The Unified Agreement is an international agreement concluded between States and ratified by Kuwait and Libya. If the contract concluded by the investor with the public or local authorities or one of the public institutions is violated, and if this contract contains an arbitration clause, then, according to the Agreement, the contract obliges not only the public or local authority or institution that has concluded the contract, but also the State or competent ministry that has issued a decision that violates any of the investor’s rights

arising from the Agreement, due to their submission to the obligation provided for in Article 10 of said Agreement.

**Accordingly,**

Whereas the Arbitral Tribunal refers in this regard to the opinion of Judge Dr. Burhan Mohammed Tawhid Amrallah, Doctor of Law and Appellate Judge (AD-HOC) at the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA), and the Secretary General of the Arab Union for International Arbitration, who has submitted in this case a "Legal Opinion Report" upon the request of the Plaintiff (p.7 et seq. of the report), and whereas the Arbitral Tribunal finds that the opinion of Judge Burhan Amrallah is well-founded,

Judge Burhan Amrallah states:

***“On the one hand, the extension of the arbitration clause to the defendants corresponds to the reality of the original contractual relationship, since said defendants, who intervened in the performance of the original contract and who were aware of the existence of the arbitration clause, have implicitly agreed to be subject to this clause with regard to any disputes that might arise from the original contractual relationship. On the other hand, the extension of the arbitration clause as mentioned above unifies the jurisdiction when it comes to the performance of the original contract.”***

(Paris Court of Appeal, 7/12/1994, and note by Jarrosson, Revue d'Arbitrage 1996, p.245)

Judge Burhan Amrallah adds:

***“The determination of the scope of application of the arbitration clause to persons is based, in reality, on the interpretation of said clause and on the identification of the parties thereto. After a thorough review of numerous arbitral awards and judicial rulings, one infers that the arbitration clause is extended to the non-signatories thereof if there is a common will by all the parties to consider third parties as parties in view of their role in the conclusion, performance or termination of the contracts containing the arbitration clause. (Dr. Hafiza Al-Haddad, Modern Trends relating to the Arbitration Agreement, Dar Al-Fikr Al-Jamii in Alexandria, 2001, pp.155-156.)”***

Judge Burhan Amrallah also adds:

***“It is worth mentioning here that the rules of interpretation of the international arbitration agreement do not greatly differ from the general rules of interpretation of contracts and documents used in courts. It is established that the judge ruling on the merits of the case has the absolute power to interpret the provisions of agreements and know the meaning behind them by adopting the meaning that he deems closest to the intentions of the concerned parties, without being limited to its terms and while being guided by the facts and circumstances of the case. (Egyptian Cassation, hearing of 25/3/1971 of Judicial Year 22, page 344, and hearing of 24/5/1962 of Judicial Year 13, page 693; refer to the commentary by Dr. Burhan Amrallah on the partial award rendered in the ICC arbitration case No. 9288 in March 1998, Journal of Arbitration, Issue 3, Beirut, pp. 815-829)”***

Judge Burhan Amrallah continues :

***“If we refer to the arbitration clause in the present case, we find that it is contained in Article 29 of the contract dated 8/6/2006. Who are the parties thereto? The first party is the Tourism Development Authority that is affiliated to the former General People's Committee for Tourism (Ministry of Tourism). It declared in the preamble of the contract that it is entrusted with the allocation of the lands owned by the State located in the touristic development areas, and the conclusion of relevant contracts in line with Decision No. 87/1374 issued by the General People's Committee, i.e. the Council of Ministers. It is the aforementioned General People's Committee that invited the Plaintiff to visit...Libya... to discuss the establishment of its proposed project (Exhibits No. 1 and 2 of the Plaintiff's docket attached to the statement of claim). It is also the General People's Committee for Tourism that authorized the conclusion of the contract and determined its main terms by virtue of its Decision No. 135/2006. According to Article 22 of the contract, the project enjoys the exemptions and privileges granted by Laws No. 5/1997 and 7/2004 and their executive regulations. The two parties had agreed in Article 29 to settle any dispute that might arise between them in accordance with the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States. The General People's Committee then interfered through its letter No. 11752 on 30/12/2009 entrusting the Department of Socialist Real Estate Registration and Documentation to cancel the rights established on the disputed land. Accordingly, said Department requested from the General Authority for Investment and Ownership to terminate the contract concluded with the Plaintiff on 8/6/2006 in order to allocate the aforementioned land to the Libyan Local Investment and Development Fund. (Exhibit No. 20 of the Defendants' docket)”***

***“On 19/4/2010, the General Authority for Investment and Ownership, which is affiliated to the General People's Committee for Industry, Economy and Trade, interfered by drafting a memorandum and suggesting the annulment of Decision No. 135/2006 authorizing the establishment of the project (Exhibit No. 19 of the Defendants’ docket). Then the General People's Committee for Industry, Economy and Trade interfered again by issuing Decision No. 203/2010 on 10/5/2010 that cancels the approval granted to the Plaintiff’s investment project by virtue of Decision No 135/2006. This inevitably led to the termination of the disputed contract dated 8/6/2006 and the cancellation of the allocation of the relevant land (Exhibit No. 21 of the Defendants’ docket). Then, the General People’s Committee (the Council of Ministers) issued Decision No. 213/2010 on 7/6/2010 cancelling the rights established on the disputed real estate and returning its ownership to the State of Libya (Exhibit No. 22 of the Defendants’ docket).”***

Judge Burhan Amrallah adds:

***“Given that the determination of the scope of the arbitration clause with regard to the parties necessitates a case-by-case study and a thorough analysis of the language used in drafting the agreement as well as an objective interpretation of the behavior of the parties in their previous business relations, all according to the requirements of good faith in relations. In other words, the contracting parties’ real intention must be identified as well as whether this intention resulted in the non-signatories of the contract being bound by the arbitration clause or beneficiaries therefrom. Such an inference does not ensue from mere generalizations, but shall rely on the language of the clause, the relations and transactions between parties with regard to the fact or case under examination.”***

**Accordingly,**

Judge Burhan Amrallah concludes from the aforementioned facts and circumstances of the case that the fact that the Government of Libya is represented by the General People’s Committee (Council of Ministers) and the General People's Committee for Industry, Economy and Trade (Ministry of Economy), who have both intervened in the performance and termination of the disputed contract, is sufficient to consider them as parties to the mentioned contract. It is worth mentioning that it is not enough to confirm, in order to contradict the aforementioned, that the Tourism Development Authority followed by the General Authority for Investment and Ownership have an independent legal personality, since each one of them was totally subject to the

authority of the Ministry of Economy (General People's Committee for Industry, Economy and Trade), and the higher authority of the General People's Committee. Therefore, the Tourism Development Authority, the General Authority for Investment and Ownership, the General People's Committee for Industry, Economy and Trade, and a fortiori the General People's Committee have, as established from the exhibits produced by both parties to the arbitration, acted vis-à-vis the Plaintiff and in relation to the disputed contract as instruments of the State of Libya that carry out its will. In this sense, the Arbitral Tribunal decided in the case of "Amoco International Finance Corporation v. Islamic Republic of Iran, Award no.310-56-3 (14 July 1987)" that in certain circumstances, the separate legal personality of entities fully controlled by the State can be discarded; consequently, the State is considered bound by the terms of the contract concluded by such entity whenever it is possible to conclude that the entity acted as an instrument of the State.

In this sense:

*"In certain circumstances, the separate personality of an entity fully controlled by a state can be discarded and the state considered bound by the terms of a contract entered into by such an entity.... Such a conclusion, however can only be drawn if this entity acted as an instrument of the state", (G.B. Born, International Commercial Arbitration, W. Kluwer, Netherlands 2009, vol. I, p.203 ft. 313)".*

(End of the opinion of Judge Burhan Amrallah)

In light of the above mentioned, Judge Burhan Amrallah concluded the extension of the scope of the arbitration clause and its invocation against the State of Libya and the Libyan Ministry of Economy. The Arbitral Tribunal considers that the opinion of Judge Burhan Amrallah is well-founded.

#### **For these reasons**

The Arbitral Tribunal decides that the arbitration clause set out in the contract may be invoked against:

- 1- The State of Libya**
- 2- The Libyan Ministry of Economy**
- 3- The General Authority for Investment Promotion and Privatization Affairs, formerly known as the General Authority for Investment and Ownership, and formerly known as the Tourism Development Authority.**

The Arbitral Tribunal bases its conviction on the following:

- 1- The land covered by the contract is owned by the State, and the Tourism Development Authority, which is a governmental body, has the right to lease it or establish usufruct rights over it.
- 2- The fact that the Minister of Tourism issued an order approving the investment in conformity with the disputed contract confirms the governmental character of both the contract and the signatory party, i.e. the Tourism Development Authority.
- 3- The rights and obligations of the signatory party, i.e. the Tourism Development Authority, were transferred to the General Authority for Tourism and Traditional Industries, then to the Authority for Investment Promotion that is affiliated to the Ministry of Economy. These bodies are responsible for the investment policy of the State of Libya, which necessarily means that they are governmental bodies forming an integral part of the State of Libya since the State's policy is only carried out by governmental bodies.
- 4- The Authority for Investment Promotion to which the rights and obligations of the Tourism Development Authority were transferred is in charge, as per its legal definition, of "the implementation of the public investment policy...in Libya...", and such responsibilities are only entrusted to governmental bodies.
- 5- The jurisprudence of the Libyan Supreme Court considered that the independence of the administrative entities from the State as well as having a moral personality and a financial autonomy does not mean that they are totally independent from the State and that a legal action can be brought only against them without involving the State.
- 6- The letters exchanged between multiple governmental bodies and the Plaintiff Company on the performance of the disputed contract confirm the governmental character of the investment and of the contract signed on 8/6/2006.

### **Eighth Point: The validity of the joinder of the Ministry of Finance in Libya as a fourth defendant**

The dispute here revolves around the validity of the joinder of the Ministry of Finance as a fourth defendant in accordance with the allegations of the Plaintiff set out in its replication dated 3/1/2013, whereby it requested the joinder of the Ministry of Finance in Libya as a fourth defendant.

The Defendants replied saying that in the present case, only the Secretary of the Administration Committee of the General Authority for Investment Promotion and Privatization Affairs represents it before the courts and in its relations with third parties, and not the competent minister. Consequently, the Libyan Ministry of Finance cannot



be joined as a party in the case, given that it is not a party to the contract concluded on 8/6/2006 and is not concerned with the enforcement of final judicial rulings rendered against the General Authority for Investment Promotion and Privatization Affairs.

**Accordingly,**

Following referral to the Libyan Law on the State's financial system and to the General People's Committee's Decision No. 322 of 2007 (Exhibit No. 3 of the memorandum of reply submitted by the Plaintiff on 3/1/2013),

The Arbitral Tribunal notes that Article 1 of Decision No. 322/2007 amended Article 171 of the "Regulation on the budget, accounts and financial organizations", as follows:

***"a. The public budget of the State shall include financial allocations for the enforcement of final judicial rulings rendered against public entities funded by the State Treasury (...).***

***b. The General People's Committee for Finance shall disburse the funds due for the enforcement of final judicial rulings rendered against public entities funded by the State Treasury (...).".***

Whereas the "Ministerial Decision No. (364) of 2012 amending Decision No. (89) of 2009 A.D. on the establishment of the General Authority for Investment and Ownership" (Exhibit No. 2 of the replication submitted by the Plaintiff on 3/1/2013) provided that:

***"Article (1) of the General People's Committee's aforementioned "previous" Decision No. (89) of 2009 was amended as follows:***

***Article (1):***

***"A general authority called the "General Authority for Investment Promotion and Privatization Affairs" will be established and will have legal personality and financial autonomy. Said Authority will be affiliated to the Ministry of Economy and will have the necessary powers to organize and manage the investment and privatization affairs".***

Therefore, based on the Council of Ministers' Decision No (364) of 2012 that amended Article 1 of Decision No. (89) of 2009, the "General Authority for Investment and Ownership" has become the "General Authority for Investment Promotion and Privatization Affairs" which is the third defendant in the present case and is affiliated to the Ministry of Economy. (Emphasis by underlining added)

Whereas Article 1 of Decision No. (322) of 2007 of the General People's Committee ***"amending a provision of the "Regulation on the budget, accounts and financial organizations" and establishing other provisions", by virtue of which the State's public***

**budget should include financial allocations for the enforcement of final judicial rulings rendered against public entities funded by the State Treasury**, (Emphasis by underlining added)

And whereas the “General Authority for Tourism and Traditional Industries” is one of the public entities funded by the Libyan State Treasury,

**Therefore,**

The Ministry of Finance in Libya is thus bound to enforce final judicial rulings issued domestically and internationally against Libyan public entities funded by the Libyan State Treasury, and the “General Authority for Investment Promotion and Privatization Affairs” is among those entities.

**Consequently,**

**The Arbitral Tribunal decides to accept the joinder of the Ministry of Finance in Libya as a fourth defendant in the present arbitration case.**

**Ninth Point: Rejection of the request of joinder of the Libyan Investment Authority as a fifth defendant:**

Whereas the Plaintiff requests the joinder of the Libyan Investment Authority to the present case so that the enforcement of the arbitral award is sought against it, and maintains that said Authority is a part of the governmental entities and bodies and is funded by the State’s budget,

Whereas the Defendants (final submission, 6/3/2013, pp. 291-292) allege that the Libyan Investment Authority is in no way related to this arbitration given that it is not a party to the contract concluded on 8/6/2006, that it did not directly intervene or participate in the conclusion or performance of the contract so as to invoke the arbitration clause against it in application of the rule of extension of the scope of the arbitration clause, and that it has an independent legal personality and its functions are restricted to investments outside Libya, in accordance with Article 3 of Law No. 13 of 1378 a.P. (2010 A.D.) on the organization of the Libyan Investment Authority,

**Consequently,  
The Arbitral Tribunal unanimously decides the following,**

**Whereas the Arbitral Tribunal finds, upon referral to Law No. 13 of 1378 a.P. (2010 A.D.) on the organization of the Libyan Investment Authority, that said Authority is in no way related to the present arbitration given that it did not actually participate in the conclusion, performance or termination of the contract, that it has a legal personality and a financial autonomy, and is affiliated to the General People's Committee (Article 3 of Law No. (13) of 2010); whereas regardless of whether its investments are inside Libya or abroad, it remains an integral part of the State of Libya even if it has the legal personality and financial autonomy, in accordance with the aforementioned jurisprudence of the Libyan Supreme Court which principles are considered to have the same effect as laws, as previously indicated by the Arbitral Tribunal:**

***“The established case law of this Court recognizes that, having regard to the fact that the State enjoys a legal personality and should, as a general rule, be represented by each secretary with regard to the affairs of his secretariat since he supervises it and implements the public policy of the State, the fact that some administrative units, which are supervised by one of these Secretariats, are endowed with legal personality and have delegates empowered to represent them before the courts and in their relation with third parties does not mean that they are totally independent from the State but they remain under its supervision and control. Accordingly, it cannot be claimed that only the administrative unit should be litigated because it has a financial autonomy and legal personality without involving the body that supervises it.”***  
(Emphasis by underlining added)

**(Supreme Court – Challenge No. 123 of Judicial Year  
43, dated 18/2/2000)**

**Therefore,**

**The Arbitral Tribunal rejects the request of joinder of the “Libyan Investment Authority” to the present arbitration, given that it is in no way related thereto. However, the Arbitral Tribunal confirms that the Libyan Investment Authority, regardless of the location of its investments, whether inside or outside Libya, remains an integral part of the State of Libya to which applies the arbitral award as well as to all its entities and bodies, even though they were not joined to the present arbitration case.**

**Consequently,**

**The Arbitral Tribunal decides the validity of invoking the arbitration clause contained in the disputed contract against:**

- 1- The State of Libya.**
- 2- The Libyan Ministry of Economy.**
- 3- The General Authority for Investment Promotion and Privatization Affairs, formerly known as the General Authority for Investment and Ownership, and formerly known as the Tourism Development Authority.**
- 4- The Libyan Ministry of Finance.**
- 5- The rejection of the request of joinder of the Libyan Investment Authority, while maintaining that it is an integral part of the State of Libya to which applies the arbitral award as well as to all its entities and bodies, even though the Libyan Investment Authority was not joined to the present arbitration case.**
- 6- The rejection of the Defendants' allegations pertaining to the inadmissibility of invoking the arbitration clause.**

## **Section 5: The substantive scope of the arbitration clause**

The dispute here revolves around whether the arbitration clause contained in Article 29 of the contract extends to the subject matter of the present arbitration case. The Defendants assert, as indicated in Part Two of the arbitral award, that the scope of the arbitration clause should be restricted to the interpretation and performance of the contract during its validity period and should not extend to disputes relating to its non-performance, annulment or termination. They also assert that the Plaintiff's requests do not fall within the substantive scope of the arbitration clause contained in Article (29) of the disputed contract. They further added, in the rejoinder dated 6/2/2013, that the Plaintiff company requests compensation for damages it claims to have incurred as a result of the issuance of Administrative Decision No. (203) of 2010 cancelling the approval granted to the investment. Therefore, the Defendants consider that the administrative courts shall have jurisdiction *ratione materiae* to rule on compensation of damages resulting from administrative decisions. The Defendants maintain that Article 24 of Law No. 5/1997 cannot be invoked to state that international conventions prevail over the Libyan law. The Plaintiff rejects the aforementioned allegations and maintains that the present arbitration case is covered by the arbitration clause.

In this regard, the Arbitral Tribunal refers to the opinion of Judge Dr. Burhan Amrallah (p. 9 et seq. of the Legal Opinion Report he submitted upon the request of the Plaintiff) recommending the non-interpretation of the wording of the arbitration clause in a literal manner. This legal opinion is well-founded.

Judge Burhan Amrallah stated the following:

***“If the wording of the contract is not clear enough as to prevent any deviation from the meaning thereof, it is necessary, upon its interpretation, to look for the true intention of the contracting parties without being limited to the literal meaning... The court ruling on the merits of the case enjoys absolute power when it comes to the interpretation of documents, contract wording and disputed clauses. It should proceed in a manner that it considers will best reflect the intention of the contracting parties and should deduce what can be deduced therefrom without being limited to the wording. The interpretation of the arbitration agreement in good faith requires the supersession of the common intention of the contracting parties by making clear their wish to resort to arbitration as an effective means for the settlement of any present or future dispute that might arise between them. The judge should give the wording the meaning which achieves this common intention and which leads to what the two***

*parties sought in this regard. (Ruling of Circuit (91) of the Cairo Court of Appeal in case No. 101/122J, Arbitration, dated 26/4/2006)”.*

*“This is known in doctrine as the Principle of Effectiveness (Principe de l’effet utile); a widely recognized principle in international arbitration jurisprudence:*

*(P. Fouchard, E. Gaillard et B. Goldman, Traité de l’Arbitrage Commercial International, Litec, Paris, 1996, No. 304, p.278 et No. 478, p.279)”.*

Judge Burhan Amrallah proceeded by saying:

*“Therefore, the Swiss Federal Tribunal ruled in the Sonatrach case that nothing justifies the restrictive interpretation of the agreement of the parties whenever they agree on arbitration. On the contrary, the judge will consider that the parties’ agreement to settle their dispute by way of arbitration means that they wish to grant the Arbitral Tribunal a wider jurisdiction. The French Court of Cassation ruled that the arbitration clause relating only to the performance of the contract grants the arbitrator the authority to decide also on the validity of the contract. The same applies in Switzerland where the court found that the arbitration clause relating to all disputes arising from the interpretation or performance of the contract also covers disputes relating to its termination. (Jean-François Poudret et Sébastien Basso, Droit Comparé de l’Arbitrage International, Schulthess 2002, pp. 279-280)”*

*"The Egyptian Court of Cassation ruled that the agreement on arbitration relating to the contract performance covers disputes on the non-performance, totally or partially, of the contract or on its defective performance. (Egyptian Civil Cassation, hearing of 8/2/2007, Challenge No. 7307/76J, published in “New principles issued by the Commercial Circuits at the Court of Cassation – from October 1<sup>st</sup>, 2006 until late September 2007 – Technical Office of the Court of Cassation, p. 68)”.*

Judge Burhan Amrallah provides further clarifications, as follows:

*“It should be noted that the assertion that arbitration is an exceptional means for dispute settlement and that the arbitration agreement should therefore be interpreted restrictively, even if assumed applicable to internal or domestic arbitration, does not apply to international arbitration, given that this type of arbitration is no longer an exception to the competence of State courts having general jurisdiction to rule on disputes. On the contrary, international arbitration became the normal and universally recognized means (mode normal et universellement admis) for international commercial dispute settlement, and should thus be interpreted in a manner that is closest to the true intention of the contracting parties”.*

The Arbitral Tribunal deems it necessary, at this point of the analysis, to highlight the following:

**A key observation: Is the arbitration only governed by the provisions of the arbitration clause or is it also governed by the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States? If so, what are the limits of said arbitration? The scope of application of the arbitration clause:**

Whereas the arbitration clause contained in Article 29 of the disputed contract provides the following:

***“In the event of a dispute between the two parties arising from the interpretation or performance of the provisions of the present contract during its validity period, such a dispute shall be settled amicably. Failing that, the dispute shall be referred to arbitration pursuant to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States adopted on Nawar (November) 26, 1980 A.D.”.***

Whereas the dispute between the two parties revolves around the provision of the arbitration clause relating to the **“interpretation or performance of the provisions of the present contract during its validity period”**, given that the Defendants assert that the requests set out in the statement of claim are not relevant to the performance of the contract during its validity period but to the issuance of Administrative Decision No. 203 of 2010 cancelling the investment approval granted to the Plaintiff, which decision is distinct and independent from the contract concluded on 8/6/2006, therefore, the dispute falls outside the substantive scope of the arbitration clause. The Defendants consider that the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States cannot be applied, while the Plaintiff considers that the compensation relates to the termination of the contract following the issue of the decision by the Minister of Economy annulling the decision of the Minister of Tourism which approved the investment.

In any event, the Unified Agreement for the Investment of Arab Capital in the Arab States is the basis of this arbitration. According to this Agreement, the compensation sought, whether relating to the decision of the Minister of Economy or to the contract, is granted in case of violation of the investment conditions. The Defendants assert that

the Unified Agreement for the Investment of Arab Capital in the Arab States does not apply to this arbitration and only the part thereof relating to arbitration does apply.

The dispute is hence restricted to the following points:

- 1- Is the Arbitral Tribunal competent to rule on its own competence? The Arbitral Tribunal had previously ruled on this matter and considered itself competent to rule on its own competence.
- 2- Is the Unified Agreement for the Investment of Arab Capital in the Arab States applicable to the arbitration, and do its provisions determine the scope of application of the arbitration clause in such a manner to make the arbitration the reference for the dispute settlement and for the request for compensation of the damages incurred as a result of the decision of the Minister of Economy annulling the decision of the Minister of Tourism approving the investment project which was detailed in the contract concluded between the two parties and entitled ***“Lease contract of a land plot for the purpose of establishing a tourism investment project”***?
- 3- Does the scope of the arbitration clause encompass the request for compensation of the damages incurred as a result of the decision of the Minister of Economy cancelling the investment project or as a result of the decision of the Minister of Economy terminating the contract and, consequently, the investment project?

**First: The Unified Agreement for the Investment of Arab Capital in the Arab States is part of the Libyan law, and its provisions shall have priority of application in instances where they conflict with any provision of the Libyan law:**

Whereas the State of Libya has ratified the Unified Agreement for the Investment of Arab Capital in the Arab States on 4/5/1982, which has become an integral part of the Libyan law; whereas Article (3) of the Unified Agreement provides that: ***“...the provisions of the Agreement shall have priority of application in instances where they conflict with the laws and regulations in the States Parties”*** (Emphasis by underlining added);

Therefore, the Arbitral Tribunal considers that the Unified Agreement for the Investment of Arab Capital in the Arab States is part of the Libyan law, and the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States shall have priority of application in instances where they conflict with any provision of the Libyan law.



**Second: The Unified Agreement imposes as a condition, by virtue of an imperative rule, the settlement of disputes arising from its application through one of the three means which are: a- conciliation; b- arbitration; c- recourse to the Arab Investment Court. The two parties chose arbitration under the Unified Agreement for the Investment of Arab Capital in the Arab States set out in the arbitration clause deemed as independent in accordance with the principle of severability of the arbitration clause:**

- a- In the preamble of the Agreement, it is stated, in the first line on page two regarding Arab investments, that the purpose of the Agreement is to ***“protect it (investment) by means of guarantees against non-commercial risks and a special judicial system”***. (Emphasis by underlining added)
- b- The following sentence was featured at the end of the preamble ***“Have approved this Agreement and its annex, which forms an inseparable part of the Agreement...”*** and said annex pertains to ***“Conciliation and Arbitration”***. (Emphasis by underlining added)
- c- Article 25 of the aforementioned Agreement provides that ***“disputes arising from the application of this Agreement shall be settled by way of conciliation or arbitration or by recourse to the Arab Investment Court”***. (Emphasis by underlining added)

**Therefore, Article 25 of the Unified Agreement for the Investment of Arab Capital in the Arab States encompasses an imperative rule of law, given that the provision did not state that disputes “may” be settled but “shall” be settled.**

- d- Article 26 provides that ***“Conciliation and arbitration shall be conducted in accordance with the regulations and procedures contained in the annex to the Agreement which is regarded as an integral part thereof”***. (Emphasis by underlining added)

**Therefore,**

The Arbitral Tribunal finds that all disputes arising from the application of this Agreement shall be settled by way of arbitration if the two parties so chose for dispute settlement. A fortiori, the two parties explicitly chose to resort to arbitration as provided for in Article (29) of the contract:

*“In the event of a dispute between the two parties arising from the interpretation or performance of the provisions of the present contract during its validity period, such a dispute shall be settled amicably. Failing that, the dispute shall be referred to arbitration pursuant to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States adopted on Nawar (November) 26, 1980 A.D.”*

**Accordingly,**

The Arbitral Tribunal finds itself in front of:

- a- A contractual provision restricting arbitration to the interpretation or performance of the terms of this contract during its validity period.
- b- An imperative rule of law set out in a comprehensive legal provision contained in the aforementioned Unified Agreement that prevails over any Libyan legal provision and provides that “disputes arising from the application of this Agreement (the aforementioned Unified Agreement) shall be settled by way of... arbitration”.

**Consequently,**

Whereas Article (25) of the Unified Agreement for the Investment of Arab Capital in the Arab States encompasses an imperative rule of law providing that “disputes arising from the application of this Agreement shall be settled...”, and not “**may**” be settled; therefore, the Arbitral Tribunal considers this imperative rule of law applicable in case of conflict between the contractual provision that limits, to arbitration, the settlement of contractual disputes relating to the interpretation or performance of the contract during its validity period and the comprehensive legal provision contained in an imperative rule of law that prevails over all the other legal and contractual provisions and that **imposes as an obligation the settlement of disputes arising from the application of the aforementioned Unified Agreement** by way of arbitration if the two parties choose this means out of the three means which are: conciliation, arbitration and recourse to the Arab Investment Court.

Whereas Article (29) of the contract provides for arbitration “pursuant to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States”,

Whereas the general rule in arbitration is the separability of the arbitration clause which is considered as one of the principles of the International Commercial Law according to

the Arab doctrine, it is therefore applied to the arbitration clause contained in Article (29) of the contract,

***“Many arbitral awards highlighted the independence of the arbitration agreement from the original contract, based on the fact that it is related to one of the general principles of the International Commercial Law, without sensing the slightest need to refer to a specific national law for the justification of this independence”.***

**(Dr. Hafiza Al-Haddad – Modern Trends relating to the Arbitration Agreement – Dar Al-Fikr Al-Jamii – pp. 33-34)**

**Consequently,**

**The Arbitral Tribunal considers that the arbitration clause contained in Article (29) of the disputed contract refers compulsorily to arbitration (as long as the two parties chose arbitration among the three means) pursuant to Article (25) of the Unified Agreement for the Investment of Arab Capital in the Arab States which provides that disputes arising from the application of the aforementioned Unified Agreement shall be settled by way of conciliation or arbitration or by recourse to the Arab Investment Court. Therefore, the arbitration clause covers the contract as well as the decision issued by the Minister of Economy annulling the decision of the Minister of Tourism approving the investment and leading to the conclusion of an official contract entitled *“Lease contract of a land plot for the purpose of establishing a tourism investment project”*. Therefore, the damages sought by the Plaintiff are covered by the arbitration of the aforementioned Unified Agreement, given that said damages are related to disputes arising from the application of the aforementioned Unified Agreement.**

**Third: The decision of the Arbitral Tribunal complies with the Libyan jurisprudence in terms of the extension of the arbitration clause to administrative decisions:**

Whereas the Libyan jurisprudence addressed the matter of the contract termination by virtue of an administrative decision and did not restrict the scope of application of the arbitration clause to the contract, but extended the arbitral jurisdiction to the examination of the reasons behind the termination and the contracting party’s right to compensation following the termination of the contract by the administrative authority, if there is a legal foundation for said compensation requests:

***“Whereas the Ministry of Agriculture terminated the contract in accordance with Article 9, which is undoubtedly its right, given that it deems it is necessary for the***

***public interest; however, it is up to State courts of general jurisdiction or to arbitration courts of specific jurisdiction to control the reasons behind the termination in such a manner to make a balance between the administration's dangerous authority to terminate the contract and the contractor's right to compensation, if based on a legal foundation; if the dispute covers unquestionably and implicitly the examination of the reasons behind the termination, the arbitration clause accepted by the Ministry and contained in its contract shall apply, which clause the Ministry cannot deny and constitutes one of the bases of its dealings with the company"***.

**(Libyan Supreme Court - Ruling rendered on 5/4/1970 – Published in the Supreme Court Journal – Volume 4 – July 1970 – Administrative Challenge)**

The Libyan Supreme Court has also decided the following:

***"Civil courts have the general jurisdiction to rule on disputes between litigants, and they cannot be deprived of this jurisdiction unless by virtue of an explicit provision in the law. If Article 4 of Law No. 88 of 1971 on administrative courts provided that the Circuit of Administrative Jurisdiction rules on disputes related to concession, public works and supply contracts, this means that civil courts were not deprived of their jurisdiction to rule on these contracts, but that the Circuit of Administrative Jurisdiction joined the civil courts to rule on said contracts (...).***

***Furthermore, the supply contract, on which administrative courts have jurisdiction to rule, is the contract which one of its two parties is a legal person of Public Law, which relates to a public utility, which contains highly unusual clauses uncommon in private law contracts and which includes the intention of the Administration that took into consideration, upon its conclusion, the procedure of public law. In the absence of one of these characteristics, the contract will not be considered as an administrative supply contract and the dispute arising in relation thereto does not fall under the jurisdiction of the administrative courts.***

***Even if we assume that all the aforementioned conditions are fulfilled in the disputed contract, which is consequently considered an administrative supply contract, this does not prevent civil courts from ruling on the dispute relating thereto"*. (Emphasis by underlining added)**

**(Libyan Supreme Court, Civil Challenge No. 117/52J, dated 18/7/2007)**

Whereas, in any event, financial rights related to any administrative decision that may be subject to conciliation, can also be subject to arbitration (arbitral award issued by the Cairo Regional Centre for International Commercial Arbitration on 29/2/2012 – Journal of Arab Arbitration, Issue 18, June 2012, p. 243 – referred to in the final submission

submitted by Dr. Fathi Wali and Dr. Mahmoud Samir el-Sharkawi on behalf of the Plaintiff on 20/2/2013),

**For these reasons,**

The Arbitral Tribunal considers that the claims for compensation of damages submitted by the Plaintiff are covered by the arbitration clause which refers to the application of the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States. Therefore, the present arbitration case falls under the jurisdiction of the Arbitral Tribunal and not under the exclusive jurisdiction of administrative courts according to the grounds above mentioned which are in conformity with the Libyan law, doctrine and jurisprudence.

**Consequently,  
The Arbitral Tribunal decides that:**

- 1- The project, subject of the lease contract, is an investment project in accordance with the Libyan law in force at the time of the conclusion of the contract, i.e. Law No. (5) of 1997, and in accordance with Law No. (9) of 2010, and is governed by the Unified Agreement for the Investment of Arab Capital in the Arab States.**
- 2- It is competent to rule on its own competence and on the scope of extension of the arbitration clause to the claim for compensation of the damages incurred as a result of the Minister of Economy's Decision No. (203) of 2010 annulling Decision No. (135) of 2006 of the Minister of Tourism approving the investment and leading to the conclusion of a contract entitled "*Lease contract of a land plot for the purpose of establishing a touristic investment project*".**
- 3- Both parties have made amicable endeavors prior to filing the arbitration case, however without leading to any solution. Consequently, the present case was filed in due time in accordance with the procedures provided for in the arbitration clause and is not premature.**

- 4- The validity of invoking the arbitration clause contained in the disputed contract against:**
- a. The State of Libya**
  - b. The Libyan Ministry of Economy**
  - c. The General Authority for Investment Promotion and Privatization Affairs, formerly known as the General Authority for Investment and Ownership, and formerly known as the Tourism Development Authority**
  - d. The Libyan Ministry of Finance**
  - e. The rejection of the request of joinder of the Libyan Investment Authority, while maintaining that it is an integral part of the State of Libya to which applies the arbitral award as well as to all its entities and bodies, even though the Libyan Investment Authority was not joined to the present arbitration case.**
- 5- The claims for compensation of damages submitted by the Plaintiff are covered by the arbitration clause which refers to the application of the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States. Therefore, the present arbitration case falls under the jurisdiction of the Arbitral Tribunal.**

**Second: Was the plot of land handed over and taken over in accordance with the “Minutes of handing over and taking over of a touristic investment site” dated 20/2/2007?**

The dispute here revolves around the “Minutes of handing over and taking over of a touristic investment site” dated 20/2/2007. The Plaintiff alleges that the title of these minutes bears no relation to its content, given that the latter covers the delimitation of the borders, whereas the Defendants state that these minutes confirm that the Plaintiff took over the site, following, as stated by the Defendants, a thorough inspection of the land; otherwise, the Plaintiff would have refused to conclude the contract relating thereto or would have expressed its reservations at the time of taking over on the presence of occupancies and impediments. This means that the Plaintiff was handed over the plot of land free of occupancies and persons. The Defendants took into consideration the criterion of the reasonable person to argue that the Plaintiff Company, renowned for its high professionalism in the technical field and its wide expertise in managing such situations, could have ignored the “insignificant occupancies” present on the plot of land. The Defendants concluded that the Plaintiff “was not serious about the commencement of the execution” and “fabricated the fact that the plot of land covered by the contract was not handed over to it” in accordance with what was mentioned in Part Two of the arbitral award.

**Accordingly,**

Whereas, following referral to the “Minutes of handing over and taking over of a touristic investment site”, the Arbitral Tribunal reads verbatim the following:

***“Data relating to the investment site:***

***The area of the Andalusi investment site is 24 hectares, the contract number is 4 and is dated 8/6/2006 A.D., the party that took over the site is: Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trade, Contracting and Industrial Structures.***

***On Monday 20/02/2007 A.D., and in the presence of both parties, represented by:***

***- The First Party:***

***The Tourism Investment Site Delivery Committee at the Tourism Development Authority, by virtue of Decision No. (23) of 1374 a.P. (2006 A.D.) issued by the Secretary of the Administration Committee of the Tourism Development Authority***

- **The Second Party:**  
**Engineer Saad Ahmad Salem, the representative and authorized signatory of the Mohamed Abdulmohsen Al-Kharafi & Sons Co. for General Trade, Contracting and Industrial Structures**

**The two parties inspected the mentioned site at the predetermined time and place and its borders were delimited as follows:**

- **On the northern side: The beach**                      - **On the southern side: The highway**
- **On the eastern side: Public property**            - **On the western side: Public property**

**Signature”**

Whereas the Arbitral Tribunal, by referring to the mentioned minutes, relies on Article 90 of the Libyan Civil Code which gives priority to the "true meaning", i.e. the true will, over the apparent will by providing that:

**"A will may be declared verbally, in writing, by signs in general use, and also by such conduct as, in the circumstances of the case, leaves no doubt as to its true meaning".**

Whereas the Arbitral Tribunal relies on the interpretation of Dr. Abdul Razzak El-Sanhuri (Exhibit No. 4 of the replication submitted by the Plaintiff on 3/1/2013 in reply to the statement of defense submitted by the Defendants on November 23, 2012, seeking to increase the relief sought to two billion, fifty five million and five hundred and thirty thousand U.S. dollars and requesting the issue of a summary final arbitral award) who noted that: **"the theory in practice comes as a logical outcome of the autonomy of will. As long as the will of the contracting parties creates and determines the scope of the obligation, it is imperative to search for this will in the very depth of the soul and heart. It is this will that crossed the mind and materialized in the conscience that should be taken into consideration. As for the aspect under which it is expressed, it is nothing but a proof of the will and is not taken into consideration unless it expresses the hidden will truthfully and accurately. If, on the other hand, there was proof that this material aspect conflicts with the psychological will, no attention will be paid to that aspect, which only shows the will, but the true will, which is the substance, will prevail."**

**(The Contract Theory – Al-Majma’ Al-Ilmi Al-Arabi Al-Islami – Mohamed El-Daya Publications – Abdul Razzak El-Sanhuri – p. 168 – Hidden will theory)**



Whereas the Arbitral Tribunal refers to the jurisprudence of Libyan courts, more particularly of the Libyan Supreme Court which decided as follows:

*"Given that the court ruling on the merits of the case has the authority to interpret the wording of the contract and understand the intention of the contracting parties to deduct the fact; given that whenever the wording of the contract clearly expresses the intention, said wording shall not be interpreted or construed in a way that contradicts its meaning; however, if the contract is vitiated by equivocation or ambiguity, the court shall look for the common intention of the contracting parties without adhering to the literal meaning of the sentences, while being guided by the nature of the dealings and by the trust and confidence that must exist between the contracting parties."*

**(Libyan Supreme Court, Civil Challenge No. 90/46J, dated 12/11/1371 a.P. = 2003)**

**For these reasons**

The Arbitral Tribunal finds that the aforementioned minutes made no mention of the handing over and taking over of the plot of land, subject matter of the dispute, and are nothing but minutes of inspection and borders delimitation of the aforementioned site at the predetermined time and place. Therefore, the true will that is binding on the contracting parties and stated in the content of the minutes was limited to the delimitation of the borders, contrary to what was stated in the title of these minutes which only represents the apparent will, "the material aspect", of the minutes. The Arbitral Tribunal notes that the absence of handing over and taking over the plot of land was corroborated by the Plaintiff's letter dated 28/7/2007, i.e. five months following the date of the aforementioned minutes, whereby it requests from the Libyan Administration to fix an effective date for the taking over of the land to be able to put in place the project timetable according to what will be explained hereinafter.

**Consequently,**

The Arbitral Tribunal finds that it is the content of the minutes that determines its legal nature in conformity with Article 90 of the Libyan Civil Code according to which the true will stated in the content of the minutes shall be binding on the contracting parties, and not the apparent will stated in the title of the same.

The Arbitral Tribunal also finds that it is necessary to refer to the set of letters which prove that the Plaintiff did not take over the property free of all occupancies and that the problem that led to the dispute is the non-respect, by the Defendants, of their obligation of handing over the plot of land free of all occupancies for several years during which the Plaintiff company was technically prepared to take over the plot of land free of all occupancies in order to commence the project execution.

**Accordingly,**

Whereas the Plaintiff has sent a letter on 29/7/2006 (Exhibit No. 10 of the statement of claim) by virtue of which it requested from the Director of the Department for the Development of Touristic Areas to fix an effective date for the taking over of the land so that said date can be included within the project timetable, given that this is closely linked to the effective date of handing over of the plot of land free of all occupancies and impediments in accordance with the contract **(Emphasis by underlining added)**,

**Therefore,**

The Arbitral Tribunal finds that on 29/7/2006 the Plaintiff requested to be informed of the effective date of the handing over of the land free of all occupancies and impediments, i.e. several months before the drafting of the "Minutes of handing over and taking over of a touristic investment site" dated 20/2/2007.

Whereas the Arbitral Tribunal finds, after having perused the case exhibits, that following the delimitation of the borders of the leased plot of land on 20/2/2007, in what is known as the "Minutes of handing over and taking over of a touristic investment site", the Plaintiff has sent a letter to the Defendants dated 22/4/2007 (Exhibit No. 14 of the statement of claim) by virtue of which it requested that all necessary measures be taken for the removal of all occupancies, persons and all legal and physical impediments for the purpose of land acquisition **(Emphasis by underlining added)**,

Whereas the Plaintiff wrote again on 15/5/2007 (Exhibit No. 16 of the statement of claim) to the Defendants informing them that the land is occupied by containers, pipes and equipment belonging to the General Company for Building and Construction and guarded by a group of individuals, and a small building consisting of a cafeteria; whereas the Plaintiff requested that all necessary measures be taken to ensure that the site is vacant to initiate the project execution **(Emphasis by underlining added)**,

Whereas on 22/7/2007 (Exhibit No. 19 of the statement of claim), the Plaintiff discovered from the records of the Department of Real Estate Registry that a contract of sale of ownership and of the right of usufruct of the same land was deposited in favor of the Umma Bank and that said property is currently registered in the name of the Umma Bank,

Whereas on 28/7/2007 (Exhibit No. 20 of the statement of claim), the Plaintiff requested from the Administration to fix the effective date for the taking over of the land so that said date can be included within the project timetable,

Whereas the Plaintiff responded on 1/8/2007 (Exhibit No. 21 of the statement of claim) to the letter of the Secretary of the General Authority for Tourism and Traditional Industries on 1/7/2007, requesting information on several matters including:

- 1- A proof that the land is owned by the Libyan State and is free of mortgages or occupancies of any kind in compliance with Decision No. 135 of 2006.
- 2- The handing over of the site free of impediments and obstacles during the month of August. (Emphasis by underlining added)
- 3- The obtainment of approvals and licenses necessary for the execution of the project works within one week from the date of submittal of the request for the obtainment of said approvals and permits.
- 4- The adoption of the project's architectural plans by the competent authorities within one week from the submittal of said architectural plans.
- 5- The cooperation, on all levels, with security forces as well as with the tourism police force and municipal guards, to assist in the prompt execution of the project. (Emphasis by underlining added)
- 6- The approval, in principle, on the management of the hotel by an international company specialized in hotel management.

**Accordingly,**

The Arbitral Tribunal finds that the Plaintiff requested in April 2007 (i.e. two months following the drafting of the "Minutes of handing over and taking over of a touristic investment site" on 20/2/2007) to be handed over the site free of any impediments. The Plaintiff also sent a letter in August 2007 in which it reiterated its request, and added that the Committee's cooperation shall provide additional incentives for the achievement of the project on time. This letter was received by the Secretary of the General Authority for Tourism and Traditional Industries on 1/8/2007.

**Consequently,**

The Arbitral Tribunal finds that on 1/8/2007, the Plaintiff still has not taken over the plot of land free of all impediments.

Whereas the Plaintiff sent letters on 2/9/2007 to the Authority for Investment Promotion and to the Director of the Department for the Development of Touristic Areas, to which it attached the timetable clarifying the project execution phases, mentioning that the timetable is closely linked to the handing over of the project land free of all occupancies (Exhibit No. 24 of the statement of claim) (Emphasis by underlining added),

**Accordingly,**

The Arbitral Tribunal finds that on 2/9/2007, the Plaintiff still has not taken over the plot of land free of all occupancies, despite the drafting of the “Minutes of handing over and taking over of a touristic investment site” on 20/2/2007.

Whereas the Plaintiff has informed the Defendants on 30/10/2007 (Exhibit No. 29 of the statement of claim) that some individuals prevented the contractor from executing the works relating to the construction of the fence around the project land on the basis of their ownership of the land,

Whereas on 1/11/2007 the fence around the project’s plot of land has been subject to intentional damage that required the drafting of a report by the police (Exhibit No. 30 of the statement of claim),

Whereas the municipal guards in Tajura did not approve of the license granted to the Company by the Authority for Investment Promotion to erect the temporary fence; whereas the Al-Tahrir Club in Tajura claims ownership of the land from where the sign was still not removed (Exhibit No. 33 of the statement of claim),

Whereas it is established that the municipal guards have aggressed the contractor’s workers, and that the Tourism Development Authority has asked the Plaintiff to stop the works and remove the equipment from the site (Exhibits No. 36, 37, 38, 39, 49 and 50 of the statement of claim),

Whereas the Arbitral Tribunal also refers to the Plaintiff's reply dated 22/11/2007 (Exhibit No. 36 of the statement of claim) to the letter of the Director of the Department for the Development of Touristic Areas and the Head of the Permanent Working Team at the General Authority for Tourism and Traditional Industries dated 12/11/2007 requesting the submission of the designs in order to present them to the Technical Committee (Exhibit No. 8 of the Defendants' statement of defense),

Whereas the Plaintiff, after referring in this letter to the minutes of handing over and taking over dated 20/2/2007 which deals with the delimitation of the "site borders", has informed the Director of the Department for the Development of Touristic Areas and Head of the Permanent Working Team of the General Authority for Tourism and Traditional Industries that the land still contained some pipes, containers and equipment belonging to the General Company for Building and Construction and guarded by a group of individuals, and a small building consisting of a cafeteria under the name of "Al Nakhla" coffee shop owned by Ibrahim Abdel Salam Abu Thahir and Abdel Raouf Ahmad Ikreem who claim that they hold a twenty-five year contract of usufruct concluded with the Al-Tahrir Sports and Cultural Club in Tajura, in addition to the allegations that some citizens own parts of that land,

Whereas the Plaintiff explained to the Defendants that, under these circumstances, it could not initiate the execution of the project works despite finishing the preliminary design works, and that it hopes they will intervene to enable it to take over the site free of all impediments so that it can initiate the project execution the soonest possible, given that no positive measures were taken to remove said occupancies and impediments,

**Therefore,**

**The Arbitral Tribunal finds that, on 22/11/2007, the Plaintiff had not yet taken over the land free of occupancies and impediments while the "Minutes of handing over and taking over of a touristic investment site" had been drafted on 20/2/2007.**

Whereas the Secretary of the General Authority for Tourism and Traditional Industries addressed a letter on 12/11/2007 to the Assistant Secretary of Technical Affairs and the Office for the Implementation of Housing Projects and Facilities requesting him to swiftly clear the site allocated for the tourism project of the Plaintiff, given that these

issues hinder the work progress of the project, which could in turn cause damages to the Plaintiff (Exhibit No. 34 of the statement of claim),

**Therefore,**

It is evident for the Arbitral Tribunal, from the letter of the Secretary of the General Authority for Tourism and Traditional Industries dated 12/11/2007, that the Libyan administrations, i.e. the Defendants, have contradicting opinions and failed to hand over the plot of land covered by the lease contract to the Plaintiff.

Whereas on 18/11/2007 (Exhibit No. 35 of the statement of claim), the Director of the Department for the Development of Touristic Areas addressed a letter to the municipal guards whereby he requested the removal of obstacles and the consideration of the license to erect the fence issued by the Authority for Investment Promotion as valid,

Whereas, on 22/12/2007, the Plaintiff asked the Director of the Department for the Development of Touristic Areas to protect its workers who had been aggressed and forced to stop the erection of the temporary fence, despite the license issued by the Authority for Investment Promotion on 22/8/2007 (Exhibit No. 38 of the statement claim); whereas, on the same date, the President of the Board of Directors of the Plaintiff Company addressed a letter to the Libyan Minister of Tourism informing him of the problems, damages and aggressions against the fence, as well as the expenses, financial losses and delays incurred and soliciting the protection of the workers to execute the project on the land (Exhibit No. 39 of the statement of claim),

Whereas on 30/12/2007 (Exhibit No. 39 of the statement of claim), the Plaintiff addressed a letter to the Defendants whereby it informed them that the municipal guards had stopped the works on the project land and despite the intervention of the police to protect the workers on the site, the municipal guards forced the contractor's workers to stop the works, which necessitated the presence of five police cars; whereas in the end, the Tourism Development Authority requested that the Plaintiff stop the works and remove the equipment from the site (Emphasis by underlining added),

**For these reasons,**

The Arbitral Tribunal finds that, contrary to the Defendants' allegations, the Plaintiff took the commencement of the project execution very seriously given that it began requesting the handing over of the project land since 29/7/2006 (Exhibit No. 10 of the

statement of claim), i.e. only one month and a half following the date of signature of the lease contract (8/6/2006), and several months before and after the drafting of the “Minutes of handing over and taking over of a touristic investment site” on 20/2/2007.

The Arbitral Tribunal decides that all the data and facts established in the exhibits produced by the Plaintiff and the Defendants prevented the Plaintiff from initiating the execution works on the project site especially that those hindering the work of the Plaintiff are municipal guards themselves and that there are people claiming ownership of the land.

The Arbitral Tribunal notes that even if the Libyan State had serious, strong and honest intention when promulgating legislation organizing the investment, the facts in the present case show a large gap between the aspirations of the Libyan State and the reality. Aspirations have been confronted by administrative corruption that perhaps was not organized or deliberate, but is deemed a gross negligence and disregard of investment rules, the evidence of which is clear. This has hampered the Plaintiff's endeavors and rendered the Libyan Administration incapable of fulfilling its obligations and in an unenviable position vis-à-vis the Arab Kuwaiti investor in the present litigation. However, it remains legally liable along with the institutions and authorities affiliated thereto which supervise the direct performance of the disputed contract.

The Arbitral Tribunal rules that it was impossible for the Plaintiff to overcome the obstacles, occupancies and persons occupying the plot of land, and to address violence against it. These are not self-inflicted obstacles that the Plaintiff brought about so as to avoid honoring its obligations which serve its interests of investing the project for a period of 83 years.

Consequently, the Arbitral Tribunal rejects the allegations of the Defendants concerning the Plaintiff's liability and dallying in this regard.

Whereas the Arbitral Tribunal takes into consideration an additional proof of the non handing over of the land covered by the contract, which is that the Defendants suggested to the Plaintiff an **alternative site** for the one agreed upon in the contract,

Whereas the Defendants allege that on 21/1/2009, the Director of the Department for the Development of Touristic Areas and the Head of the Permanent Working Team of the General Authority for Tourism and Traditional Industries wrote a letter whereby he referred to the suggestion made to the Plaintiff to choose an alternative site to execute the project while keeping the site until obstacles are dealt with (Emphasis by underlining added),

Whereas the Defendants allege that the Plaintiff has refused such alternative and preferred to keep the site (Exhibit No. 13 of the statement of defense),

Whereas the Plaintiff Company has explained, in a letter addressed on 12/1/2011 to the Director of the Administration Committee of the General Authority for Investment and Ownership (**Exhibit No. 68 of the statement of claim**), that it insists on erecting the touristic investment project at the same site originally allocated therefor given its unique location, and that this is the only reason why it submitted its request to establish the project to the Tourism Development Authority, which confirms that on 12/1/2011 the plot of land had not been yet handed over to the Plaintiff,

Whereas the project land is located within the touristic development areas as indicated in the **preamble** of the lease contract of a land to establish the touristic investment project in the Tajura area in Tripoli on the shores of the Mediterranean Sea, consisting of a waterfront extending over 1.4 km suitable for swimming and water sports, as well as a private beach club and 5-star water sport facilities,

Whereas the suggestion of an alternative site violates the ***“pacta sunt servanda”*** principle provided for in Article 147 of the Libyan Civil Code, given that the contract makes the law of the contracting parties and ***“it may not be revoked or amended unless following agreement of both parties or for reasons provided for by the law.”***,

Whereas Article 148 of the Libyan Civil Code provides that ***“the contract must be performed in accordance with its contents and in compliance with the requirements of good faith”***,

Whereas Article 152 of the Libyan Civil Code deals with the issue of interpretation of the contracts and provides that ***“when the wording of the contract is clear, it cannot be deviated from in order to ascertain by means of interpretation the intention of the parties”***; whereas in the present case, there is no room for the contract interpretation given that the common intention of the contracting parties is clear when it comes to the project land,

Whereas the contract concluded between the Plaintiff and the Defendants does not include any provision that compels the Plaintiff Company to move to another site,

Whereas the Plaintiff has explained that it cannot accept this suggestion since all the designs, maps and studies, which cost a fortune, have been tailored to this particular site and not to any other site,



**For these reasons,**

Whereas Article 5 of the lease contract explicitly provides that the Defendants should deliver the plot of land which area, borders, and location are specified in Article 1 thereof, provided that it is free of occupancies and persons, as per the following:

***“The First Party undertakes to hand over to the Second Party the plot of land free of any occupancies and persons, guarantees that there are no physical or legal impediments preventing the initiation of the project execution or operation during the usufruct period immediately upon the signature of this contract, and permit it to take physical possession thereof for the purpose of establishing the project, the execution of which is authorized by virtue of Decision No. 135 of 1374 a.P. issued by the Secretary of the General People's Committee for Tourism.”,***

**Therefore,**

The Arbitral Tribunal finds that the Defendants’ suggestion to the Plaintiff to choose an alternative location to establish the project is a further proof of the Defendants’ failure to hand over the project’s plot of land in accordance with Article 5 of the lease contract (Emphasis by underlining added).

The Arbitral Tribunal also decides that there is no contractual or legal obligation obliging the Plaintiff to accept the offer relating to the alternative land, the characteristics of which remain undetermined by the Defendants.

**Therefore,**

**The Arbitral Tribunal considers that the minutes entitled “Minutes of handing over and taking over of a touristic investment site” dated 20/2/2007 do not prove that the Plaintiff Company has taken over the disputed land pursuant to Article 5 of the “Lease contract of a land plot for the purpose of establishing a tourism investment project” .**

The Arbitral Tribunal decides to reject all the allegations of the Defendants in this regard and to hold them contractually liable given that they breached their primary obligation imposed thereon by virtue of Article 5 of the abovementioned contract which obliges

them to hand over the plot of land to the Plaintiff free of occupancies, something the Defendants failed to do.

### **Third: On the legal nature of the disputed contract and the applicable law**

Whereas the Arbitral Tribunal has decided the issue of the application of Law No. 5 of 1997 on the Promotion of Foreign Capital Investment repealed by Law No. 9 of 2010 on the Promotion of Investment, of the subjection of the tourism project, subject matter of the arbitration, to the Unified Agreement for the Investment of Arab Capital in the Arab States, which supersedes Libyan laws, and of the consideration of the project as an investment project pursuant to Libyan legal criteria,

Whereas the dispute between the two parties in this regard concerns the legal nature of the disputed contract, as the Plaintiff alleges that the contract is a civil law contract according to the Libyan law, while the Defendants allege that it is an administrative contract according to the Libyan law, the positions of both parties on this issue being detailed in Part Two of the arbitral award,

**Therefore,**

**The Arbitral Tribunal refers to the definition of the administrative contract set out in the Libyan Regulation on Administrative Contracts and applies it to the contract to determine whether or not it fulfills the conditions of an administrative contract. In case it does not fulfill such conditions, then what is the legal nature of the disputed contract?**

Whereas Article 3 of Decision No. 563 of 1375 a.P. (2007 A.D) of the General People's Committee issuing the Libyan Regulation on Administrative Contracts provides that:

***“Is defined as an administrative contract in the application of the provisions of this Regulation every contract concluded by one of the authorities referred to in the previous article [i.e. administrative authorities and units] for the purpose of executing, supervising the execution or upgrading one of the projects adopted in the development or budget plan, or providing technical consultancy or operating one of the public utilities regularly and continuously whenever such contract includes highly unusual clauses uncommon in civil law contracts aiming at serving the public interest.”***

**Therefore,**

The conditions previously mentioned in Article 3 of the Libyan Regulation on Administrative Contracts should be fulfilled in order for contracts to be considered administrative contracts.

Whereas the Libyan Supreme Court had included in its ruling rendered on 13/11/1983 in the administrative challenge No. 16/27J the three conditions that must be satisfied to consider a contract an administrative one, by providing that:

***“The jurisdiction ratione materiae of the administrative courts to rule on disputes relating to the contract of supply depends on the fact that this contract, according to the intent of the legislator in Article 4 of Law No. 88/1971 A.D on Administrative Courts, is administrative in the meaning that one of its parties is a public legal person, that it relates to a public utility, that it includes highly unusual clauses uncommon in private law contracts and that it sheds light on the intention of the Administration which took into consideration, when concluding it, the procedure of the public law. In the absence of one of these three characteristics of administrative contracts, the contract will not be considered an administrative contract of supply and the dispute relating thereto shall not fall under the jurisdiction of the administrative courts.”***  
(Emphasis by underlining added),

**Therefore,**

According to the Libyan law, the contract shall satisfy three conditions in order to be considered an administrative contract:

- 1- One of the contracting parties should be an administrative authority.
- 2- Both parties to the contract should agree to take into consideration the characteristics of the Public Law by including in the contract highly unusual clauses uncommon in the Private Law.
- 3- The Contract should be related to a public utility.

**Therefore,**

In order for a contract to be considered an “administrative contract”, the aforementioned three conditions should all be met. However, if one of these conditions is not met, the contract will not be considered an “administrative contract”.

Whereas the scholar Dr. Suleiman Mohammed al-Tamawi, in his book entitled “General Rules of Administrative Contracts – Comparative Study – Dar El Fikr El Arabi – p. 78 et seq.”, defined administrative contracts as follows:

***“The fact that administrative contracts are based on highly unusual clauses is justified by the fact that such contracts are closely related to a public utility”.***

***“This is confirmed by the Council of State in France in many rulings it rendered and is reiterated by the French Court of Conflicts. Here are some examples:***

***(a) Ruling rendered by the Council of State in France on May 6, 1931 in the “Hertz” case providing:***

***« La cession dont s’agit ne peut être regardée comme intervenue pour assurer un service public ».***

***(b) Ruling rendered by the Council of State in France on October 25, 1935 in the “Duchêne” case providing:***

***« La convention dont il s’agit n’avait pas pour objet l’exécution d’un service public et présentait un caractère de droit privé ».***

***(c) Ruling rendered by the Court of Conflicts on November 22, 1951 in the “Chélaifa Hassen” case, providing:***

***« Ce contrat, qui ne concerne pas l’exécution d’un service public, est par sa nature même un contrat de droit privé, et les clauses dont se prévaut l’administration n’ont pu en modifier le caractère ».***

***(d) And last, the ruling rendered by the Court of Conflicts on March 27, 1955 in the “Effimief” case, published in “Rev. Adm. 1955 – 285, Liet. Veaux” and in the compilation “J.C.P. 8786, note Blaevoët”, provides that the procurement contract “aims at realizing one of the public utility objects” (“Poursuivre une mission de service public”).***

***“If there are any doubts on the degree of necessity of the relation between the administrative contract and the public utility in France – (...) – the wording of the rulings of Egyptian administrative courts in this regard precludes any uncertainty: the idea of public utility prevailed in relatively old rulings. The current wording is more accurate, and the prerequisite for the contract to be related to a public utility is so clear that it does not require further interpretation. The aforementioned ruling rendered by the Contracts Circuit of the Administrative Judicial Court on December 9, 1956 in Case No. 870 of the fifth judicial year provides that: “... Administrative contracts differ from private law contracts by a specific criterion that depends on the needs of the public utility which the administrative contract ensures its operation and where the public interest prevails over the private interests of individuals. However, the sheer association of the contract with the public utility, though a mandatory condition, is not sufficient”. In its ruling***

*rendered on December 16, 1956 (Case No. 1609 of the tenth judicial year), this Court provides: "... Whereas these (administrative) contracts are different from civil law contracts as they intend to serve a public interest which is the operation of public utilities with the assistance of the activity of individuals, thus requiring, first and foremost, that the public interest prevails over the private interest of individuals..."*

*Moreover, the old and modern case law of the Supreme Administrative Court links the condition that the administrative contract should be related to the public utility to the condition that the procedures of the Public Law should be taken into consideration. (...)*

*In its ruling rendered on December 30, 1967 (13<sup>th</sup> judicial year, p. 359), the Court provides: "It becomes evident, from the perusal of the concluded contract, that it relates to the operation of a public utility, which is a medical facility. It is a contract for the provision of services for a public utility, whereby the Defendant undertakes to work at the hospital for a period of five years after completing their studies in return for the tuition and accommodation fees paid on their behalf by the Public Authority for Railways... The contract enjoys, therefore, the specific characteristic of administrative contracts as it relates to a public utility and takes into consideration the procedure of the Public Law". (Dr. Suleiman Mohammed al-Tamawi's book entitled "General Rules of Administrative Contracts – Comparative Study" – Dar El Fikr El Arabi – p. 78 et seq.) (Emphasis by underlining added)*

**Therefore,**

The Arbitral Tribunal will examine whether the disputed contract:

- 1- Relates to a public utility
- 2- Includes highly unusual clauses.
- 3- Has, as one of its parties, the Administration.

Whereas the Arbitral Tribunal had already decided in the award relating to the "Jurisdiction of the Arbitral Tribunal" that the "Tourism Development Authority" is a public administration, it will focus now on whether the contract relates to a public utility and whether it includes highly unusual clauses.

### **Section One: Public utility:**

Whereas the scholar Abdel Razzak Al-Sanhouri, who drafted the Libyan Civil Code, has defined the public utility as follows:

***“The public utility and its characteristics: The public utility is a project that is operated or organized and supervised by the Administration in the aim of providing services or fulfilling needs of a public interest, such as the defense, security, justice, health and educational utilities, as well as water, electricity, gas, transport, provisioning and irrigation utilities. The public utility enjoys three characteristics:***

***First: The public utility should be a project of public interest, such as the provision of public services or the satisfaction of public needs. In case it serves a private interest rather than a public one, it becomes a civil utility instead of a public utility even if it is under the State’s operation. The management, by the State, of its own private property is not considered the management of a public utility because the State’s private property is not considered of public interest.***

***Second: The main objective of the public utility should not be the making of profits. Even if the management of the public utility generates profits at times, it is only accidental and secondary because the main objective is the provision of public services or the fulfillment of public needs. Economic utilities are not free of charge, they are paid for by users in the form of duties. By imposing such duties, the State does not intend to make commercial profit, but to have the users of this utility bear its costs. Had the State made it free of charge, taxpayers would have had to incur the costs. It is unfair for taxpayers, even if they are not the users, to assume the expenses of economic utilities. When the State seeks to make profit from a project – such as the French Government’s monopoly of tobacco – the project ceases to be a public utility.***

***Third: The public utility must be operated or organized and supervised by an administration. The project that is run by individuals, companies or associations is not a public utility even if it is of public interest. This is the case of charitable organizations, [...] schools and private hospitals. The contrary is also true, as previously indicated, because the project that is managed by the State is not considered a public utility unless it serves a public interest. Administrations that manage or organize and supervise public utilities are either the State or relevant public institutions or local administrative persons such as district, city and town councils.***

- ***The legal system of public utilities: Public utilities enjoy a legal system based on the following principles that are dictated by the nature of the public utility:  
First: The continuity and stability of the public utility must be guaranteed. This is realized through the presence of (1) the stability, (2) the regularity and (3) the adaptability. (...)***

***Second: Total equality must be ensured vis-à-vis public utilities so as to guarantee equal utilization opportunities for all users without any preferential treatment.***

***Third: The public utility should be accessible to all those who need it and should not be deprived of it due to its high cost. Purely administrative utilities are usually free of charge and accessible to everyone, such as defense and security utilities. If a fee is to be imposed thereon, it should not overburden the users. This is the case of judiciary and tuition fees, and treatment and medication costs in hospitals. As for economic utilities, they are provided in consideration of a fee that is paid by the users in the form of duties as previously stated. We will see that the Administration exercises a strict control over the prices of economic utilities and takes into consideration that they do not burden the users.***

***Fourth: Special rules are applicable to public utilities that are not the rules of the Civil Code but those of the Administrative Law. These special rules regulate the function of the utilities' civil servants. Said function is not a contractual function, but rather an organizational function. They also organize the funds allocated to the operation of the utilities, which are public, not private, funds.***

***Moreover, these rules regulate the works and contracts necessary for the utilities management. Such works constitute administrative orders and such contracts are considered administrative contracts. This is why these administrative rules differ from the rules of the Civil Code. Finally, they regulate the relation between utilities and users, i.e. the public in general, thus establishing the users' rights and obligations...".***

***The first three principles definitely apply to all public utilities, whether administrative or economic, with no need for any legislative provision; it is an application of the general principles of the Administrative Law even in the absence of such provision. As for the fourth principle, it inevitably applies to administrative utilities. As previously indicated, the scope of economic utilities was extended to cover many aspects of the public sector activities which were formerly limited to the private sector. Consequently, it became necessary in certain cases to keep the rules of both the Civil Code and the Administrative Law because they are more appropriate to the nature of activities of some of these utilities".***

**(Abdel Razzak Al-Sanhouri, Volume 7, Part 1, Work Contracts, p. 218-221)**

Whereas the scholar Dr. Suleiman Mohammed al-Tamawi refers in his book entitled "General Rules of Administrative Contracts (Comparative Study), 5<sup>th</sup> Edition – Ain Shams University Printing Press, 1991 – p. 79" to the definition of the public utility set out in the jurisprudence being as follows:



The ruling rendered by the Administrative Judicial Court on December 16, 1956 (Case No. 1609 of the tenth judicial year) provides the following:

***“... Whereas these (administrative) contracts are different from civil law contracts as they intend to serve a public interest which is the operation of public utilities with the assistance of the activity of individuals, thus requiring, first and foremost, that the public interest prevails over the private interest of individuals...”***

The scholar Dr. al-Tamawi refers to another ruling and further says:

***“The ruling rendered by the Contracts Circuit of the Administrative Judicial Court on December 9, 1956 in Case No. 870 of the fifth judicial year provides that: “... Administrative contracts differ from private law contracts by a specific criterion that depends on the needs of the public utility which the administrative contract ensures its operation and where the public interest prevails over the private interests of individuals”***

**(The scholar Dr. Suleiman Mohammed al-Tamawi - General Rules of Administrative Contracts – Comparative Study – 5<sup>th</sup> Edition – Ain Shams University Printing Press – 1991 – p. 97)**

**Therefore,**

In light of this clear definition of the public utility, the Arbitral Tribunal, following referral to the investment project covered by the contract and to the decision of the Minister of Economy cancelling the same, observes that the project does not offer a public service to people, in particular the Libyan population, but offers a private service to whomever wishes to receive it, whether it is the accommodation in the hotel or villas, or the access to the movie theaters or restaurants (in the commercial mall) etc. considering that the project charges recipients of its touristic services a fee that differs according to the conditions of supply and demand in a global market, which is the tourism and services market, and is not a fee fixed by the State that is subject to change.

Whereas the Plaintiff is the sole responsible for the operation, management and maintenance of the investment project, subject matter of this dispute, so as to achieve the expected profits for a period of 83 years,

Whereas, in any case, the subject of the contract is to build a touristic hotel, a services and commercial center, restaurants, recreational areas, hotel apartments, residential

apartments and villas, which totally differs from the concept of a public utility in all its forms, and falls under the State's private property which does not aim at achieving public interest or fulfilling the public needs of individuals but is managed by the State (here the Defendants receive the project 83 years after being invested by the Plaintiff) according to the procedures of the Private Law and in conformity with the rules of the market; whereas, furthermore, the contract does not include highly unusual clauses uncommon in the Private Law (Complementary Report on a Legal Opinion of Judge Burhan Amrallah – p. 5 – February 2013); therefore, the investment project is a tourism project not funded by the Libyan Public Treasury that does not have precise specifications and constituents set by the Libyan State.

Whereas the preamble of the contract with respect to the Defendants' endeavor to *"raise the level of touristic services in the area where the plot of land covered by this contract is located and encourage [the first party] to establish and operate a tourism investment project thereon"* does not have any effect on the aforementioned,

Whereas it is established from Article 2 of the contract that the "first party" (the Defendants) *"has leased the plot of land to the second party"* and that *"the period of usufruct is 90 years (ninety years)"* (Article 3 of the contract) (Emphasis by underlining added),

Whereas the first party (the Defendants) acknowledges, in Article 4 of the contract, that *"the plot of land covered by this contract is a State-owned land and that it is legally entitled to allocate the land, sign the lease contracts relating thereto and collect the rents thereof"* (...) (Emphasis by underlining added),

**Therefore,**

**Whereas the Plaintiff will acquire from the Defendants, by virtue of the "Lease contract of a land plot for the purpose of establishing a tourism investment project", the right to use and benefit from the land covered by the contract for a period of 90 years while the Defendants will only be entitled to collect the financial revenues relating to the lease contract, i.e. the rental fee, as agreed upon in the contract,**

**The Arbitral Tribunal rejects the Defendants' allegations that the purpose of the contract is to "execute one of the projects adopted in the development plan (...) aiming at serving the public interest".**

**The Arbitral Tribunal does not consider the private tourist facilities and resorts that the investment project comprises, being the hotel, villas, apartments, commercial**

mall, movie theaters, restaurants, etc. that are granted to the Plaintiff by virtue of the contract for the purpose of being invested, as a public utility according to the definition of the public utility given by the law, doctrine and jurisprudence.

## **Section Two: Highly unusual clauses:**

Whereas the scholar Dr. Suleiman Mohammed al-Tamawi has defined highly unusual clauses in his book entitled "General Rules of Administrative Contracts, p. 93 et seq.", as follows:

***"Clauses conferring privileges to the Administration that are not conferred to the other contracting party:***

***These privileges, in the contract clauses, distinguish administrative contracts the most as they enable the Administration, at its sole discretion, to burden the contractor with obligations placing the parties to administrative contracts in a position of inequality. This inequality between the contracting parties appears as of the early stages of the conclusion of the administrative contracts. The individual who applies in the aim of securing a contract through a tender or a public bid commits by the mere submission of the application, while the Administration only commits at a later stage and might even not commit at all (...). In some contracts, the Administration may impose clauses such as the unconscionable clauses of the Private Law. Whereas individuals commit by the mere conclusion of a contract, the Administration may not commit to anything and even more, may reserve the right to break free from the entire contract, such as in the case of an agreement on a request to offer assistance in the design (...). Such clauses are mostly manifest upon the performance of the contract. The Administration always includes, in its administrative contracts, clauses under which it reserves the right to modify the obligations of the contractor, by reducing or increasing them, to interfere to supervise the contract performance, to amend and temporarily suspend the performance, to rescind or terminate the contract of its own free will and without the consent of the second party. Finally, some of these clauses grant the Administration the right to impose penalties on the other party to the contract if such party breaches its obligations in the absence of damage or without the need to resort to courts... etc.***

***These clauses are constantly highlighted by the Egyptian administrative courts, whether in the rulings of the Supreme Administrative Court or the Administrative Court. We did give some examples above.***

- a- The provision relating to the right of the Permanent Authority for the Clearing of Lands to impose a daily fine of one pound in the event of breach of any of the contract clauses.***
- b- The provision relating to the absolute right of the aforementioned Authority to terminate the contract if the supplier violates any of the contract clauses.***
- c- The independence of the contracting Administration to set forth the contract clauses.***

***These detailed rulings – in France or in Egypt – reveal the nature of uncommon clauses.***

***Among the current examples of the highly unusual clauses that were highlighted by the Supreme Administrative Court:***

- Its ruling rendered on May 20, 1967 (12<sup>th</sup> J.Y., p. 1094) on the right of the Administration to impose attachment on the account of the defaulting contracting party and to impose penalties without resorting to courts.***
- Its ruling rendered on December 30, 1967 (13<sup>th</sup> J.Y, p. 359) on the clauses of commitment inserted in teaching contracts, or else the payment of the entire tuition fees.***
- Its ruling rendered on May 11, 1968 (13<sup>th</sup> J.Y, p. 874) on the Administration's right to "amend lines (inland waterways), tariffs, traffic system, timings, and to impose fines for failure to operate the facilities, and so forth.***
- Its ruling rendered on May 18, 1968 (14<sup>th</sup> J.Y, p. 953) on the right of the Ministry of Education to definitively deprive the author of his right in favor of the Ministry, and its right to freely revise and edit a work without the author having the right to object to the same.***

***These uncommon clauses can be linked to general ideas, and can also be based on specific presumptions. We summarize all the aforementioned as follows:***

***Among the uncommon clauses those that confer exceptional powers on the party who concluded a contract with the Administration vis-à-vis third parties: this means that they confer, on the party who concluded a contract with the Administration, the right to exercise some aspects of the power usually exercised by the Administration and to the extent necessary for the performance of the administrative contract. It is obvious that these clauses do***

*not have equivalents in the contracts concluded between individuals within the framework of the Private Law.*

*On this basis, the public service concession contracts generally incorporate clauses conferring on the concession holders the right to exercise certain police powers, the right of expropriation or the right to impose certain easements. The sum collected by the concession holder from the users – according to some opinions and as detailed below – is a fee governed by the provisions of the Public Law, and not a salary paid in return for a service as is the case in private law contracts. Certain clauses inserted in the concession contract - without including an express delegation to exercise aspects of the above public authority - have characteristics that render them uncommon in private law contracts. For instance, they allow the concession holder to use and exploit the public domain in such a manner that renders him the owner of a de facto monopoly “Monopole de fait”. These clauses will therefore result in restricting the freedom of competing projects.*

*It is often found, in procurement contracts, clauses conferring on the contractor the privilege of temporarily occupying certain private real estate “Privilège d’occupation temporaire” without the need for prior approval of their owners. This falls under the powers that are usually exercised by the Administration. Other contracts confer on the other party to the contract concluded with the Administration the right to take possession of some movables by force “Droit de requisition”.*

(The scholar Dr. Suleiman Mohammed al-Tamawi, “General Rules of Administrative Contracts”, p. 93 et seq.)

Whereas the Arbitral Tribunal, through the above concept of highly unusual clauses, refers to the articles and clauses of the disputed contract, and to the articles mentioned by the Defendants when they alleged that they are highly unusual clauses:

**First: Whereas the Defendants allege that the establishment of the project on a private property owned by the State, knowing that it is a touristic project and that the contractor has no right to establish any other projects, constitutes a highly unusual clause in private law contracts,**

Whereas the Defendants allege that the preamble of the disputed contract includes the following:

***“Whereas the plot of land covered by the present contract is a State-owned property and whereas the First Party is in charge of allocating the lands located within the tourism development areas owned by the State and signing their lease contracts by virtue of Decision No. 87 of 1374 a.P. of the General People's Committee”.***(...)

Therefore, as the Defendants see it,

***“The plot of land covered by the contract is part of the Libyan State private properties that the State may dispose of in any way that is not prohibited by laws or regulations, including the lease explicitly provided for in the preamble of the contract as per Decision No. 87 of 1374 a.P. of the General People's Committee”.***

Whereas the scholar Abdel Razzak Al-Sanhouri explained the difference between the State’s private properties and public properties as follows:

***“When it comes to the State’s private properties, the State has a private property right and not an administrative property right thereon. These properties are subject to the ownership provisions just like individual properties, for example uncultivated lands with no owners such as deserts and mountains, etc.”***

(See Dr. Abdel Razzak Al-Sanhouri: Al-Waseet in the Interpretation of the Civil Code, Part 8: Ownership Right, Revised by Justice Ahmad Medhat Al Maraghi, Former President of the Court of Cassation, 2006 Edition, The Lawyer’s Library Project, paragraph 77, p. 142, and paragraph 80, p. 147)

Dr. Al-Sanhouri adds:

***“The ability of the State to dispose of the State-owned object is undisputed. The State has the right to dispose of its property as any private individual would of his/her own. However, the State is bound by many laws and regulations that it is subject to in disposing of private property and allocating it for investment, and it is imperative therefore to abide by the provisions of such laws and regulations. But in the absence of a restriction in a law and regulation, the rules of the Civil Code apply to the disposal, by the State, of its private properties. Similarly, it is the judicial courts, and not the administrative ones, that have jurisdiction to settle any disputes arising from the State’s disposition of its private property”.*** (Emphasis by underlining added)

(Previous reference, paragraph 86, p. 157)

**Therefore,**

The establishment of the investment project on the State's private property and the investment of the project by the Plaintiff, which is a private company, for 83 years is subject to the rules of the Civil Code applicable to the State's disposition of its private properties. It is the judicial courts, and not the administrative ones, that have jurisdiction to settle disputes arising thereof according to Dr. Abdel Razzak Al-Sanhouri who drafted the Libyan Civil Code. As for prohibiting the contracting party from carrying out other projects, it could figure in any private law contract as it could be provided for in a donation contract whereby the donor would require the receiver not to alter the allocation of the donated funds.

**Therefore,**

**The Arbitral Tribunal does not consider this clause relating to the establishment of the project on a State-owned private property a highly unusual clause exclusive to administrative contracts, but rather a clause that is common in private law contracts.**

**Second: Whereas the Defendants allege that the contracting party's commitment to execute the project within a set period of time is considered a highly unusual clause indicating the Administration's intention to adopt the procedure of the Public Law,**

Whereas the Arbitral Tribunal does not consider the clause relating to the period of time to be a highly unusual clause, but rather a clause that is common in all contracts for works concluded between Private Law persons,

**Accordingly,**

**The Arbitral Tribunal does not consider Article (12) of the contract as a highly unusual clause exclusive to administrative contracts, but rather a clause that is common in private law contracts.**

**Third: Whereas the Defendants allege that the Administration’s right to terminate the contract without taking any other measure in case of delay in the payment of the value of usufruct of the land on the due date or if the contracting party does not initiate the project execution within three months following the date of receipt of the license to execute the project (Articles (8) and (24) of the contract) is considered a highly unusual clause,**

Whereas the Arbitral Tribunal refers to Article (8) of the contract providing that:

***“In case of delay in the payment of the value of usufruct of the land on the due date, the first party shall send a notice to the second party to pay within a period of thirty days as of the date of notice. If the second party fails to pay prior to the expiry of the time limit set forth in the notice for reasons accepted by the first party, the latter may grant the second party a similar period. If no payment is made within this time limit, the contract will be terminated without prior warning or notice. The first party may, in this case, evacuate the plot of land through administrative means considering that the second party is unrightfully occupying it”.***

Whereas Article (24) of the contract provides that:

***“The first party may terminate the present contract if the second party fails to initiate the project execution within three months following the date of receipt of the license to execute the project, unless it submits a written justification accepted by the first party”.***

**Therefore,**

The Arbitral Tribunal notes that Articles (8) and (24) include provisions that are common in any lease contract and do not include at all highly unusual clauses such as *“the Administration’s right to terminate the contract without the need to take any measure”*. Article (8) of the contract imposes on the Administration the obligation of sending a notice to the second party to pay within 30 days in case of delay in the payment of the value of usufruct of the land on the due date but did not confer on the Administration the right to terminate the contract without prior notice unless the second party fails to pay within the 30-day time limit. Furthermore, Article (24) did not confer on the Administration the right to terminate the contract unless the second party fails to initiate the project execution within three months following the date of receipt of the license to execute the project, and that is in case the second party does not submit a



written justification as to avoid the contract termination, which is a common clause in private law contracts.

**Accordingly,**

**The Arbitral Tribunal considers that Articles (8) and (24) of the contract do not constitute highly unusual clauses exclusive to administrative contracts but are common in private law contracts.**

**Fourth: Whereas the Defendants allege that Article (14) of the contract does not allow the Plaintiff Company to waive the project or transfer the rights and obligations pertaining thereto to third parties without the express approval of the Administration, which is considered, in the Defendants' view, as a highly unusual clause,**

Whereas the Arbitral Tribunal, following referral to several contracts for works, finds that they all encompass such a clause, which is common in investment contracts as important as the contract relating to the project that the Plaintiff was intending to build, mainly given that the execution of such a project requires skills and a wide experience closely linked to the person of the contracting party, namely if the Plaintiff commits to transfer the project to the Defendants after investing it for 83 years, which adds to the Plaintiff's responsibility to execute the project in accordance with the highest standards, and to the Defendants' responsibility to ensure that the Plaintiff itself will build the project and prevent it from waiving the rights thereto, given its experience in the field of construction contracts,

**Accordingly,**

**The Arbitral Tribunal considers that Article (14) of the contract does not constitute a highly unusual clause exclusive to administrative contracts, but rather a clause that is common in private law contracts.**

**Fifth: Whereas the Defendants allege that Articles 15 and 16 of the contract are highly unusual clauses because they grant the Administration the power of technically supervising and controlling the construction and exploitation phase,**

Whereas the Arbitral Tribunal, following referral to standard contracts for works, finds that they all encompass such clauses whereby the contractor, during the construction of

the project, is subject to the continuous control and supervision of the consultant engineer or of the employer, especially that the Plaintiff is required to transfer the investment project to the Defendants following the construction and investment thereof for a period of 83 years,

**Accordingly,**

**The Arbitral Tribunal does not consider Articles 15 and 16 of the contract as highly unusual clauses exclusive to administrative contracts, but rather clauses that are common in private law contracts.**

**Sixth: Whereas the Defendants allege that Articles (20) and (21), which oblige the contracting party to use raw materials, tools, equipment and machines locally produced that are necessary for the project execution and operation, provided they are in conformity with the specifications and standards adopted for the project, to employ and train local labor force and help it acquire technical skills and expertise, and to bring in and employ foreign technical labor force and experts to execute, operate and manage the project in the absence of such local labor force and technical experts, are considered as clauses not common in private law contracts,**

Whereas the Arbitral Tribunal refers to Articles (20) and (21), which dispose as follows:

***“Article (20):***

***The second party undertakes to exploit and to use raw materials, tools, equipment and machines locally produced that are necessary for the project execution and operation, provided they are in conformity with the specifications and standards adopted for the project, and is entitled to import those that are not available.”***

***“Article (21):***

***The second party undertakes to employ and train Libyan labor force and help it acquire technical skills and expertise, and is entitled to bring in and employ foreign technical labor force and experts necessary for the execution, operation and management of the project in the absence of such local labor force and technical experts.”***

Whereas the Arbitral Tribunal finds that Article (20) includes an obligation in favor of both parties, whereby the required specifications and standards are international specifications and standards, and that the Plaintiff has the right to import the services

and equipment that are not locally available, which is a clause that is common in international and private contracts for works concluded between private law persons,

Whereas Article (21) is also common in all international contracts for works and grants the contractor the right to bring in and employ foreign labor force and technical experts necessary for the project execution, operation and management when they are not locally available, a right very common in private international contracts for works,

**Accordingly,**

**The Arbitral Tribunal considers that Articles (20) and (21) of the contract are not highly unusual clauses exclusive to administrative contracts, but are common in private law contracts.**

**Seventh: Whereas the Defendants allege that the seventh highly unusual clause, which is the obligation imposed on the contracting party to transfer the entire project to the Administration – First Party – at the expiry of the usufruct period set out in this contract in an operational condition, without having the right to claim any sums or compensation in consideration of the amounts paid for the project execution, preparation and putting into operation, is a clause that is not common in the Private Law (Article (26) of said contract),**

Whereas the Arbitral Tribunal refers to Article (26):

***“Article (26):***

***The second party undertakes to transfer the entire project to the first party at the end of the lease period set out in the present contract in an operational condition, without having any in-kind and legal rights established thereon, and without having the right to claim any sums or compensation in consideration of the amounts paid for the project execution, preparation and putting into operation.”***

Whereas the Arbitral Tribunal considers that said article, which obliges the Plaintiff Company to transfer the project in an operational condition without having the right to claim any sums or compensation in consideration of the amounts paid for the project execution, is of the same nature of the B.O.T. contracts which bind the contractor to build and invest (investment for 83 years in this case) facilities, then transfer them at the end of the investment period (in this case, the transfer will be to the Defendants) in

an operational condition, is a clause that is common in all construction and investment contracts, even more is a clause of the same nature of the B.O.T. contracts governed by the Private Law,

**Accordingly,**

**The Arbitral Tribunal does not consider Article (26) as a highly unusual clause exclusive to administrative contracts, but a clause that is common in private law contracts and is of the same nature of the B.O.T. contracts governed by the Private Law.**

**Eighth: Whereas the Defendants allege that the contract is an administrative contract because it includes a clause they deem is highly unusual not entitling the contracting party to make any additions or amendments to certain project-related activities unless with the approval of the Administration and obliging said party to undertake, when necessary, periodic and complete maintenance of the project in such a manner to ensure its perpetuity, thus causing a strong imbalance between the interests of the contracting parties with a view to making the public interest prevail over the individual interest, and entitling the Administration to supervise the exploitation phase (Article (23) of the contract),**

Whereas the Arbitral Tribunal refers to Article (23) of the contract which provides that:

***“Following the approval of the first party, the second party may make any additions or amendments to certain project-related activities without entailing any obligation upon the first party, and undertakes, when necessary, periodic and complete maintenance of the project in such a manner to ensure its perpetuity.”***

Whereas the aim of these measures is to make sure that the Plaintiff will transfer the touristic project to the Defendants, after an investment period of 83 years, in a condition that is conform to the terms and standards initially agreed upon in the contract, and not the public interest or the fact of considering the contract and the investment project as having the same characteristics of an administrative contract, especially that the investment remains private and strictly managed by the Plaintiff for a period of 83 years,

Accordingly,

The Arbitral Tribunal does not consider Article (23) as a highly unusual clause exclusive to administrative contracts, but a clause that is common in private law contracts.

**Ninth: Whereas the Defendants allege that the contract includes an additional highly unusual clause found in the clauses set out in the laws and regulations, considering that, unless otherwise stipulated in the contract, the parties agreed (in Article (30) of the contract) to apply the provisions of Law No. (5) of 1426 Heg. on the Promotion of Foreign Capital Investment and its executive regulations and Law No. (7) of 1372 a.P. on Tourism and its executive regulations, as well as other legislation in force in Libya, including the Regulation on Administrative Contracts; whereas the Defendants further state that by virtue of Article (103) of said Regulation, an administrative contract may be terminated in case of delay in the initiation of the project execution, and that by virtue of Article (107) of the Regulation on Administrative Contracts, the Administration may terminate the administrative contract for the public interest; whereas the Defendants allege that Article (8) of the General People's Committee Decision No. 194 of 1377 a.P. (2009 A.D.) on the establishment of some provisions concerning real estate investment compels the party to which a plot of land has been allocated by the State to commence the execution of the investment project within a period not exceeding one year as of the date of registration of the land in the Department of Socialist Real Estate Registration and Documentation, otherwise, the General Authority for Investment Promotion and Privatization Affairs will have the right to terminate the contract relating to the disposal of these lands and to restitute the land ownership to the State without the investor having the right to claim any compensation other than the cost paid of the contract value concluded in this regard,**

Whereas the clause entitling the Administration to terminate the contract in case of delay in the project execution within set deadlines is also a right given to the employer in private contracts for works,

Whereas the contractor who does not commence the project execution within the contractual period fixed in private law contracts will be held liable just like the employer who fails to deliver the site to the contractor; whereas the rights of the employer and contractor are reserved in conformity with the liability rules on the basis of the breach of contractual obligations, and these principles and rules are common in civil law contracts in line with the contractual liability rules provided for in the Civil Code,

Whereas the Defendants did not deliver the land to the Plaintiff in accordance with the obligation imposed thereon by virtue of Article (5) of the contract, hence not allowing the Plaintiff to commence the project execution; therefore, no contractual liability can be placed on the Plaintiff,

Whereas, in all cases, the Arbitral Tribunal will hereinafter thoroughly examine the matter that the contract does not have the same characteristics as an administrative contract pursuant to the Libyan Regulation on Administrative Contracts to draw the conclusion that the contract is not an administrative one, and, consequently, that Articles (103) and (107) cannot be applicable as alleged by the Defendants,

**Accordingly,**

**Whereas the Defendants are not entitled to terminate the contract and recover the land from the Plaintiff at their own discretion,**

**The Arbitral Tribunal rejects the Defendants' allegations and decides that there are no highly unusual clauses rendering the contract an administrative contract.**

**Tenth: Whereas the Defendants allege that what gives the contract the characteristics of an administrative contract is the fact that the plot of land, subject of the contract, is of a private nature, categorised to be among the touristic areas as per Decision No. 202 of 1373 a.P. (2005 A.D.) issued by the Secretary of the General People's Committee for Tourism, thus making this land fall within the touristic development areas pursuant to Article (4) of Decision No. 139 of 1372 a.P. (2004 A.D.) of the General's People Committee issuing the executive regulations of Law No. 7 of 1372 a.P. on Tourism, which leads to the necessity of taking the permission of the Secretariat of the General People's Committee for Tourism with regard to any permit to exploit the land or projects established thereon,**

Whereas the Arbitral Tribunal does not consider that these facts affect the private nature of the lease contract signed between the Defendants and the Plaintiff, which is a private company, granting the Plaintiff the right of using and benefiting from the leased land for 90 years without the Defendants having any rights save for the renting fees,

**Accordingly,**

**The Arbitral Tribunal rejects the Defendants' allegations and decides that the contract is not an administrative contract.**

**For these reasons,**

**The Arbitral Tribunal decides that the disputed contract does not include any highly unusual clauses, does not include any factual or legal circumstances, does not aim at achieving a public interest and does not revolve around a public utility. Consequently, the contract is not an administrative contract, but a private law contract governed by the Civil Code.**

**Therefore,**

Whereas the Arbitral Tribunal finds that it should determine the nature of the disputed contract given that it is not an administrative contract,

Whereas the two parties and their attorneys have different positions regarding the characterization of the disputed contract as detailed in Part Two of the arbitral award,

The Arbitral Tribunal refers, for the characterization of the contract concluded between the Defendants and the Plaintiff, to the opinion of judge Burhan Amrallah (Former President of the Court of Appeal in Cairo), a well-founded opinion, submitted in the arbitration case. The Arbitral Tribunal decides that the contract is a B.O.T. contract governed by the Private Law according to the report of Judge Burhan Amrallah:

***"... It is evident from the aforementioned clauses that the contract is of a complex nature: the lease of a land for the purpose of using it and benefiting therefrom for a period of 90 years in consideration of a fixed annual rent, and the obligation to establish the project agreed upon within a period of seven years and a half at the expense of the Plaintiff that will manage and exploit it throughout the whole period of usufruct, provided that it commits to deliver the project to the contracting department, at the end of said period, in an***

*operational condition etc... The contract as such can be considered as one of the contracts known as B.O.T. contracts.*

*Opinions on the determination of the legal nature of B.O.T. contracts differ. Some consider that they fall under administrative contracts, others consider that they fall under private law contracts, i.e. civil law contracts and commercial contracts, while the third category considers that such contracts should not be given a single characterization and that each contract shall be examined separately in light of its own particulars.*

....

*In our opinion, and taking into consideration the complex elements included in the B.O.T. contracts, some of which having their origin in administrative concession contracts while others having certainly their origin in private law contracts, especially following the development in the financing, by the private sector and consortiums, of B.O.T. projects in different countries, in such a manner that B.O.T. contracts acquired a particular nature and are concluded in conformity with different legal systems, with each contract having its own circumstances, particulars and clauses, it becomes difficult to give a single characterization to all types of B.O.T. contracts. Therefore, it is more convenient to examine each contract separately and give it the characterization that conforms to the circumstances of its conclusion, to its clauses and to the legal framework surrounding its drafting and performance, and consequently, to declare whether it is an administrative contract or a private law contract in accordance with what the research reveals to reach the characterization that totally corresponds to the substance of the contract. It can be safely stated then that B.O.T. contracts concluded by the State with the investor are not of a single nature and are not governed by one legal system because some of them are administrative contracts while others are private law contracts.*

*In light of the above, we will examine the clauses of the disputed contract and the circumstances of its conclusion. Even though it is true that one of the parties to the contract dated 8/6/2006 is an Administration and that the contract covers a touristic investment that seeks to raise the level of touristic services in the area where the plot of land is located, the project, in our opinion, is not considered a public utility in the meaning given by the theory of administrative contracts. It is an investment project aiming at generating profits for both parties thereto: the Plaintiff will make a profit from the operation of the project throughout the contract period and the Administration will receive the project at the end of that period in an operational condition without having any in-kind and legal rights established thereon and without paying any sum in consideration thereof, in addition to the project benefits and returns that will be transferred thereto.*



*The clauses included in the contract and the documents preceding its conclusion clearly reveal the two parties' will to subject the contract to the provisions of the Private Law and to keep it outside the scope of administrative contracts. This is confirmed first of all in the preamble of Decision No. 135/2006 of the General People's Committee for Tourism which explicitly provides that this Decision is governed by the rules of the Libyan Commercial Code and by laws that complement and amend it. The disputed contract was concluded following negotiations called for by the contracting department in its letter dated 8/12/2005 requesting the Plaintiff to submit an official recent extract of the Commercial Register in its name. The two parties gave the contract the characterization of "Lease contract of a land plot for the purpose of establishing a tourism investment project". Article (2) thereof provides that "the first party leased the plot of land to the second party" etc. The contract then included balanced clauses placing both parties on an equal footing. Article (5) compels the contracting department to hand over, to the Plaintiff, the plot of land covered by the contract free of any occupancy and persons, to guarantee the absence of any physical and legal impediments preventing the initiation of the project execution during the usufruct period, and that is immediately upon the signature of the contract, and to enable the Plaintiff to take possession of the land in order to establish the project covered by the aforementioned Decision No. 135/2006. The contracting department also states in Article (4) that there are no in-kind and legal rights whatsoever established on said land, and in Article (3), that the contract will enter into force as of the date of the minutes of handing over of the land covered by the contract; Articles (8) and (14) include an explicit resolutive clause in the event any of them is breached. According to Article (13), the Plaintiff will carry out the works set out therein only after taking over the plot of land free of all obstacles, occupancies and persons pursuant to Article (5). Article (9) compels the contracting department to provide, at its own expense and prior to the handing over of the land, the mentioned outlets and services within a period not exceeding 6 months as of the contract date, and Article (10) compels it to help the Plaintiff in searching for the appropriate locations to accommodate its workers and store its equipment. Article (27) provides that both parties should respect the property rights granted by the law to them and to third parties, including studies, drawings and technical specifications of the project. Article (28) obliges both parties not to establish any in-kind right whatsoever on the plot of land during the contract validity period, unless within the limits of its provisions, and obliges the contracting department to warrant against legal disturbances of enjoyment of the site during the contract validity period. Article (29) contains an arbitration clause providing that the contract and relevant disputes fall*

*outside the scope of competence of the courts of general jurisdiction in the Libyan State. Finally, Article (30) provides that the provisions of this contract are its constitution and, unless otherwise provided for in the contract, the provisions of Law No. 5/1997 and Law No. 7/2004 and their respective executive regulations, as well as other legislation in force in... Libya... shall apply.*

*It goes without saying that the aforementioned provisions of the disputed contract go against the fundamental principles of administrative contracts as they subject the contract to the provisions of the Libyan Commercial Code and impose on both parties reciprocal and balanced obligations free of the procedures of the Public Law. This is not affected by Articles 8, 11, 14, 15, 16, 20, 21 and 24 because the explicit resolutive clause enclosed in Articles 8 and 14 is a clause that is common in private law contracts, and the obligation set out in Articles (15) and (16) to execute the project under the contracting department's supervision in conformity with its observations is also a clause that is common in contracts for works and in construction contracts. As for Articles (20) and (21) of the contract, they are clauses that benefit both parties and are not exclusive to administrative contracts. Similarly, the provision of Article (24) is an explicit resolutive clause appearing in the private law contracts. Finally, it is worth noting that the arbitration clause contained in Article (29) of the disputed contract also placed both parties on an equal footing and consequently confirmed the commercial nature of the mentioned contract.* (Emphasis by underlining added)

Whereas the Arbitral Tribunal refers as well to the legal doctrine set out in the final submission submitted on behalf of the Plaintiff by Dr. Fathi Wali and Dr. Mahmoud Samir El-Sharkawi on 20/2/2013 (p. 23 et seq.) to confirm that not all B.O.T. contracts are administrative contracts as they can also be private law contracts, a doctrine that is sound and reads as follows:

*“The Defendants think that the prevailing opinion in determining the legal nature of B.O.T. contracts tends towards the characterization of these contracts as administrative contracts and not as Private Law contracts. For this, they relied on the book of Dr. Mohamed El Roubi published in 2004, which is nothing but his PhD thesis.*

*On the other hand, Dr. Hani Salah Sarie-Eldin published, in 2010, one of his most exhaustive and comprehensive books entitled “Legal and Contractual Regulations for Infrastructure Projects Financed by the Private Sector”.*

*This book is the fruit of a long scientific and practical experience in this field.*

*In pages 12-14 of his book, he enumerated the forms of the private sector participation in the provision of infrastructure services, saying:*

*“The private sector participation in infrastructure projects takes different forms at different levels depending on the extent of transfer of the ownership of assets and management from the public sector to the private sector, including the transfer of related financial, technical and commercial risks from the public sector to the private sector.*

*In general, the participation of the private sector in the provision of infrastructure services can be divided into gradual ascending forms represented as follows:*

- 1- Services Contracts*
- 2- Management Contracts (Operation and Maintenance Contracts)*
- 3- Lease Contracts*
- 4- Public Utility Concession Contracts*
- 5- Build-Own-Operate-Transfer*
- 6- Build-Own-Operate (BOO)  
or Privatization-Divestiture*
- 7- Hybrid Forms*

*As mentioned, the abovementioned forms ascend by levels when it comes to the degree of the private sector participation in the ownership of the project assets, management and risks assumption. For instance, under services, management and lease contracts, the ownership of the project’s assets remains with the public sector. In these forms, the latter bears the responsibility of its commercial investments and risks, while the responsibility of the project’s financial investments and commercial operational risks is transferred to the private sector under public utility concession contracts. The assets ownership in all the previous forms (i.e. services, management, lease and concession contracts) remains entirely with the public sector.*

*If we go further up the scale of the Build-Own-Operate-Transfer system, we find that the private sector is the owner of the project’s assets, that it is fully responsible for the project operation and maintenance, and that it bears the burdens of its commercial investments and risks.*

*This last system differs from privatization in the sense that under the Build-Own-Operate-Transfer system, the private sector undertakes to transfer the assets ownership to the State at the expiry of the license validity period, whereas the private sector’s ownership under privatization is final and there is no obligation on the private sector to transfer the property to the State.*

*These contractual systems and forms also differ in terms of their legal nature. While some fall under the administrative contracts, such as services,*

*management and public utility concession contracts, others fall under the Private Law contracts, such as the Build-Own-Operate-Transfer system (...)*".

*When he dealt with the issue of the legal characterization of the license agreement to build, own, operate and transfer the property, he laid down, in pages 242 and 243, the fundamental characteristics that this type of contracts must possess by saying:*

*"Fundamental characteristics confirming the existence of a license agreement to build, own, operate and transfer:*

*At the outset, we would like to reaffirm that the expression "Build-Own-Operate-Transfer" is not a legal term; rather, it is a term ensuing from the practical work to specify the content of such agreements. Consequently, the designation in itself is not important compared to the analysis of the agreement's content, subject of this study.*

*Therefore, it is not correct to generalize the relevant legal solutions, but each agreement must be examined separately to establish and determine its content and the intentions of the parties thereto. Hence, when we talk about the Build-Own-Operate-Transfer agreement concluded between the Administration and the investor, we suppose the following:*

- 1- The investor is entitled to own all the assets of the project during the license validity period and pledges to transfer the ownership to the State at the end of said period. In fact, this is a license to build, finance and operate the public interest project whilst allowing the investor, who shall enjoy full ownership during the license validity period, to provide this service to the public or with the State pledging to purchase said service.*
- 2- The Build-Own-Operate-Transfer system supposes that the private investor has control and authority over the project's operation and management. This does not mean that the State does not have a supervisory role, but that it does not have any role in the operation and supervision, or even in the service pricing, except as provided for in the contract.*
- 3- As for the third characteristic, these agreements, according to what is established in the international practice, do not include highly unusual provisions or clauses in the meaning set forth by administrative doctrine and jurisprudence, but do include contractual clauses similar to clauses which use was adopted within the private law relations' sphere. From a practical perspective, the three previous characteristics are necessary conditions to confirm the existence of a Build-Own-Operate-Transfer contract. If any of*

*these three characteristics is absent, which are the private sector's ownership of the project, the absence of the public control or authority, and the non-inclusion of highly unusual clauses, the contract falls outside the scope of this system.*

*For the above reasons, we conclude that the Build-Own-Operate-Transfer agreement, within the scope of its mentioned characteristics, is a Private Law contract of a complex nature and includes an authorization to the private investor to build and take possession of one of the infrastructure projects. This authorization reflects the Administration's will to eliminate the public utility nature of said project in light of its discretionary power and within the scope of the public interest. The investor shall have private and full ownership of the project during the agreement validity period. The investor can place the project's assets under a mortgage and execute the same within the limits of what is provided for in the agreement concluded with the Administration. This agreement of complex nature includes an obligation or a pledge that is binding on the investor to transfer the ownership of these assets, free of any mortgages or insurance, to the Administration or to the State at the end of the authorization period. The project resulting from this agreement is a private project for public benefit. Therefore, the agreement and the project fall outside the scope of the Public Law and its privileges and under the scope of the Private Law, and deal with the parties' rights and obligations in this regard".*

*Dr. Hani Salah Sarie-Eldin also mentioned in his abovementioned book that "it is worth noting that the Administration might also resort to the procedures of administrative contracts for the purpose of operating touristic facilities such as touristic hotels and restaurants that it owns. These contracts are not considered administrative contracts given that they pertain to the management of the public properties of the State, and, consequently, are primarily considered as private law contracts". (Emphasis by underlining added)*

**Dr. Hani Salah Sarie-Eldin, 2010, "Legal and Contractual Regulations for Infrastructure Projects Financed by the Private Sector", Pages 12-14**

**Section Three: Contracts pertaining to projects not funded by the public budget and clarified in the Libyan Regulation on Administrative Contracts are not considered administrative contracts:**

Whereas the Defendants allege in the “final submission” dated 6/3/2013 (p. 316 et seq.) and in the “final submission” submitted on 17/3/2013 that the characterization of the contract dated 8/6/2006 as a B.O.T. contract confirms the administrative aspect of the contract, in compliance with the rules set out in the Libyan Regulation on Administrative Contracts, in line with the following:

***“Article (3) of the former Regulation provides that (...) the following contracts shall be deemed administrative contracts if they fulfill the aforesaid conditions:***

***g- The contracts of execution of projects that are not funded by the public budget.”***  
(p. 427 of the “final submission” submitted on 17/3/2013)

***By referring to Article 137 of said Regulation which provides that projects that are not funded by the public budget shall be classified as follows:***

***a- .....***

***b- Projects temporarily owned by private entities:***

- 1- Design-Build-Own-Operate***
- 2- Rehabilitate-Own-Operate***
- 3- Develop-Own-Operate”***

***(P. 429 of the “final submission” submitted on 17/3/2013)***

***“By referring again to the Regulation on Administrative Contracts No. 563 of 1375 a.P. (2007 A.D.), we find that this Regulation classifies the projects that are not funded by the public budget as follows:***

***b- Projects temporarily owned by private entities:***

- 1- Design-Build-Own-Operate***
- 2- Rehabilitate-Own-Operate***
- 3- Develop-Own-Operate”***

- It follows from said Article that B.O.T. contracts, irrespective of any form described, enumerated and explained by the Plaintiff in its memoranda, are characterized by the Libyan legislator as administrative contracts, i.e. Public Law contracts and not Private Law contracts.***

- ***Consequently, the comments of the Plaintiff Company in the oral argument cannot be taken into consideration in light of the clear legal characterization given by the Libyan Law to this type of contracts as being administrative contracts, as established from the provisions of the aforementioned Regulation on Administrative Contracts”.***

**(P. 437-438 of the “final submission” submitted on 17/3/2013)**

Whereas the Arbitral Tribunal refers to the Regulation on Administrative Contracts issued in 2007 following the conclusion of the contract and applicable to the administrative contracts existing at the time of its issue in accordance with Article (1) thereof and with its Seventh Chapter on the “Special provisions on contracts pertaining to projects that are not funded by the public budget” to determine whether said Chapter, included in the Regulation on Administrative Contracts, has defined the nature of the contract corresponding to the disputed contract as an administrative contract,

The Arbitral Tribunal refers to Article (136) which defined the “projects that are not funded by the public budget” as follows:

***“a- Projects that are not funded by the public budget:***

***Contracts relating to projects that are not funded by the public budget are the industrial, services or infrastructure and public utility projects that are introduced by the administrative authority or entity. The capital needed for the execution thereof shall be funded, in whole or in part, by the instruments in charge of the execution or by any entity that is not funded by the public budget. The administrative authorities or entities shall be in charge of purchasing, leasing or renting the product or the service in accordance with the agreed upon conditions. The instruments in charge of the execution may also sell the product or the service directly to individuals in the cases determined by the administrative authority or entity.***

***These projects are either owned by the administrative authorities or entities or are temporarily owned by private entities.***

***b- Projects owned by the administrative authorities or entities:***

***They are the projects owned by the administrative authorities or entities that are introduced in the aim of being executed, rented, rehabilitated or developed and operated. These projects are then transferred to the administrative authority or entity in an operational condition at the expiry of the period set forth in the contract.***

***c- Projects temporarily owned by private entities:***

***They are the projects introduced by the administrative authority or entity in the aim of being executed, rented, rehabilitated or developed and operated. They are owned by the instruments in charge of their execution for a period of time determined in the contract provided that said period is not shorter than the lifespan forecasted when the project was designed.”***

Whereas the Arbitral Tribunal deems it necessary to refer back to the definition of the administrative contract in the Regulation on Administrative Contracts of 2007 (Article (3)) which provides that three conditions should be met to consider the contract an administrative contract:

- 1- That one of the parties to the contract is an administrative authority.
- 2- That the two contracting parties agree to take into consideration the characteristics of the Public Law, and that is by enclosing, in the contract, highly unusual clauses that are not common in the Private Law.
- 3- That the contract pertains to a public utility.

Whereas the Arbitral Tribunal already found that the disputed contract, even if one of its parties is an administrative authority, does not include highly unusual clauses and is not related to a public utility,

By referring to the definition of projects that are not funded by the public budget set out in the Libyan Regulation on Administrative Contracts, the Arbitral Tribunal finds that these projects:

- 1- Are related to public utilities.
- 2- Administrative authorities and entities are in charge of purchasing, leasing or renting the product or service.
- 3- The instruments in charge of the execution may sell the product or service to individuals.
- 4- Are owned by the administrative authorities or entities, or are temporarily owned by private entities.

Whereas the Arbitral Tribunal already decided that the disputed investment project is not a public utility,

Whereas the Plaintiff is not the owner of the touristic facilities and resorts that it is building, but leases their lands for 90 years and invests these resorts for a period of 83 years,



Whereas the definition does not mention the investment of the projects by the instruments in charge of the execution and their transfer to the administrative authorities at the expiry of the investment period, but mentions entities that will be in charge of the execution and that are not funded by the government, then the administrative authorities and entities will be in charge of the purchase, lease or rent of the product or service in accordance with the agreed upon conditions, and that the product or service may also be sold directly,

**Whereas, in the present case, the investment project is not a project introduced by the administrative authority or entity for the purpose of being executed, rented, rehabilitated or developed and operated, and is not owned by the instruments in charge of the execution for a period of time determined in the contract provided that said period is not shorter than the lifespan forecasted when the project was designed pursuant to Article (136) of the Regulation on Administrative Contracts, and that is because the Defendants did not lease the project to the Plaintiff but only leased the land on which the project will be built for a period of 90 years and it is the Plaintiff who will build and invest the project for a period of 83 years, which means that the project is a private investment project,**

**Accordingly**

**Projects that are not funded by the public budget, set out in the Regulation on Administrative Contracts, are projects of public utilities which execution is entrusted by the Administration to entities that are not funded by the public budget. It is the Administration that purchases or leases the product or service in accordance with conditions that will be agreed upon after the completion of the project, which bears no relation to the legal conditions of the investment project subject of the disputed contract. According to the definition given in the Regulation on Administrative Contracts, the instruments in charge of the execution can own the projects for a period of time determined in the contract, whereas in the disputed contract, the Plaintiff Company does not own these projects, but it invests them for 83 years before transferring them to the Administration.**

**Accordingly**

**Whereas the projects that are not funded by the public budget set out in Article 136 of the Regulation on Administrative Contracts relate to public utilities; whereas the Arbitral Tribunal found that the disputed touristic project is not a public utility according to Article 3 of the Regulation on Administrative Contracts,**

**Whereas the definition set out in Article 136 mentions that these projects are public utilities and that the Administration is a party thereto, but did not mention:**

- Any highly unusual clauses that are uncommon in the private law,**
- But rather mentioned that the product or service is purchased, leased, rented or sold according to mutually agreed upon conditions.**

**Accordingly,**

**Whereas the Arbitral Tribunal considers that:**

- 1- The definition of “projects that are not funded by the public budget” given by Article 136 of the Regulation on Administrative Contracts indicates that they are public utilities; the Arbitral Tribunal considered that the disputed investment project is not a public utility.**
- 2- In any case, if the definition of “projects that are not funded by the public budget” set out in Article 136 applies to administrative contracts, the Arbitral Tribunal considered, for reasons that were detailed, that the disputed contract is not an administrative contract as it does not include highly unusual clauses that are uncommon in private law contracts and does not constitute a public utility.**
- 3- In any case, the Regulation on Administrative Contracts did not explicitly mention in the definition set out in Article 136 that “projects that are not funded by the public budget” are considered administrative contracts. The Regulation only defined those projects without determining whether it considers them administrative contracts. Therefore, it is necessary to refer to Article 3 of the Regulation on Administrative Contracts to determine whether the contract is an administrative contract, and this is what the Arbitral Tribunal did concluding that the disputed contract is not an administrative contract.**
- 4- In any case, the investment project is not a project introduced by the administrative authority or entity for the purpose of being executed, rented, rehabilitated or developed and operated, and is not owned by the instruments in charge of the execution for a period determined by the contract, provided that said period is not shorter than the lifespan forecasted when the project was designed pursuant to Article 136 of the Regulation on Administrative Contracts, and that is because the Defendants did not lease the project to the Plaintiff but only leased the project’s land for 90 years. It is the Plaintiff who will build and invest the project for a period of 83 years which means that the project is a private investment project.**

### **For these reasons**

Whereas the contract was concluded in the same manner with which private law contracts are concluded; whereas the administrative authority did not resort to the procedures adopted for public bids and tenders in administrative contracts (Complementary Report by Judge Burhan Amrallah – p. 8 - February 2013),

Whereas the contract includes an arbitration clause in Article 29 and did not include any provision regarding the jurisdiction of administrative courts to examine the dispute arising from the contract; whereas it is established in the administrative doctrine and jurisprudence that the inclusion, in the contract, of a clause determining the jurisdiction of administrative courts constitutes a declaration, from the part of the parties, of their will to submit their contract to the Public Law, while the arbitration clause contained in Article 29 of the contract reveals the parties' will to subject the contract they concluded to the rules of the Private Law; whereas said arbitration clause confirms the equality between the two parties to the contract as it allows the disputes arising from the contract to be resolved outside the judicial courts of the contracting State (Complementary Report by Judge Burhan Amrallah – p. 8-9 - February 2013),

Whereas Law No. 5 of 1997 on the promotion of foreign capital investment and Law No. 9 of 2010 and its executive regulations confirm, more than the laws preceding them, that the project covered by the contract is an investment project, i.e. a private project,

Whereas Article 28 of Law No. 9 of 2010 provides that provisions of the legislation regulating the economic activity apply to those falling under the provisions of this law, and that is in respect of any matter not specifically provided for in the law; whereas Article 28 of the executive regulations of Law No. 9 of 2010, promulgated by virtue of Decision No. 499 of 2010 of the General People's Committee, provides that the investment project exercises its activity according to the provisions of said regulations and relevant legislation in force, under all the legal forms provided for in the Commercial Law, and is registered in the investment register of the Authority according to the procedures and rules determined in this regulation; whereas Article 46 of the same regulation revolves around the transfer of ownership within legal entities, and provides that the rights relating to the transfer of the ownership of shares or parts within every legal entity that contributes to the investment project are governed by the provisions of the law applicable to the commercial activity and the provisions of the Commercial Law in the State where the project is located in the event where the legal

entity is a branch of a foreign company (Final submission submitted on behalf of the Plaintiff by Dr. Fathi Wali and Dr. Mahmoud Samir El Sharkawi on 20/2/2013, page 19),

Whereas the Arbitral Tribunal decided to consider the disputed contract No. 4 dated 8/6/2006 as a contract that falls under the scope of the B.O.T. contracts and that it is governed by the Private Law (as abovementioned in the study of Dr. Hani Salah Sarie-Eldin upon which the Plaintiff relied), therefore, the contract is not an administrative contract and the provisions applicable to administrative contracts are not applied thereto,

Whereas the Arbitral Tribunal decided that the disputed contract falls under the scope of B.O.T. contracts and is governed by the Private Law by its nature and clauses and that is because some B.O.T. contracts are governed by the Administrative Law while others are governed by the Civil Code; whereas the Arbitral Tribunal, after having examined all the clauses of the contract, finds that the disputed contract falls under the scope of B.O.T. contracts governed by the Private Law and not by the Administrative Law, therefore, the Arbitral Tribunal rejects the allegations of the Defendants that B.O.T. contracts are all administrative contracts only and considers that the contract is a B.O.T. contract governed by the Private Law,

**Accordingly,**

**The Arbitral Tribunal decides that the following is applicable to the contract:**

**First:**            **Law No. 5 of 1997 on the Promotion of Foreign Capital Investment and its executive regulations and Law No. 7 of 2004 on Tourism and its executive regulations concerning the privileges and exemptions granted by Law No. 9 of 2010 that abrogated Law No. 5 of 1997 and replaced it.**

**Second:**        **Law No. 9 of 2010 that abrogated Law No. 5 of 1997 on the Promotion of Foreign Capital Investment which also abrogated Article 10 of Law No. 7 of 2004 on Tourism, without prejudice to the privileges and exemptions granted prior to its promulgation, i.e. which are included in Law No. 5 on the Promotion of Foreign Capital Investment and in Law No. 7 on Tourism.**

**Article 30 of Law No. 9 of 1378 a.P. (2010 A.D.) promulgated on 13 Safar 1371 a.P., corresponding to January 28, 2010, provides that:**

**“Law No. 5 of 1426 Heg. on the Promotion of Foreign Capital Investment and its amendments, Law No. 6 of 1375 a.P. on the Investment of**

**National Capital, Article 10 of Law No. 7 of 1372 a.P. on Tourism as well as any other provision that violates the provisions of this law shall be abrogated.**

**The provisions of this law shall apply to all investment projects and to the relevant facts and rights established as per the laws aforementioned in this Article upon the promulgation of this Law, and that is without prejudice to the privileges and exemptions granted prior to its promulgation.**

**Executive regulations and decisions issued remain in force in conformity with the provisions of the aforementioned laws in such a manner not to conflict with its provisions, and that is until the issuance of the executive regulations for this law.”**

(Emphasis by underlining added)

**Third: Libyan Civil Code.**

**Fourth: Unified Agreement for the Investment of Arab Capital in the Arab States.**

## **Fourth: On the liability**

Whereas the dispute here revolves around the contractual and delictual fault that the Plaintiff alleges was committed by the Defendants by not handing over, to the Plaintiff, the land covered by the lease contract pursuant to Article 5 thereof, thus preventing the Plaintiff from commencing the execution of the investment project,

Whereas the Plaintiff invokes the contractual and delictual fault committed by the Defendants as they adopted Decision No. 203 of 2010 issued by the Minister of Industry, Economy and Trade which annulled Decision No. 135 of 2006 issued on 7/6/2006 by the Minister of Tourism approving the investment project, while the Defendants consider that Decision No. 203 is well founded given that the Plaintiff had neglected, according to the Defendants, the commencement of the execution of the project,

Whereas the Plaintiff considers that Decision No. 203 of 2010 was unfair and violated both the Libyan laws and the contract since the Libyan party (the Defendants) did not fulfill its obligations to “hand over the plot of land free of occupancies and impediments”, while the Defendants consider that the Plaintiff had violated its

contractual obligations as well as the Libyan laws and did not proceed with the execution of the project within the contractual time limit,

Whereas the Plaintiff considers that Decision No. 203 of 2010 is illegal as it violates Article 20 of Law No. 9 of 2010 and therefore it is useless for the Defendants to invoke Article 8 of Decision No. 194 of 2009 on the establishment of some provisions concerning real estate investment issued by the Council of Ministers, given that the Decision of the Council of Ministers has a value inferior to Law No. 9 of 2010, and that Article 8 of the Decision of the Council of Ministers violates Articles 18, 19 and 20 of Law No. 9 of 2010; whereas the Plaintiff argues that Decision No. 203 of 2010 that canceled the investment approval relied on facts unrelated to the real reason behind the impossibility of execution of the project, the real reason being the serious violation, by the Defendants, of their obligation to hand over the land to the Plaintiff free of all occupancies and persons, and to guarantee the absence of any physical and legal impediments that would hinder the project execution or operation during the usufruct period, as well as the serious violation of their obligation to enable the Plaintiff company to take possession of the land immediately upon signing the contract; whereas, from a legal standpoint, Decision No. 203 of 2010 relied exclusively on Law No. 5 of 1997, although this law was repealed by virtue of Law No. 9 of 2010, and made no reference whatsoever to Law No. 9 of 2010; therefore, the annulment decision No. 203 of 2010 had ignored the provisions of Law No. 9 of 2010 that obliges the Administration, in paragraph 1 of Article 20, not to cancel the approval, unless in case the project execution was not started or finished within the set time limit, without any justification with regard thereto (The addition "*without any justification*" in Law No. 9 of 2010 was not mentioned in Law No. 5 of 1997), ( pp. 28-30 of the final submission of the Plaintiff submitted on 20/2/2013 by Dr. Fathi Wali and Dr. Mahmoud Samir Al Sharkawi),

Whereas the Defendants' reply was limited to a comparison between the provisions of Law No. 5 of 1997 and Law No. 9 of 2010 in order to prove that there is no difference between the two laws when it comes to the administration's right to terminate the contract (pp.163-164 of the Defendants' statement of defense dated 6/2/2013),

Whereas the Defendants consider that they did hand over the land covered by the contract concluded on 8/6/2006 and that they did not violate Law No. 5 of 1997 on the Promotion of Foreign Capital Investment, nor Law No. 9 of 2010 on the Promotion of Investment, nor the Unified Agreement for the Investment of Arab Capital in the Arab States,

Therefore, the Arbitral Tribunal subdivides the liability issue into two sections:

- 1- Contractual liability
- 2- Legal liability

## **Section One: Contractual Liability**

Whereas the Arbitral Tribunal considered that the “minutes of handing over and taking over of a touristic investment site” are related neither to a handing over nor to a taking over of the land free of all occupancies,

Whereas the Arbitral Tribunal finds that the legal opinion of Judge Burhan Amrallah on the contractual fault is a well-founded opinion that emphasizes the following:

- ***“Whereas the relationship between the two parties to the dispute is primarily a contractual relationship governed by the provisions of the disputed contract dated 8/6/2006, and in the absence of such a text, the provisions of Law No. 5/1997 and its executive regulation as well as Law No. 7/2004 and its executive regulation and other legislation in force in Libya shall apply; whereas Article (147/1) of the Libyan Civil Code provides that: “1- The contract is the law of the contracting parties. It cannot be cancelled or amended except by their mutual consent or for reasons admitted by the law...”; whereas Article 148 of the same Code provides that: “1- A contract shall be performed according to its contents and in the manner which accords with the requirements of good faith. 2- A contract binds the contracting party not only as regards its expressed conditions, but also as regards everything which, according to law, usage and equity, is deemed, in view of the nature of the obligation, to be a necessary sequel to the contract.”; whereas Article (159/1) of the aforementioned Code provides that: “1- In bilateral contracts (contrats synallagmatiques) if one of the parties does not perform his obligation, the other party may, after serving a formal summons on the debtor, demand the performance of the contract or its rescission, with damages, if due, in either case.”***
- ***Whereas it had been established that the non-fulfillment, by the debtor, of his contractual obligations is considered a fault in itself giving rise to his liability, which cannot be negated unless he proves the existence of an external cause that eliminates the causal link; whereas it is sufficient for the existence of a fault entailing the contractual liability, to prove that the contracting party did not fulfill his contractual obligations; whereas such contracting party will remain liable unless he himself proves that the non-***

***fulfillment of his obligations was due to a force majeure, to an external cause or to a fault committed by the other contracting party; whereas proving the fault giving rise to the contractual liability of one of the contracting parties constitutes an evaluation of the merits falling under the jurisdiction and discretionary power of the court ruling on the merits of the case so long as its findings are valid; and whereas the contract is the law of the contracting parties, and it cannot be cancelled or amended except by their mutual consent or for reasons admitted by the law, means that none of the contracting parties may unilaterally cancel or amend the contract, which is also applicable on the judge. Article 147/1 of the Civil Code”.***

Whereas Article 5 of the contract provides the obligation of the Administration (the Defendants) to hand over to the Plaintiff the plot of land covered by the contract free of all occupancies and persons, and to guarantee the absence of any physical and legal impediments that would hinder the commencement of the project execution or operation during the usufruct period, as well as to enable the Plaintiff to take possession of the land for the purpose of establishing the project,

Whereas Article 28 of the contract provides the obligation of the Administration (the Defendants) to warrant against legal disturbances of enjoyment, by the Plaintiff, of the site during the contract validity period,

Whereas the Arbitral Tribunal understands that this essential obligation provided for in the contract, as per its nature and the purpose of its conclusion, is the handing over of the plot of land free of all occupancies and persons as well as enabling the Plaintiff to take possession thereof for the purpose of commencing the execution of the agreed upon project,

Whereas, according to the contract, the contracting party's obligation is not limited to the handing over of the plot of land covered by the contract on the set date to commence the execution, but requires – according to the contract – the handing over of said plot of land free of all occupancies and impediments that might hinder or delay the project execution, the result of which being that the project execution phase only starts at the date of handing over of the site; whereas “handing over” in this context means the handing over of the site free of physical and legal impediments, i.e. the site should be ready, upon handing over, for the commencement of the works that have been agreed upon without any hindrance or impediment,

Whereas this obligation to hand over the plot of land is not limited to handing it over free of all occupancies, persons and impediments, but the Defendants are also under



the obligation to enable the Plaintiff to take possession of the land and extend its control over it so as to be able to commence the abovementioned works,

Whereas the Defendants are also under the obligation to ensure that the land is still in the possession of the Plaintiff without any objection by anyone to such possession or any attempt to deprive it thereof, or to prevent it from executing the works covered by the contract,

Whereas, in order to confirm the importance of this obligation, the two parties ensured to insert it in Articles 5 and 28 of the contract,

Whereas the existence of any impediments on the site during the validity period of the contract is a violation by the Defendants of one of their fundamental contractual obligations,

Whereas it is established from the case exhibits, evidence and documents that the Defendants did not hand over, to the Plaintiff, the plot of land subject of the contract in the abovementioned meaning, knowing that the Plaintiff requested that the Defendants honor their obligation and hand over the land by virtue of its letters dated 29/7/2006, 13/9/2006, 1/11/2006 (Exhibits No. 10, 11, 12 of the Plaintiff's docket annexed to the statement of claim); whereas, furthermore, the Plaintiff sent letters dated 22/4, 15/5, 28/7, 1/8, 30/10, 1/11, 12/11, 22/11, 22/12, 31/12/2007 indicating that it had suffered damages due to the presence of occupancies, as well as of items and containers belonging to third parties in the land subject of the dispute, and that it had been banned from building a fence around the land and that said fence had been destroyed,

Whereas the Plaintiff had complained that it was disturbed by the presence of third parties, facilities and a restaurant, that some citizens are claiming the ownership of some parts of the land, and that the equipment of a construction company are still present on the plot of land (Exhibits No. 14, 16, 20, 21, 24, 29, 30, 33, 36, 38, 39 of the Plaintiff's docket annexed to the statement of claim),

Whereas the Plaintiff had sent on 15/9/2008 and 23/9/2008 two letters to the Defendants relating to the continued presence of occupancies and sewage pipeline (Exhibits No. 44 and 45 of the Plaintiff's docket annexed to the statement of claim); whereas the Plaintiff kept on sending its written complaints on the continued occupancies and the failure to practically take over the land through its letters dated 11/7/2009, 1/9/2009, 22/10/2009, 9/1/2010 (Exhibits No. 47, 49, 50, 51 of the Plaintiff's docket annexed to the statement of claim),

Whereas the Defendants did not deny the presence of the aforementioned occupancies and impediments but rather recognized that the actual handing over of the land covered by the contract did not take place, given that the General Authority for Tourism and Traditional Industries declared in its letter dated 7/8/2007 that work will be undertaken to remove all impediments preventing the handing over of the land (Exhibit No. 22 of the Plaintiff's docket annexed to the statement of claim); whereas said Authority asked the General Company for Building and Construction, in its letter dated 17/9/2007, to evacuate the land from all its equipment and machinery to enable the Plaintiff to execute its project (Exhibit No. 25 of the Plaintiff's docket annexed to the statement of claim); whereas the Plaintiff also sent a similar request to the Office for the Implementation of Housing Projects on 12/11/2007 and to the municipal guards (Exhibits No. 28, 34, 35 of the Plaintiff's docket annexed to the statement of claim); whereas the General Authority for Tourism and Traditional Industries declared, in its letter dated 21/1/2009, the presence of impediments on the disputed land, and offered the Plaintiff an alternative land but the Plaintiff had refused the alternative land and insisted on the land covered by the contract (Exhibit No. 48 of the Plaintiff's docket annexed to the statement of claim),

Whereas the General Authority for Investment and Ownership had recognized on 2/2/2010 that no actual handing over of the land subject of the dispute had taken place as it had requested that the Plaintiff coordinates with it to carry out the actual handing over of the said land; whereas said Authority also requested that the Plaintiff submits all drawings and designs of the project to discuss them and adopt them, and transfer a part of the project capital within thirty days of the date of the letter (Exhibit No. 53 of the Plaintiff's docket annexed to the statement of claim, and Exhibit No. 16 of the Defendants' docket annexed to the statement of defense),

Whereas the Plaintiff had sent copies of the required drawings and designs with its letter dated 15/2/2010 after having previously sent three copies thereof to the General People's Committee for Tourism with its letter dated 14/5/2008 (Exhibits No. 46 and 54 of the Plaintiff's docket annexed to the statement of claim),

Whereas the Defendants had violated their obligation to hand over the land covered by the contract dated 8/6/2006,

Whereas the General People's Committee for Industry, Economy and Trade (Ministry of Economy) had, on 10/5/2010, canceled the approval granted to the project covered by the contract by virtue of its Decision No. 203/2010 (Exhibit No. 58 of the Plaintiff's docket annexed to the statement of claim); whereas the General People's Committee

(Council of Ministers) issued Decision No. 213/2010 on 7/6/2010 cancelling any rights established on the mentioned land and returning its property to the State of Libya,

Whereas that proves the Defendants' intention not to hand over the said land to the Plaintiff at all, thereby violating the terms of the disputed contract,

Whereas the allegations made by the General Authority for Investment and Ownership that the cancellation of the project approval was due to the Plaintiff's four-year delay in executing the project (Exhibits No. 63, 66, and 69 of the Plaintiff's docket annexed to the statement of claim) are irrelevant, and that all the pieces of evidence establish the contrary; whereas this constitutes the element of the fault giving rise to the contractual liability of the Defendants, which obliges them to compensate the Plaintiff in accordance with Article 218 of the Libyan Civil Code,

Whereas the non-fulfillment, by the debtor, of his contractual obligation is considered a fault in itself giving rise to his liability, which cannot be negated unless he proves the existence of an external cause that eliminates the causal link (Egyptian Civil Cassation, hearing of 12/12/1972, 23J, p. 1364),

Whereas it is sufficient for the existence of a fault entailing the contractual liability, to prove that the contracting party did not fulfill his contractual obligations; whereas such contracting party will remain liable unless he himself proves that the non-fulfillment of his obligations was due to a force majeure, to an external cause or to a fault committed by the other contracting party (Egyptian Civil Cassation, hearing of 18/4/1998, Judicial Year 49, Vol. I, p. 329, and hearing of 24/11/1970, Judicial Year 21, p. 1148),

Whereas proving the existence of the fault giving rise to the contractual liability of one of the two contracting parties constitutes an evaluation of the merits falling under the jurisdiction and discretionary power of the court ruling on the merits of the case so long as its findings are valid (Egyptian Civil Cassation, hearing of 31/7/1970 Judicial Year 21, page 538),

Whereas the contract is the law of the contracting parties, and it cannot be cancelled or amended except by their mutual consent or for reasons admitted by the law, means that none of the contracting parties may unilaterally cancel or amend it (Article 147/1 of the Civil Code) (Egyptian Civil Cassation, hearing of 16/6/1998, Judicial Year 49, Vol. 2, page 521),

On the other hand, the Arbitral Tribunal considers that the serious fault means a fault of exceptional gravity not deliberately committed, and the deduction of this fault falls

within the discretionary power of the court ruling on the merits of the case (Egyptian Civil Cassation, hearing of 7/2/1984),

Whereas Judge Burhan Amrallah considers in the legal opinion report submitted during the proceedings (p. 17 et seq.) that ***“the idea of serious fault cannot be precisely and accurately defined, and it is difficult to differentiate it from the minor fault. However, we can say that a serious fault is the consequence of recklessness in contractual relationships, or of an inability to respect obligations, or even, as considered by some, is based on the possibility that damages can be suffered. A fault is deemed serious in the event the party committing it perceived the damage caused to the aggrieved party as a potential consequence of his act. Evaluating the damages relies on an objective criterion, i.e. the criterion of the reasonable person, and not on the debtor’s will.”***,

Whereas it is established to the Arbitral Tribunal from the exhibits produced that the Defendants were unable to vacate the land subject of the contract from all occupancies and persons, that they violated their obligation to hand over the said land and tried to avoid being held liable for the contractual fault established against them by requesting, on 2/2/2010, that the Plaintiff coordinates with them to take possession of said land although the General People’s Committee (Council of Ministers), in the letter issued before 30/12/2009, cancelled any rights established on the disputed land, namely the withdrawal of its property from the Plaintiff (Exhibits No. 16, 19 and 20 of the Defendants’ docket),

Whereas the non-handing over of the land to the Plaintiff is deemed a fault giving rise to the Defendants’ liability, therefore, the Defendants shall be held liable for compensating the damages suffered by the Plaintiff in accordance with paragraph 1 of Article 224 of the Libyan Civil Code which provides as follows:

***“1- The judge shall fix the amount of the compensation, if it had not been fixed in the contract or by law. The compensation shall include the loss incurred by the creditor as well as his lost profit provided that this is a natural consequence of the non-fulfillment of the obligation or the delay in its fulfillment. The damage is considered a natural consequence whenever the creditor fails to exert reasonable efforts to avert it.”***

Whereas in accordance with this text, the compensation of direct and foreseeable damages with regard to contractual liability also includes the loss incurred by the creditor as well as his lost profit; whereas the law does not prevent that the

compensation includes whatever gains that the aggrieved party was hoping to obtain provided that their hope is based on acceptable grounds, considering that if the opportunity of realizing a profit is a probable thing, then losing such profit is a certain thing, because it was the Plaintiff itself who was going to build the resorts and touristic facilities had the Defendants not made the fault of not handing over the land, thus necessitating the compensation of the Plaintiff for the real and certain, not potential, lost profits; whereas the judge ruling on the merits of the case, when assessing the compensation that is considered one of the questions of fact, is only required to clarify the elements of the damage which necessitated the compensation (Egyptian Civil Cassation, hearing of 12/12/1989, Challenge No. 388/57J and hearing of 22/3/1977, 82J, page 722),

Whereas the assessment of the compensation falls under the authority of the judge ruling on the merits of the case so long as the law does not comprise a binding text on the specific criteria to be applied thereon (Egyptian Civil Cassation, hearing of 16/2/1967, Judicial Year 18, page 373), and whenever the judge has specified the elements of the incurred damage and the right of the aggrieved party to request compensation (Egyptian Civil Cassation, hearing of 28/12/1967, Judicial Year 18, page 943),

Whereas the compensation shall also include the moral damage pursuant to Article 225/1 of the Libyan Civil Code, knowing that with regard to civil liability, any party that has suffered a damage shall receive compensation, whether it is a moral or a material damage (Egyptian Civil Cassation, hearing of 30/4/1964, Judicial Year 15, page 631),

**Accordingly,**

**The Arbitral Tribunal finds that the Defendants have committed a contractual fault, and that the Plaintiff is entitled to compensation; the Arbitral Tribunal estimates the compensation taking into consideration all the aspects of the material and moral damages, as well as of the lost profits.**

**The Arbitral Tribunal will look into the allegations of the Defendants by virtue of which they deny any liability. The Arbitral Tribunal will analyze and examine these allegations to determine if they are valid.**

**First allegation: The letter of the Secretary of the General Authority for Tourism and Traditional Industries dated 1/7/2007 in which the Defendants requested, as they claim, the submission of a detailed timetable for the project execution phases, as well as the submission of the designs required for the project as soon as possible. The Defendants claim that the Plaintiff did not reply thereto.**

Whereas it is established to the Arbitral Tribunal that the Plaintiff had replied on 1/8/2007 and requested to be handed over the land free of all impediments in order to be able to set the timetable and designs, and to obtain the approvals and authorizations necessary for the execution of the project and for the adoption of the architectural plans by the competent authorities within one week,

**Therefore,**

**The Arbitral Tribunal rejects this allegation.**

**Second allegation: The letter of the Director of the Department for the Development of Touristic Areas of the General Authority for Tourism and Traditional Industries dated 11/7/2007 requesting the submission of the documents relating to the project. The Defendants claim that the Plaintiff did not reply thereto.**

It is established to the Arbitral Tribunal that the Plaintiff replied on 29/7/2007 and requested to be provided with the date of handing over of the site in order to be able to submit a timetable for the project, and then submitted on 2/9/2007 the timetable clarifying the project execution phases indicating that this hinges on the procedure of handing over the land.

**Therefore,**

**The Arbitral Tribunal rejects this allegation.**

**Third allegation: The letter of the Director of the Department for the Development of Touristic Areas and the Head of the Permanent Working Team at the General Authority for Tourism and Traditional Industries in which he mentioned the meeting held on 11/9/2007 and reiterated his request concerning the submission of the drawings prior to 4/11/2007. The Defendants claim that the Plaintiff did not reply thereto.**

Whereas it is established to the Arbitral Tribunal that the Plaintiff replied by submitting three copies of the designs as well as three CD copies,

**Therefore,**

**The Arbitral Tribunal rejects this allegation.**

**Fourth allegation: The letter of the Director of the Department for the Development of Touristic Areas and the Head of the Permanent Working Team at the General Authority for Tourism and Traditional Industries dated 12/11/2007 requesting the submission of the designs in order to present them to the Technical Committee. The Defendants claim that the Plaintiff did not reply thereto.**

It is established to the Arbitral Tribunal that the Plaintiff replied by stating that the land is still occupied by a number of containers, pipes and equipment and is being guarded by a number of individuals working for the General Company for Building and Construction. It added that a building still stands on the site, consisting of a cafeteria under the name of "Al Nakhla" coffee shop owned by Ibrahim Abdel Salam Abu Thahir and Abdel Raouf Ahmad Ikreem who claim that they hold a twenty-five year contract of usufruct concluded with the Al-Tahrir Sports and Cultural Club in Tajura, in addition to the allegations that some citizens own parts of this land. The Plaintiff company noted that for all these reasons, it could not initiate the execution of the project works despite finishing the preliminary design works, and that it hopes the Defendants will intervene to enable it to take possession of the site free of all impediments so that it can initiate the project execution the soonest possible, given that no positive measures were taken to remove said occupancies and impediments.

**Therefore,**

**The Arbitral Tribunal rejects this allegation.**

**Fifth allegation: The request made by the Plaintiff to the Director of the Department for the Development of Touristic Areas dated 8/1/2009 to exempt it from handing over the project on time.**

Whereas it is established to the Arbitral Tribunal that the Plaintiff justified its request in accordance with the following:

- 1- The Plaintiff Company was subject to third party interference when, on 31/10/2007, some people prevented the contractor from pursuing the work under the pretense that they are the owners of the land.
- 2- On 1/11/2007, the fence surrounding the land of the project was subject to deliberate damage which required the drafting of a report by the police.
- 3- The municipal guards in Tajura did not approve of the license granted to the Company by the Authority for Investment Promotion to erect the temporary fence, and the Al-Tahrir Club in Tajura claims ownership of the land from where the sign was still not removed.
- 4- The municipal guards stopped the contractor's workers and assaulted them. Consequently, the Tourism Development Authority asked the Plaintiff to stop the works, remove the equipment from the site and completely demolish the fence.

Therefore, the Plaintiff states that the continued presence of the impediments in the site and the aggression of its workers prevented it from commencing the execution of the project, which made it request that it be exempted from handing over the project on time while staying under the supervision of the General Authority for Tourism. The Plaintiff asks for the assistance of the General Authority for Tourism in the hope that such a support and interference by a governmental authority would expedite the handing over of the land in order to commence the project execution.

The Defendants made no reply as the Plaintiff states and as established to the Arbitral Tribunal, which made the Plaintiff requests that it be exempted from handing over the project on time.

**Therefore,**

**The Arbitral Tribunal rejects this allegation based on these established facts.**



**Sixth allegation: The suggestion made by the Director of the Department for the Development of Touristic Areas and the Head of the Permanent Working Team at the General Authority for Tourism and Traditional Industries on 21/1/2009 to the Plaintiff company to choose an alternative site for the project execution while keeping the site until the impediments are removed.**

Whereas the Plaintiff is not bound by the contract to accept an alternative site even though the suggestion of an alternative site was not detailed and precise; whereas the Plaintiff submitted designs, maps and drawings, etc. upon the conclusion of the contract with the Defendants based upon the land, covered by the contract, that was not handed over to it; whereas any alternative plot of land will require designs, maps and drawings which the Plaintiff is not contractually bound to accept,

Whereas, furthermore, this suggestion strengthens the proof that the Defendants are unable to hand over the land that was agreed upon in the contract,

**Therefore,**

**The Arbitral Tribunal rejects this allegation and considers it groundless.**

**Seventh allegation: The letter of the third Defendant dated 2/2/2010 relating to the transfer of a part of the capital of the investment project that is estimated at 130 million dollars.**

Whereas the Arbitral Tribunal, following referral to the contract, finds that no contractual obligation binds the Plaintiff to transfer “a part of the capital of the investment project” that is estimated at 130 million dollars,

Whereas the Arbitral Tribunal finds that it is necessary to reject the allegations made by the Defendants in the “final submission” dated 6/3/2013 (page 306) where they maintain that the correspondence addressed by the third defendant to all companies investing in Libya and governed by the Investment Law confirm the necessity to provide the latter with the required documents including an acknowledgement of deposit of 10% of the capital value, in cash, in the project account from the date of receipt, by said companies, of the investment approval Decision, given that this obligation to pay 10% of the project investment value is considered as one of the legal and administrative

procedures necessary for the project establishment (Exhibits No. 36, 37 and 38 of the Defendants' final submission dated 6/3/2013),

Whereas the Arbitral Tribunal, after examination of exhibits No. 36, 37 and 38 of the Defendants' final submission dated 6/3/2013, finds that the third defendant has based its request of payment, by the companies to which it addressed the correspondence, of 10% of the project investment value, as well as other procedures and conditions, on Article 27 of the executive regulations of Law No. 5/1997 A.D. on the Promotion of Foreign Capital Investment and its amendments,

Whereas the Arbitral Tribunal also finds that exhibits No. 36, 37 and 38 relate to the Libyan European Company for Medical Services, a public limited company, to the Diar Company for Touristic Investment, and to the Libyan Ukrainian Ophthalmology Center; whereas these three documents relate to foreign companies exclusively, and cannot apply to the Plaintiff Company; whereas the Arbitral Tribunal expresses astonishment at the behavior of the Defendants in this regard,

Whereas after examination of Article 27 of said executive regulations, the Arbitral Tribunal finds that it provides as follows:

***“Obligations of the Investor:***

*The investor who was granted the license for investment shall abide by the following: -*

- 1- To execute the project within six months from the date of being informed of the approval to erect it in accordance with the provisions of these Regulations. The People's Committee for the Authority may, for objective reasons, permit, if necessary, the extension of this period for a further suitable period.*
- 2- To execute the project in accordance with the request submitted on the basis of which the license was issued.*
- 3- To keep the accounting registers and books provided for in the Libyan Commercial Law, and to annually submit the financial statements and budget of the project, certified by an auditor, to the Tax Department and the Authority.*
- 4- To provide the Authority with annual reports on the project activities and any expansions or developments thereof.*

*5- To give priority to national manpower whenever the required qualifications for filling the positions or jobs required by the project are equal.*

*The People's Committee for the Authority may raise a recommendation to the Secretary of the General People's Committee for Economy and Trade to withdraw or cancel the decision of approval or to completely cancel the project in any of the following cases:*

*a) Non-completion of the execution of the project within the period specified in the license, and expiry of the additional period granted to the investor.*

*b) If it transpires to the Authority that the investor is not serious in the execution of the project or is incapable of continuing its execution at the financial or technical level.*

*c) If the investor violates any of the obligations provided for in this Article or violates any of the provisions set out in Law No. (5) of 1426 Heg. and these regulations.*

*The People's Committee for the Authority shall notify the investor of the necessity to complete the execution of the project according to the specified timetable by virtue of an official notice served thereon at the address indicated in the request for approval of the investment project.*

*In case of withdrawal of the decision, the investor shall sell the properties and lands he might have purchased for the project. He may as well be asked to remove any constructions or additions made to the lands he was allowed to use for the project purposes, and to reconstitute them to their original condition and form at its own expenses. The investor shall be informed thereof by registered letter with acknowledgement of receipt.*

*Upon withdrawal of the decision for any of these reasons, the investor shall pay the customs duties and taxes or any other fees on the imported machinery, equipment and transport means, from which he might have been exempted by virtue of the provisions of the mentioned Law No. (5) of 1426 Heg., in case of disposal thereof by sale or assignment, without prejudice to any compensation, if any, provided for by the Law."*

**Consequently,**

The Arbitral Tribunal finds that Article 27 of the executive regulations of Law No. 5/1997 A.D. on the Promotion of Foreign Capital Investment and its amendments does not provide for any legal obligation to pay part of the investment capital, whether 10% of the investment capital or any other percentage.

Therefore, the Arbitral Tribunal rejects the allegations of the Defendants in this regard and expresses astonishment at the attempts of the Defendants to create texts of law that are inexistent and to modify the content of the law.

**Therefore,**

**The Arbitral Tribunal rejects this allegation.**

\* \* \*

Whereas the Arbitral Tribunal, by referring to the Libyan jurisprudence in the field of contractual liability, builds upon the following provisions:

***“The criterion relied upon to determine the liability in the presence of multiple reasons causing the damage – according to the established jurisprudence of this Court - consists of determining the efficient cause that has an important role in the occurrence of the damage without the occasional cause.”***

**(Libyan Supreme Court, Civil Challenge No. 473/44J, dated 25/12/1370 a.P. = 2002)**

***“Whereas the court ruling on the merits of the case has the power to characterize the claims of the litigants and rectify them in such a manner to be in conformity with the facts brought before it and the claims and pleas that might be submitted thereto, thus exercising its right to give the appropriate characterization to the case and determine what the litigants mean in their claims in order to be able to apply thereon the applicable legal provisions.”***

**(Libyan Supreme Court, Civil Challenge No. 668/51J, 4/6/1374 a.P., 2006 A.D.)**

***“According to the established jurisprudence of this Court, the deduction of the facts of the case, the proving of the fault and the causal link between the fault***

***and the damage, and the determination of the party liable for this fault is entrusted solely to the judge ruling on the merits of the case without any control thereon, so long as the judge's decision relies on the case facts and circumstances, and on the exhibits submitted therein."***

**(Libyan Supreme Court, Civil Challenge No. 724/53J, dated 24/6/2008)**

Whereas, in light of all the above, the Arbitral Tribunal notes, upon examination of the liability of the Defendants, that the points at issue between the two parties revolve around the following:

**A- The submission of documents, designs, drawings, maps and timetable:**

It is established to the Arbitral Tribunal that these designs, maps, drawings, timetable and documents are all submitted by the Plaintiff but were not detailed as the Plaintiff was still awaiting to take possession of the land upon which the investment project will be built.

Consequently, the Arbitral Tribunal rejects the allegations made by the Defendants relating to the Plaintiff's delay to submit the timetable, and that is in violation of the Regulation on Administrative Contracts (Article 110) that binds the contractor to submit a timetable for the project execution within 15 days from the signature of the contract (final submission, 17/3/2013, page 482). In fact, as the Arbitral Tribunal had decided on the contract's legal nature, the contract is not an administrative contract and the Plaintiff is not a "contractor" undertaking public works. In all cases, the Plaintiff submitted a preliminary timetable while awaiting to take possession of the land to commence the execution.

**B- Impediments in the land:**

It is established to the Arbitral Tribunal that the land contractually agreed upon to be handed over to the Plaintiff in order to begin the execution of the project was occupied by a number of containers and equipment, was being guarded by certain individuals and a building still stands on the site, consisting of a cafeteria. Furthermore, the workers of the Plaintiff were banned by certain individuals from entering the land under the pretence that the land belonged to them.

Whereas the Arbitral Tribunal examines a fact that is established in the minutes and reports, being that the Plaintiff company was banned from beginning the works by **the municipal guards** who stopped and assaulted the Plaintiff's workers... and that the same **Administration** asked the Plaintiff, as a result thereof, to **cease all works** and to remove its equipment from the site,

Therefore, the Arbitral Tribunal cannot but hold the Defendants liable for all these actions.

**C- The Defendants' offer of an alternative plot of land:**

The offer, by the Defendants to the Plaintiff, of an alternative land was made in a vague manner, and the Arbitral Tribunal finds that this offer does not contractually bind the Plaintiff to accept it as the maps, designs and drawings, etc... are all based on the plot of land that was due to be handed over as per the contract. However, although the Arbitral Tribunal sees in this offer a sign of good faith from the State of Libya because it expresses its desire and intention to achieve its sought objective of the project, it considers that such an offer does not exempt the State of Libya from being held liable for the multiple violations.

**D- Payment of a part of the capital amounting to 130 million dollars:**

The Plaintiff is not contractually under the obligation to pay 10% (i.e. 13 million USD) of the project capital amounting to 130 million USD, but is only under the obligation to pay 0.1% as provided for in Article 3 of the investment approval Decision No. 135 of 2006, and had paid said amount.

Therefore, the Arbitral Tribunal does not consider, as aforementioned, that the Plaintiff has violated any contractual obligation in this regard, especially that the plot of land was not handed over to it in the first place to enable it to commence the project execution.

**E- Aggression of the Plaintiff's workers:**

The Arbitral Tribunal notes that the Defendants, contrary to their contractual obligation to register the right of usufruct of the land in the Plaintiff's name, had already granted this right of usufruct to the Libyan Umma Bank, which means that the impediments were:

- 1- Individuals who claimed ownership of the land.

- 2- Individuals who assaulted the Plaintiff's workers and damaged the fence surrounding the land.
- 3- The municipal guards themselves, affiliated to the State, who also assaulted the Plaintiff's workers.

**F- Granting the right of usufruct of the land to the Libyan Umma Bank:**

From a legal point of view, the right to use and benefit from the land has become impossible given that such right was granted to the Libyan Umma Bank prior to or following the signature of the contract.

**G- Selling the right of usufruct of the land to the Libyan Central Bank:**

It is also established from the documents that the right of usufruct of the land had also been sold to the Libyan Central Bank, and that the real estate property is registered under the name of the Libyan bank, which means that the Defendants acted twice in violation of the contract provisions in terms of the right of usufruct of the land.

**Accordingly,**

**Whereas the Arbitral Tribunal, following referral to Article 5 of the contract, finds that the Defendants were contractually bound to hand over the land free of occupancies as provided for in said Article:**

***“The First Party undertakes to hand over to the Second Party the plot of land free of any occupancies and persons, guarantees that there are no physical or legal impediments preventing the initiation of the project execution or operation during the usufruct period immediately upon the signature of this contract, and permit it to take physical possession thereof for the purpose of establishing the project, the execution of which is authorized by virtue of Decision No. 135 of 1374 a.P. issued by the Secretary of the General People's Committee for Tourism.”***

**Therefore,**

**The Arbitral Tribunal considers that the Defendants', by breaching Article 5 of the contract and by failing to hand over the land to the Plaintiff free of all occupancies and persons and of any physical or legal impediments, have violated the contract and**

committed a contractual fault for which they shall be held liable in implementation of Articles 214, 217 and 224 of the Libyan Civil Code.

Whereas the Arbitral Tribunal relies in this on the Libyan jurisprudence that provides as follows:

*“Should a contractual relation be established, and its parties and scope determined, and should the damage caused to one of the contracting parties be ascribed to the other party’s violation of their contractual obligations, the contractual liability should be taken into consideration given that said liability shall apply as the sole means to govern the relationship between the two parties and not the tortious liability – which does not bind the aggrieved party by a former contractual liability. The application of the rules of the tortious liability disregard, in fact, the provisions of the contract relating to the liability of non-performance of the contract, which constitutes a derogation from the principle of the binding force of the contract, unless it is proven that the act committed by one of the contracting parties and which was damaging for the other party is a crime, a fraud, or a serious fault constituting the tortious liability. This is, in fact, about a violation of a legal obligation, with such an act being always prohibited, whether or not its perpetrator is a party to a contract.”* (Emphasis by underlining added)

(Libyan Supreme Court, Civil Challenge No. 502/48J, dated 28/12/1370 a.P. 2002)

Accordingly,

The Arbitral Tribunal decides that the Defendants committed a fault that entails their contractual liability as well as their tortious liability because they violated legal obligations as will be discussed below.



## **Section Two: Legal Liability**

### **First: On the obligation to perform the contract in good faith in accordance with the provisions of Article 148 of the Libyan Civil Code:**

Whereas Article 148 of the Libyan Civil Code provides that: ***“the contract must be performed in accordance with its contents and in compliance with the requirements of good faith”***,

Whereas it is established to the Arbitral Tribunal that the Plaintiff company did submit the maps, designs and drawings to the Defendants, while the Defendants were requesting additional details without entitling the Plaintiff to take possession of the land on which the project was to be established,

Whereas it is established to the Arbitral Tribunal that the land that the Defendants were under a contractual obligation to hand over to the Plaintiff was occupied by a number of containers and equipment that certain individuals were guarding, in addition to the existence of a cafeteria,

Whereas the Defendants did not take any measure in this regard,

Whereas some individuals assaulted the Plaintiff’s workers who were attempting to commence the works without the Defendants taking any action in this regard; whereas the municipal guards, who take their orders from the Defendants, assaulted the Plaintiff’s workers as they were trying to arrange the equipment without the Defendants taking any action,

Whereas the Defendants requested that the Plaintiff stops the works instead of dealing with the aggressions against it,

Whereas the Defendants made a vague offer to the Plaintiff for an alternative plot of land then blamed the Plaintiff for refusing the offer while knowing that the maps, designs and drawings had been specially drafted for the plot of land covered by the contract and that moving the project to another plot of land would require new drawings, maps and designs,

Whereas the Defendants granted the right of usufruct of the land to the Libyan Umma Bank then to the Libyan Central Bank in violation of their contractual obligation that binds them to grant it to the Plaintiff,

Whereas after all this, the Defendants, through the Minister of Economy, annulled the decision of the Minister of Tourism approving the touristic project, which spawned the termination of the contract,

Whereas the Arbitral Tribunal considers that all the above actions do not comply with the obligation of performing the contract in good faith as provided for in the Libyan Civil Code,

**Accordingly,**

**The Arbitral Tribunal considers that the Defendants have violated the legal obligation provided for in Article 148 of the Libyan Civil Code and therefore committed a delictual fault for which they shall be held liable.**

**Second: On the prevention from confiscating and freezing the project or from subjecting it to procedures having the same effect as Law No. 5 of 1997 on the Promotion of Foreign Capital Investment and its executive regulation, abrogated by Law No. 9 of 2010 without prejudice to the privileges and exemptions granted prior to the promulgation of Law No. 9/2010, and on the violation of Law No. 7 of 2004 on Tourism which Article 10 thereof is repealed by virtue of Law No. 9/2010:**

Whereas Law No. 5 of 1997 was repealed by virtue of Law No. 9 of 2010 without prejudice to the privileges and exemptions granted prior to the promulgation of said Law,

Whereas Article 10 of Law No. 7 of 1372 a.P. on Tourism was repealed by Law No. 9 of 2010 without prejudice to the privileges and exemptions granted prior to the promulgation of said Law,

Whereas the Plaintiff invokes the privileges and exemptions granted by virtue of Law No. 5 of 1997 on the Promotion of Foreign Capital Investment and Law No. 7 of 1372 a.P. on Tourism, prior to the promulgation of Law No. 9 of 2010 on the Promotion of Investment,

Whereas the Plaintiff asserts that the governmental entity, i.e. the Defendants, failed to respect the law on foreign investment No. 5 of 1997 which does not allow it to confiscate nor freeze the project, nor subject it to procedures having the same effect; whereas the Defendants, by arbitrarily adopting the decision of the Minister of Economy and Trade No. 203 of 2010 annulling the decision of the Minister of Tourism No. 135 of

2006 based on which the contract relating to the touristic investment was concluded, did not enable the Plaintiff to take possession of the plot of land on which the project is to be established and therefore violated the investment law and committed a delictual fault,

Whereas the Defendants failed to respect the Libyan Investment Law No. 5 amended by Law No. 7 which “***prevents them from confiscating or freezing the project, or subject it to procedures having the same effect***” (Article 23 of Law No. 5/1997 relating to investment and Article 23 of Law No. 9/2010 relating to investment),

Whereas the arbitrary Decision No. 203 of 2010 issued by the Libyan Minister of Economy and Trade annulling Decision No. 135 of 2006 issued by the Minister of Tourism, by virtue of which the touristic investment contract was concluded, initiated procedures having the same effect as the freezing and confiscation of the investment project, thus violating the explicit provisions of Law No. 5 of 1997 relating to investment, replaced by Law No. 9 of 2010 which prohibits the adoption of procedures having the same effect as confiscation and freezing; whereas by adopting that decision that comprises procedures having the same effect, the Defendants violated the Libyan investment Law No. 9 of 2010 which replaced Law No. 5 of 1997,

Whereas the Arbitral Tribunal considers that Article 23 of Law No. 5 of 1997, pertaining to the privileges and exemptions, has not been amended and has been retained in Law No. 9 of 2010 without prejudice to the privileges and exemptions granted to the investment project,

Whereas Law No. 9 of 2010 was promulgated on 28/1/2010; whereas Article 31 thereof provides that it shall enter into force as of the date of its publication in the Official Gazette; whereas said Law was actually published in Issue No. 4 of the Official Gazette dated 28/4/2010,

Therefore, the dispute should be settled in light of Law No. 5 of 1997 and Law No. 7 of 2003, and the Arbitral Tribunal will examine Law No. 9 of 2010 for comparative purposes.

Whereas the Arbitral Tribunal finds, contrary to the allegations made by the Defendants, that the Plaintiff has submitted the preliminary drawings, maps and designs prior to any taking over of the land but cannot submit the detailed designs, drawings, maps and timetable unless after taking possession of the land,

Whereas the Defendants have adopted a decision issued by the Minister of Industry, Economy and Trade on 10/5/2010 under No. 203 of 2010 which annulled Decision No. 135/2006 issued by the Minister of Tourism on 7/6/2006 approving the investment project and leading to the conclusion of the “Lease contract of a land plot for the purpose of establishing a tourism investment project”,

Whereas the reason behind the adoption of the decision of the Minister of Economy cancelling the approval granted to the project is, as claimed by the Defendants, the Plaintiff’s failure to commence the execution of the works,

Whereas the Plaintiff was unable to commence the execution of the works as long as the Defendants had not yet handed over the land free of all occupancies to the Plaintiff, thus making it impossible for the latter to enter the land especially that its workers had been assaulted, when they entered the site, by the municipal guards who report to the Defendants,

**Therefore,**

**The Arbitral Tribunal considers that Decision No. 203/2010 issued by the Minister of Economy on 10/5/2010 and annulling the decision of the Minister of Tourism which approved the project, is an arbitrary decision and should be considered as a procedure similar to freezing and confiscation, both prohibited by virtue of Law No. 5 of 1997 in its Article 23 that is not modified by Article 23 of Law No. 9 of 2010 which replaced Law No. 5 of 1997.**

**Third: On the violation of the Unified Agreement for the Investment of Arab Capital in the Arab States aiming at the prohibition of measures leading to the sequestration, administration of assets, freezing, confiscation or liquidation:**

Whereas the Unified Agreement for the Investment of Arab Capital in the Arab States has become an integral part of the Libyan Law after Libya ratified it on 4/5/1982; whereas “the provisions of the Agreement shall have priority of application in instances where they conflict with the laws and regulations in the States Parties”; whereas the Agreement is considered a special law which provisions prevail over any other Libyan laws,

Whereas the disputed investment project is governed by this Agreement as stated at the beginning of this award and before the Arbitral Tribunal decided on its own competence,

Whereas the Arbitral Tribunal has decided that the Unified Agreement for the Investment of Arab Capital in the Arab States applies to this arbitration case contrary to the allegations made by the Defendants in this regard,

Whereas Article 9(1) of the Agreement provides as follows:

***“Article 9(1)- According to the provisions of this Agreement, the capital of the Arab investor shall not be subject to any specific or general measures, whether permanent or temporary and irrespective of their legal form, which wholly or partially affect any of the assets, reserves or revenues of the investor and which lead to confiscation, compulsory seizure, dispossession, nationalization, liquidation, dissolution, the extortion or elimination of secrets regarding technical ownership or other material rights, the forcible prevention or delay of debt settlement or any other measures leading to the sequestration, freezing or administration of assets, or any other action which infringes the right of ownership itself or prejudices the intrinsic authority of the owner in terms of his control and possession of the investment, his right to administer it, his acquisition of the revenues therefrom or the fulfillment of his rights and the discharge of his obligations.”***

Whereas the Arbitral Tribunal finds that is considered as "... special measures... leading to confiscation, liquidation... and freezing... represented by the [Defendants'] control over the investment" the decision of the Minister of Economy annulling the decision of the Minister of Tourism which approved the investment, because this decision led to the confiscation, liquidation and freezing of the project,

Whereas this decision is arbitrary because it is based on the allegation that the Plaintiff company did not initiate the works which led to the liquidation, confiscation and freezing of the project, while the cause of the Plaintiff's delay in beginning the execution was due to the fact that the Defendants themselves failed to hand over the plot of land to the Plaintiff,

Whereas the Arbitral Tribunal considers that the Defendants are solely responsible for the delay in handing over the plot of land to the Plaintiff,

**Therefore,**

**The Arbitral Tribunal decides:**

**First Point: On the drawings, designs and maps:**

Whereas the Plaintiff has submitted the preliminary drawings, maps and designs prior to any taking over of the land but cannot submit the detailed designs, drawings, maps and timetable unless after taking possession of the land,

**Second Point: On the prevention of the Plaintiff from initiating the works:**

Whereas the land that the Defendants were under a contractual obligation to hand over to the Plaintiff was occupied by a number of containers and equipment that certain individuals were guarding, in addition to the existence of a cafeteria...; whereas, furthermore, some individuals prevented the Plaintiff's workers from entering the plot of land on the basis of their ownership of the land, the worst being, as established in the minutes and reports, that the Plaintiff company was prevented from initiating the works by the municipal guards who stopped the contractor's workers and assaulted them ... and that the administration itself requested that the Plaintiff stops the works and removes the equipment from the site,

**Third Point: On the offer of an alternative plot of land:**

Whereas the Defendants offered, in a vague manner, an alternative plot of land that the Plaintiff is not contractually obligated to accept given that the maps, designs, drawings, etc... were all based on the contractually agreed upon plot of land,

**Fourth Point: On the payment of 10% (i.e. 13 million American dollars) of the capital amounting to 130 million American dollars, which is neither a contractual nor a legal obligation, and on the non-maturity of the first installment of the annual usufruct value:**

Whereas the Plaintiff, as previously shown, is not contractually or legally under the obligation to pay a part of the capital amounting to 130 million US dollars, but is only under the obligation to pay 0.1% as provided for in Article 3 of Decision No. 135/2006 approving the investment, which is what the Plaintiff actually did and which proves that

it did not violate any of its contractual obligations; whereas the Plaintiff is contractually obligated to pay the first installment of the annual usufruct value only thirty days following the date of taking over of the plot of land; whereas it is unequivocally established that the land was not effectively handed over and that the case exhibits made no indication suggesting that the Defendants demanded – during the period preceding the dispute – any sums of money in exchange for the usufruct (Complementary Report on a Legal Opinion - Judge Burhan Amrallah - February 2013, p. 9),

**Fifth Point: On the granting, by the Defendants, of the right of usufruct of the land to the Libyan Umma Bank:**

Whereas the Defendants, contrary to their contractual obligation to register the right of usufruct of the land in the Plaintiff's name, had already granted this right of usufruct to the Libyan Umma Bank,

Whereas the impediments were:

- a. Individuals who claimed ownership of the land.
- b. Individuals who assaulted the Plaintiff's workers and damaged the fence surrounding the land.
- c. The municipal guards themselves who also assaulted the Plaintiff's workers.
- d. From a legal point of view, the right to use and benefit from the land has become impossible given that such right was granted to the Libyan Umma Bank prior to or following the signature of the contract.

**For these reasons,**

The Arbitral Tribunal considers that these elements, separated or combined, in addition to the decision of the Minister of Economy No. 203 of 2010 cancelling the investment license constitute measures leading to the confiscation, liquidation, freezing and control of the investment. The cancellation of the license was based on the Plaintiff's failure to initiate the works, whereas it is the Defendants who are solely responsible for that delay as per their implicit confession. The Defendants then arbitrarily cancelled the investment project based on the decision of the Minister of Economy, a decision that violates the Unified Agreement for the Investment of Arab Capital in the Arab States which precludes the Defendants from taking such a measure leading to the freezing, confiscation and liquidation of the project.

**Sixth Point: On the allegation of the Defendants pertaining to the failure of the Plaintiff Company to give the Sidi Al Andalusi Tourism Complex project a legal form as required by the Libyan law:**

The Defendants contend in their final submission dated 17/3/2013, p. 460 et seq., that the Plaintiff has violated its obligation to give the Sidi Al Andalusi Tourism Complex project a legal form as required by the Libyan law (Article 9 of the executive regulation of Law No. 5 of 1997 A.D. on the Promotion of Foreign Capital Investment and its amendments),

The Arbitral Tribunal, by referring to Article 9 of the executive regulation of Law No. 5 of 1997 A.D. on the Promotion of Foreign Capital Investment and its amendments, finds that it indeed provides as follows:

*"Project form:*

*The investment project shall take on one of the following forms:*

- 1. Joint-stock companies*
- 2. Limited liability companies*
- 3. Foreign company branches*
- 4. Individual project"*

The Arbitral Tribunal considers that the foreign investor's project must take on one of the commercial forms provided for in the Libyan Commercial Law and in the abovementioned Article 9. In other words, the project must take on the form of a joint-stock company or the form of any other company if the investment project is owned by multiple partners, whether they are all foreigners or foreigners and Libyans.

However, if the foreign investment project is wholly owned by a foreign company (as is the case with the Plaintiff company), the project automatically takes on the form of a foreign company branch as provided for in the Libyan Commercial Law and in Articles 9 and 11 of the executive regulation of Law No. 5 of 1997. Therefore, the Plaintiff company exists by the mere existence of its registration certificate in the investment registry and it is legally considered in Libya as a branch of the Al-Kharafi Company located in Kuwait, which legally enables it, following its registration in the investment registry, to conclude contracts with third parties, to register its cars under its name and to open files under its name at the Ministry of Labor, Passports and Taxes, and others.



**Accordingly,**

The Arbitral Tribunal rejects the Defendants' allegations regarding the Plaintiff's violation of its obligations pursuant to Law No. 5 of 1997 and its executive regulation. The Arbitral Tribunal further considers that the Defendants violated the Unified Agreement for the Investment of Arab Capital in the Arab States which became an integral part of the Libyan law following its ratification by the State of Libya. This special law is applicable to the present dispute and the decision to cancel the investment license constitutes, as such, a delictual fault with regard to this Agreement and to other legislation governing investment as well as to the explicit provisions of the contract.

On the other hand, the Unified Agreement for the Investment of Arab Capital in the Arab States provides that the investor shall enjoy "facilities and guarantees", whereas the Defendants, in the five aforementioned points, failed to provide any facility or guarantee to the Plaintiff, i.e. the investor. On the contrary, during all the years of cooperation with the investor, the Defendants sought to plant obstacles and create barriers, and even the police and municipal guards assaulted the Plaintiff's workers when they tried to enter the plot of land without the Defendants taking appropriate measures in this regard, thus violating yet again the Unified Agreement for the Investment of Arab Capital in the Arab States in such a manner to entail the liability of the Defendants.

**Fourth: On the illegality of the Decision of the General People's Committee for Industry, Economy and Trade No. 203 of 2010:**

Whereas the Plaintiff invokes the illegality of the Decision of the General People's Committee for Industry, Economy and Trade No. (203) of 2010, dated 10/5/2010, cancelling the investment approval granted to the Plaintiff company by virtue of Decision No. (135) of 2006, given that Decision No. (203) did not refer at all to Law No. (9) of 2010 on the Promotion of Investment but rested on Law No. (5) of 1997 and on the minutes of the fourth ordinary meeting of the Administration Committee of the General Authority for Investment and Ownership; whereas the decision, just like the recommendations of the Committee and without any justification, rested on a law that was repealed and disregarded Law No. (9) of 2010 in force obligating the Administration – in clause (1) of Article (20) – not to cancel the approval unless based on the non-

initiation of the execution or on the non-completion of the execution on the specified date,

**Accordingly,**

By referring to Decision No. (203) dated 10/5/2010, the Arbitral Tribunal finds that it did not mention and did not rest on Law No. (9) on the Promotion of Investment dated 28/1/2010 A.D., promulgated in January 2010, i.e. five months prior to the issuance of Decision No. (203), and which came into force on 28/4/2010 in accordance with Article 31 of Law No. (9) of 2010 providing that the law shall come into force as of the date of its publication in the Official Gazette; whereas Law No. (9) of 2010 was published in Volume 4 of the Official Gazette, dated 28/4/2010, therefore, it came into force on 28/4/2010.

Whereas Decision No. (203) rested, without any justification, on Law No. (5) of 1997 which was repealed, and on the minutes of the fourth ordinary meeting of the Administration Committee of the General Authority for Investment and Ownership; whereas said Decision violated the provisions of Article 20(1) of Law No. (9) of 2010 which obligates the Administration (the Defendants) not to cancel the approval unless based on the non-initiation of the execution or on the non-completion of the execution on the specified date; whereas it is established that the Plaintiff was not responsible for the non-execution but that the Defendants were the ones solely responsible for the non-initiation of the project execution,

**Accordingly,**

**The Arbitral Tribunal decides that Decision No. (203) of 2010 which canceled the investment approval granted to the Plaintiff is a decision that violates the law. By issuing such a decision, the Defendants have committed an additional delictual fault by expressly violating the law.**

**Fifth: On the license to execute the investment project and the license to operate the investment project obtained by the Plaintiff:**

Whereas the Defendants argue that the Plaintiff violated Article 10 of the General People's Committee's Decision No. (138) of 1372 a.P. (2004 A.D.) issuing the executive regulation of Law No. (5) of 1997 which stipulates that every licensed investment project must be registered in the investment registry, and that the Plaintiff violated Article 1 of the General People's Committee for Tourism's Decision No. (2) of 1372 a.P.

(2004 A.D.) on the adoption of models of licenses to execute an investment project, as well as Article 19 of the General People's Committee's Decision No. (499) of 1378 a.P. (2010 A.D.) issuing the executive regulation of Law No. (9) of 1378 a.P. on the Promotion of Investment, along with the aforementioned Article 10 which stipulates the same obligations, and also Articles 22 and 23 of the executive regulation of the Law on the Promotion of Investment pertaining to granting the investor a license to execute the investment project upon his request and following the submission of the requested documents,

Whereas the Defendants maintain that the extract of the tourism investment registry (Exhibit No. 9 of the statement of claim) did not provide any data in the column relating to the license to execute the project and in the column relating to the license to operate the project,

Whereas it is established to the Arbitral Tribunal that the Plaintiff obtained a license to establish its investment project following the issuance of the Decision of the Minister of Tourism No. 135/2006 on 7/6/2006 which approved the investment project and led to the conclusion of the "Lease contract of a land plot for the purpose of establishing a tourism investment project",

Whereas the Arbitral Tribunal finds that the Defendants violated the content of the license granted to the Plaintiff, which was evidenced by the rejection, from the part of the municipal guards in Tajura, of the license granted to the company by the Authority for Investment Promotion for the erection of the temporary fence, and by the claim of ownership of the land by the Al-Tahrir Club in Tajura, knowing that the sign placed on the land was still not removed; whereas it was established to the Arbitral Tribunal that the Plaintiff could not take possession of the plot of land, and that it notified the Defendants on 30/10/2007 that some individuals prevented the contractor from executing the works relating to the erection of the fence around the land on the basis of their ownership of said land (Exhibit No. 29 of the statement of claim),

Whereas on 1/11/2007, the fence surrounding the project land was deliberately damaged which required the drafting of a report by the police (Exhibit No. 30 of the statement of claim); whereas the municipal guards in Tajura rejected the license granted to the company by the Authority for Investment Promotion for the erection of the temporary fence, while knowing that the Al-Tahrir Club in Tajura also claimed ownership of the land from where the sign was still not removed (Exhibit No. 33 of the statement of claim),

Whereas the Defendants maintained in the "final submission" dated 16/3/2013 (p. 473) that the reasons why the municipal guards suspended the work of the contractor, seized the Plaintiff's equipment and demolished the fence were the Plaintiff's failure to obtain the building license and the urban planning approval; whereas the Arbitral Tribunal cannot but reject these allegations knowing that the Defendants never informed the

Plaintiff of these reasons, especially that the Plaintiff had already obtained a license from the Authority for Investment Promotion for the erection of the temporary fence, Whereas it is established that the municipal guards assaulted the contractor's workers and the Tourism Development Authority has then asked the Plaintiff to suspend the works and remove the equipment from the site (Exhibits No. 36, 37, 38, 39, 49 and 50 of the statement of claim),

Whereas the Arbitral Tribunal, following referral to exhibit No. 9 of the statement of claim, finds that it is "**model No (6)... extract of the tourism investment registry... project No 07/11, project name: Sidi Al Andalusi Tourism Complex, registration number 8/001/06, registration date: 8/12/2005 A.D., investment field: touristic investment, project approval decision number: (135), date of the decision: 7/6/2006 A.D.**",

Whereas the Defendants violated their obligation to hand over the project land to the Plaintiff free of any occupancy and impediment, as observed by the Arbitral Tribunal, thus preventing the Plaintiff from drawing up the project's final designs to obtain any necessary additional license, and from opening bank accounts in the name of the project in Libyan banks in accordance with the Defendants' allegations, especially that the latter failed to reassure the Plaintiff of the investment project's fate and continued to withhold the project land from the Plaintiff,

Whereas, in any event, any license to execute the project first requires the taking over of the land,

Whereas the license to operate the project is a license issued upon the project completion and operation commencement, following the evaluation and calculation of the investment value of the investment project, and considering that as of the license issuance date the tax exemption period begins and the company starts to enjoy the privileges provided for in the investment law,

**Accordingly,**

**The Arbitral Tribunal decides to reject all the aforementioned allegations of the Defendants and considers that the Plaintiff did not commit any delictual fault in this regard.**

**Sixth: On the non-violation, by the Plaintiff, of Article 224 of the Libyan Civil Code relating to the prevention of the aggravation of damages:**

Whereas the Defendants maintain that the Plaintiff has violated Article 224 of the Libyan Civil Code relating to the prevention of the aggravation of damages,

Whereas the Arbitral Tribunal, following referral to Article 224 of the Libyan Civil Code, finds that it provides as follows:

***"(...) The damage is considered a natural consequence whenever the creditor fails to exert reasonable efforts to avert it",***

Whereas the Defendants consider that the Plaintiff did not seek to prevent the aggravation of damages by delaying both the termination of the contract concluded between them and the resorting to the courts or to arbitration to demand compensation, and by refusing the alternative plot of land suggested by the Defendants, Whereas the Arbitral Tribunal has already decided the Plaintiff's right to refuse the alternative plot of land which, anyway, did not constitute the basis for a serious and clear offer on the part of the Defendants for failure to specify the characteristics, area and location of said alternative land,

Whereas it is established from the correspondences between the two parties that the Defendants repeatedly promised to hand over the plot of land to the Plaintiff, and that the Plaintiff took these promises seriously, given that it was dealing with a State, being the State of Libya,

Whereas the Plaintiff requests, in the present case, compensation for direct moral and material damages incurred as a result of the cancellation of its investment project, and compensation for loss of profits as a result of the non-investment of its project for a period of 83 years in accordance with the contract concluded with the Defendants,

**For these reasons,**

Even if the Plaintiff has requested the contract termination and the compensation for damages in 2007 or in 2010, it would, in any case, be entitled to compensation for the loss of profits that would have been realized from the investment of its project for 83 years,

**Therefore,**

The Arbitral Tribunal decides to reject the Defendants' allegations in this regard and considers that the Plaintiff did not violate the provisions of Article 224 of the Libyan Civil Code and therefore did not cause the aggravation of damages.

**Accordingly,**

**The Arbitral Tribunal finds that the Defendants committed contractual and delictual faults ascertaining their contractual and legal liability for violating the contractual obligations, for violating Law No. (5) of 1997 which was replaced by Law No. (9) of 2010, and for violating the Unified Agreement for the Investment of Arab Capital in the Arab States which is an integral part of the Libyan law and which provisions prevail over other Libyan laws.**

## **Fifth: On the request to issue a summary award to be immediately enforced**

Whereas the Plaintiff requests the issue of a summary final arbitral award to be immediately enforced, and refers to this end to the following four grounds (p. 87 et seq. of the replication submitted by attorney Dr. Nasser el-Zaid, dated 3/1/2013):

***"First: Because the Libyan and Egyptian Codes of Civil and Commercial Procedure [...] (Articles 382 (3) et seq. of the Libyan Code, and Articles 290 (4) et seq. of the Egyptian Code) provide the necessity to grant summary enforcement:***

***"if the judgment was rendered in favor of the party requesting the enforcement in a dispute related to him".***

***Therefore, the Tribunal (the arbitral tribunal) shall be entitled to order the summary enforcement of the arbitral award.***

***Second and alternatively: In case the Egyptian and Libyan laws [...] are considered insufficient and do not justify the issuance of judgments ordering the summary enforcement:***

***In this case, the Unified Agreement for the Investment of Arab Capital in the Arab States provides that the arbitral award shall be final, not subject to appeal and enforceable. It shall be immediately enforceable in the same manner as a final enforceable judgment, which means that the arbitral award issued by virtue of the Unified Agreement for the Investment of Arab Capital in the Arab States:***

***a- is enforceable, in other words it does not need a leave for enforcement.***

***b- is not subject to any means of recourse and therefore is not subject to annulment.***

***The arbitral award rendered in accordance with the Unified Agreement for the Investment of Arab Capital in the Arab States shall, therefore, have the same legal nature of a judgment ordering the summary enforcement. The Plaintiff requests that this should be expressly stated in the final arbitral award so that it will benefit from the summary enforcement.***

***Third and more alternatively: In case the Egyptian and Libyan laws [...] do not grant the summary enforcement, Article 3 of the Unified Agreement for the Investment of Arab Capital in the Arab States provides that "the provisions of***

**the Agreement shall have priority of application in instances where they conflict with the laws and regulations in the States Parties”:**

***Whereas the text of the Agreement provides for the granting of the summary enforcement of the arbitral award; therefore, it is this Unified Agreement that will be applicable in the event of a conflict with the Libyan laws. The Unified Agreement shall prevail over these laws and the summary enforcement shall consequently be granted in accordance with its provisions given that it constitutes a law just like other state laws, as discussed above.***

**Fourth and even more alternatively: The Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) applicable in this case provide that the arbitral award shall be final and binding and that the parties shall enforce it without delay:**

***Whereas the applicable text of the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration is similar to the one applied by the International Chamber of Commerce,***

***Whereas the arbitration case law drew from this text a conclusion leading to the establishment of the right to grant the summary enforcement; and whereas the Plaintiff Company is hence entitled to benefit from the summary enforcement of the arbitral award in the present case,***

***Whereas the Plaintiff has sought in its replication the issuance of a summary final arbitral award to be immediately enforced "given the urgent aspect of the present case which was initiated approximately three years ago and in which the rights of the Plaintiff continue to be violated up to now (...)",***

***(p. 87 of the replication submitted by attorney Dr. Nasser el-Zaid)***

**Whereas the Plaintiff relies in its claim on the text of Article (34) of the Unified Agreement for the Investment of Arab Capital in the Arab States which establishes the final and urgent aspect of the arbitral award and its enforceability as follows:**

***"2. Judgments shall be final and not subject to appeal. Where there is a dispute as to the meaning or import of a judgment, the Court shall provide its interpretation at the request of any of the parties concerned.***

***3. A judgment delivered by the Court shall be enforceable in the States Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgment delivered by their own competent courts."***

Whereas the Plaintiff requested in its final submission dated 20/2/2013 (submitted by attorney Dr. Nasser el-Zaid) the issuance of a summary final arbitral award to be



immediately enforced, given the urgent and pressing aspect of the case and the gravity of the damage which it will help repairing,

Whereas the Libyan Code of Civil and Commercial Procedure established the principle of summary enforcement as well as the Egyptian Code of Civil and Commercial Procedure (in its Articles 195 et seq.),

Whereas the Libyan and Egyptian laws allow the court to grant its decision the summary and immediate enforcement

***"If the judgment was rendered in favor of the party requesting the enforcement in a dispute related to him",***

Whereas, on the other hand, both Libya and Egypt acceded to the Unified Agreement for the Investment of Arab Capital in the Arab States, thus making said Agreement part of the legal system in Libya and Egypt,

**Whereas said Unified Agreement provides in Article 3, paragraph 2, that:**

***"(...) the provisions of the Agreement shall have priority of application in instances where they conflict with the laws and regulations in the States Parties."***

**Whereas the Plaintiff contends that Article (34) of the Unified Agreement for the Investment of Arab Capital in the Arab States does not conflict with the provisions of the Libyan and Egyptian laws but rather completes them, and that in case of conflict with the provisions of the Agreement, the latter shall have priority,**

**Whereas the Plaintiff points out that Article 2 (8) of the Annex of Conciliation and Arbitration to the Unified Agreement provides the following:**

***"8- Decisions of the Arbitral Panel rendered in accordance with the provisions of this article shall be final and binding. Both parties must comply with and implement the decision immediately it is rendered unless the panel specifies a deferral of its implementation or of the implementation of part thereof. No appeal may be made against arbitration decisions."***

And that this Unified Agreement has, therefore, authorized the summary and immediate enforcement,

**Whereas the Plaintiff further states (p. 88 of the replication submitted by attorney Dr. Nasser el-Zaid):**

***"The honorable Arbitral Tribunal has chosen, in accordance with the authority granted to it by the Unified Agreement for the Investment of Arab Capital in the***

*Arab States, the application of arbitral proceedings which complete the provisions of this Agreement relating to arbitration, namely those set out in the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration which provide in Article 34 (2) the following:*

*"All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay."*

*"Whereas, in conformity with the International Chamber of Commerce (ICC) Rules of Arbitration, which correspond to the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration, the jurisprudence considered that arbitrators have wide discretionary power to grant the arbitral award the summary and immediate enforcement, (Emphasis by underlining added)*

*"Whereas the jurisprudence of the International Chamber of Commerce (ICC) has established this principle in the findings of the arbitral award No. 8303 rendered in 1998:*

*"The Arbitral Tribunal decides to order the summary enforcement of the arbitral award after finding that it is necessary for the Plaintiffs to obtain immediately the actual payment (by the Defendant) of the amounts awarded in its favor",*

*"Whereas, in the same context, a decision was rendered by the Tribunal de Grande Instance de Paris on December 11, 2002 (Paris 11 Dec. 2002, Rev. Arb. 2003. 245 TGI) confirming that the arbitral award rendered in accordance with the ICC Rules of Arbitration is summarily and immediately enforced despite the action for annulment brought against it, on the basis of the provisions of Article 28-6 of the Rules of Arbitration of the International Chamber of Commerce relating to the nature of the summary and immediate enforcement (i.e. Article 34-6 of the new Rules of Arbitration of the International Chamber of Commerce) (Emphasis by underlining added)*

*"Whereas the effectiveness of the summary and immediate enforcement of the arbitral award seems to be the natural result of the effectiveness of the arbitration agreement",*

Whereas the Defendants did not take any position on this matter,

**Accordingly,**

**The Arbitral Tribunal decides to grant the arbitral award the summary and immediate enforcement.**

## **Sixth: On the compensation due to the Plaintiff Company at the discretion of the Arbitral Tribunal**

Whereas the dispute, in this regard, revolves around the Plaintiff's right to compensation as a result of the acknowledgement, by the Arbitral Tribunal, of the Defendants' fault and their legal and contractual liability,

Whereas the Defendants refuse to acknowledge the Plaintiff's right to any compensation resulting from material or moral damages and claim not to have committed any contractual or delictual fault; whereas the Defendants affirm - as detailed in Part Two of the arbitral award - that it is the Plaintiff who has breached its contractual obligations and that none of the financial reports relied on by the Plaintiff in support of its claim should be taken into consideration,

Whereas, in light of what was mentioned in the submissions and pleadings of the parties to the dispute, the Arbitral Tribunal has decided the matter relating to the contractual and legal liability of the Defendants in accordance with what has been detailed under the title "Fourth: On the liability", and ruled that the Defendants committed a contractual fault by failing to perform their contractual obligations, and a delictual fault by violating the provisions of Article 148 of the Libyan Civil Code which requires good faith in the performance of the contract, as well as Law No. (5) of 1997 on the Promotion of Foreign Capital Investment (amended by Law No. (7) of 2003 which was replaced by Law No. (9) of 2010, both with identical provisions in terms of the State's obligations), and by violating Law No. (7) of 2004 on Tourism and the Unified Agreement for the Investment of Arab Capital in the Arab States,

And whereas the Libyan Civil Code provides in Article (224) that:

***"1- The judge shall fix the amount of the compensation, if it had not been fixed in the contract or by law. The compensation shall include the loss incurred by the creditor as well as his lost profit provided that this is a natural consequence of the non-fulfillment of the obligation or the delay in its fulfillment. The damage is considered a natural consequence whenever the creditor fails to exert reasonable efforts to avert it.***

***2 - However, if the obligation is of contractual origin, the debtor, who has not committed fraud or serious fault, is liable only for damages normally foreseeable at the conclusion of the contract".***

In implementation of this legal provision, the Arbitral Tribunal will examine the issue of the compensation due as a result of the Defendants' liability which was previously confirmed by the Arbitral Tribunal.

**Accordingly,**

The Arbitral Tribunal shall determine, hereafter, the concept, nature and scope of the compensation in the Libyan law. It shall then decide on the issue of serious fault and direct material and moral damages, as well as lost profits in the Libyan law, and finally it shall fix the amount of the due compensation.

### **Section One: Compensation for damages in the Libyan law:**

Whereas Article 166 of the Libyan Civil Code provides that:

***"Any fault that causes damage to another person renders its perpetrator liable to payment of compensation in respect thereof."***

Whereas Article (224) of the Libyan Civil Code provides that: ***"The judge shall fix the amount of the compensation, if it had not been fixed in the contract or by law. (...)"***,

Whereas Article (224) of the Libyan Civil Code also provides, with regard to the compensation, that it ***"shall include the loss incurred by the creditor as well as his lost profit provided that this is a natural consequence of the non-fulfillment of the obligation or the delay in its fulfillment"*** as stated above,

Whereas Article (225) of the Libyan Civil Code relating to moral damages provides the following:

***"1- Compensation also covers the moral damages, but, in this case, it cannot be transferred to third parties unless it is determined in an agreement, or the creditor has requested it before courts."***

**Consequently,**

The Arbitral Tribunal considers that:

- 1- Any fault that causes damage to another person renders its perpetrator liable to payment of compensation in respect thereof.
- 2- The Arbitral Tribunal is the one who decides the issue of compensation and fixes the amount thereof.
- 3- The compensation shall include the loss incurred by the creditor.
- 4- The compensation shall include the creditor's lost profits.

- 5- The damages should be resulting from the non-fulfillment of the obligation.
- 6- The debtor who did not commit fraud or serious fault when fulfilling a contractual obligation is liable to compensate only the damages normally foreseeable at the conclusion of the contract.
- 7- The debtor who committed fraud or serious fault when fulfilling a contractual obligation is liable to compensate the damages, including the damages unforeseeable at the conclusion of the contract
- 8- The compensation shall include moral damages.

**Accordingly,**

Whereas this arbitration is governed by the Unified Agreement for the Investment of Arab Capital in the Arab States as previously decided by the Arbitral Tribunal,

Whereas said Agreement is an integral part of the Libyan law, although its provisions prevail over other Libyan laws as previously established by the Arbitral Tribunal,

Whereas Article 10 (1) of the Unified Agreement for the Investment of Arab Capital in the Arab States provides that:

**"Article 10:**

**1- The Arab investor shall be entitled to compensation for damages which he sustains due to any one of the following actions by a State Party or one of its public or local authorities or institutions:**

- a) Undermining any of the rights and guarantees provided for the Arab investor in this Agreement or any other decision issued pursuant thereto by a competent authority;**
- b) Breach of any international obligations or undertakings binding on the State Party and arising from this Agreement in favor of the Arab investor or failing to take the necessary steps to implement them, whether deliberately or through negligence;**
- c) Preventing the execution of an enforceable legal judgment which has a direct connection with the investment;**
- d) Causing damage to the Arab investor in any other manner, whether by deed or prevention, by contravening the legal provisions in force within the State in which the investment is made."**

And whereas the Arbitral Tribunal considered, under the title "Fourth: On the liability", that the Defendants are liable for violating the Libyan laws in force, mainly:

- a- The Civil Code – violation of the obligation to perform the contract in good faith.

- b- Law No. (5) of 1997 on the Promotion of Foreign Capital Investment amended by Law No. (7) of 2003 which is replaced by Law No. (9) of 2010 whose provisions correspond to the old law in terms of the State's obligations.
- c- Law No. (7) of 2004 on Tourism.
- d- The Unified Agreement for the Investment of Arab Capital in the Arab States.

**Therefore,**

The Plaintiff Company is entitled to compensation for damages incurred as a result of the contractual and delictual faults committed by the Defendants.

**Accordingly,**

**Whereas the Libyan Supreme Court has decided that *"the assessment of the compensation falls under the jurisdiction of the judge ruling on the merits of the case who shall evaluate it without being subject to any control and provided that his decision is based on the circumstances of the case"*,**

**(Libyan Supreme Court, Civil Challenge No. 592/50J,  
dated 26/2/1374 a.P. (2006 A.D.))**

The Arbitral Tribunal has a discretionary power to determine the amount of compensation for direct moral and material damages and for lost profits. It will determine them as follows:

## **Section Two: Compensation for direct damages:**

Whereas the Arbitral Tribunal has decided that the Defendants are liable contractually and legally in accordance with what was established above under the title "Fourth: On the liability",

Whereas the Arbitral Tribunal has decided that the Plaintiff company is entitled to receive compensation for the direct material damages it suffered as a result of the losses and expenses it incurred for the opening of its office in Tripoli in Libya after the issuance of Decision No. 135 of 2006 that approved the investment project, which losses and expenses are confirmed by the Plaintiff company's balance sheets for a period of over four years until the office closure date,

Whereas the Arbitral Tribunal considers that there is no need to take into account the Defendants' allegations set out in their final submission dated 16/3/2013 (p. 487), according to which *"the Plaintiff company failed to prove that it had suffered any*

*material loss” and “the expenses invoked were not related to the investment project based on which it has received the investment approval”, given that the Plaintiff company has spent money, over a period of four years, in the form of workers' wages, equipment purchasing costs and office expenses; whereas this is known by both parties, and the Defendants cannot ignore these expenses and refer only to the "reports of the Plaintiff company's legal auditor, Office of Salah Eddin Bashir el-Tourki, by confirming that the Plaintiff company's expenses from 2006 until the end of 2010 (...) are all expenses that are not linked to the supply of any tools, equipment, or material related to the execution of the investment project (...)" ("Final submission" dated 17/3/2013, p. 487); whereas these incidental expenses referred to by the Defendants do not override the fact that the Plaintiff Company has incurred expenses for four years in the form of workers' wages, equipment purchasing costs and office expenses,*

**Accordingly,**

**The Arbitral Tribunal decides that the Plaintiff is entitled to a sum of 6,292,350,000 (six million, two hundred ninety two thousand, and three hundred and fifty Dinars), i.e. the equivalent of USD 5,000,000 (five million US dollars), at the exchange rate applicable at the Central Bank of Libya, representing the value of the losses and expenses incurred by the Plaintiff company for the opening of its office in Tripoli following the issuance of Decision No. 135 of 2006. These losses deemed to constitute material damages are clearly outlined in the Plaintiff Company's balance sheets prepared for the whole period until the date of the office closure, that is after more than four years, being 2006, 2007, 2008, 2009 and 2010, as shown in the statement of claim (Exhibit No. 73 attached to the Plaintiff's statement of claim).**

### **Section Three: Compensation for moral damages:**

Whereas the Arbitral Tribunal considers that the Defendants are liable contractually and legally in accordance with what was established above under the title “Fourth: On the liability”,

Whereas the Arbitral Tribunal rejects what was alleged in the "final submission" dated 16/3/2013 (p. 488) and in the "final submission" dated 6/3/2013 (p. 381) submitted by the Defendants, namely that the Plaintiff company is not entitled to any compensation for moral damages based on the fact that the third Defendant did not attribute any malicious trait to the Plaintiff such as deceit, fraud or manipulation, which negates the constituent element of the moral damages; whereas the Arbitral Tribunal considers that the Plaintiff's request for compensation, whether with regard to the material damages or to the moral damages, focused on what was mentioned in its memoranda concerning



the serious fault committed by the Defendants which tarnished the Plaintiff's worldwide reputation; whereas the Arbitral Tribunal has already exhaustively examined the Defendants' contractual and legal liability and the serious fault they have committed,

Whereas the Arbitral Tribunal has decided that the Plaintiff company is entitled to a compensation for the moral damages it incurred as a result of the damage to its worldwide professional reputation after the Defendants' abusive cancellation of the important project that they previously approved its establishment and investment, by the Plaintiff, for a period of 83 years, and for the execution of which the Plaintiff had negotiated and entered into contracts with international companies,

Whereas the Plaintiff Company is highly qualified in the execution of huge investment projects and is renowned worldwide in this field, as confirmed by the Defendants' counsel himself, Dr. Hisham Sadek, in the hearing of March 9 and 10, 2013,

**Accordingly,**

**The Arbitral Tribunal decides that the Plaintiff is entitled to the sum of USD 30,000,000 (thirty million US dollars) in compensation for the moral damages it incurred as a result of the damage caused to its reputation in the stock market, as well as in the business and construction markets in Kuwait and around the world.**

#### **Section Four: Compensation for lost profits resulting from real and certain lost opportunities:**

Whereas Article (224) of the Libyan Civil Code encompasses provisions on the assessment of compensation, as previously indicated in the part relating to the right to compensation for losses suffered by the creditor and profits of which he has been deprived,

Whereas the jurisprudence of the Libyan Supreme Court reconfirms the right to compensation for lost profits, provided for in the law:

***"It is evident from the perusal of Articles 173, 224 and 225 of the Civil Code that the judge ruling on the merits of the case is the one who assesses the amount of the compensation for damages incurred by the aggrieved party in the absence of a provision binding him to respect specific criteria. The compensation encompasses losses suffered by the creditor and profits of which he has been deprived as well as moral damages, while taking into consideration the personal circumstances of the aggrieved party without the need to determine***

***the amount of each, given that this determination is not legally necessary".***  
(Emphasis by underlining added)

**(Libyan Supreme Court – Civil Challenge No. 1387/56J – Hearing of May 26, 2012)**

Whereas the Libyan Supreme Court has decided that in any event:

***"It is established in the jurisprudence of this Court that the judge ruling on the merits of the case has the right to characterize the case and apply the appropriate legal provision to the relationship between the two parties to the action for compensation and adopt it for the case at bar considering that everything that generates for the aggrieved party a right to compensation for damages it suffered as a result of the act committed or caused by a third party will be considered the main reason leading to the compensation claim regardless of the nature of the liability on which the aggrieved party has relied in support of its claim or the legal text it relied on to do so (...)".*** (Emphasis by underlining added)

**(Libyan Supreme Court, Civil Challenge No. 154/50J, dated 29/1/1374 a.P. – 2006 A.D.)**

Whereas the UNIDROIT Principles of International Commercial Contracts (2010 edition) of the International Institute for the Unification of Private Law establish, in their Article 7.4.2, the right of the creditor to full compensation for harm sustained as a result of the non-performance, with such harm including both any loss which it suffered and any gain of which it was deprived (Emphasis by underlining added),

Article 7.4.2 provides as follows:

***"(Full compensation)***

***(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.***

***(2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress."***

Whereas the international arbitration jurisprudence, mainly the arbitration jurisprudence of the ICC, and specifically of the year 2001 in Case No. 10422 in which an arbitral award was issued ordering the calculation of the lost profit on the basis of the

net margin (in conformity with the provisions of the abovementioned Article 7.4.2.), reads as follows:

*“As to Plaintiff's lost profit, the arbitral tribunal held that it should be calculated not on the basis of the gross margin of the forecast sales volumes but on the basis of the net margin, i.e. the difference between the gross margin and the avoided costs or harm, and in this respect referred to Article 7.4.2 of the UNIDROIT Principles.*

*However, since Plaintiff has not provided any information for the calculation of the net margin, in the case at hand the arbitral tribunal made an equitable quantification of the lost profit in accordance with Article 7.4.3(3) of the UNIDROIT Principles”.*

(Emphasis by underlining added)

Whereas Article 7.4.3 (3) of the UNIDROIT Principles of International Commercial Contracts (2010 edition) provides that where the amount of damages cannot be established with a sufficient degree of certainty, the assessment will remain at the discretion of the court:

**Article 7.4.3** provides as follows:

*“(Certainty of harm)*

*(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.*

*(2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.*

*(3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.”*

## **Section Five: The Arbitral Tribunal's understanding and interpretation of the concept of “compensation of the lost profit” mentioned in Article 224 of the Libyan Civil Code:**

Whereas a debate took place between the disputing parties mainly during the arbitration hearing on the meaning and interpretation of the expression "lost profit",

especially that the Plaintiff claims an amount of two billion American dollars in compensation for the "loss of profits",

Whereas this debate focused on whether the compensation that might be awarded covers a damage that is certain and not potential, or if it is enough for the damage to be potential,

Whereas the Defendants allege that *"the Plaintiff failed to prove that it suffered any actual material loss, (...) then its claim for compensation of the lost profits, which is founded on invalid grounds as previously indicated, is rejected in toto, and the mere consideration of responding to such claim in the absence of an investment project and of an investment capital would start the collapse of Arab investment for generations to come (...)." (Final submission - 17/3/2013 - Page 487 et seq.),*

Accordingly, the Arbitral Tribunal first refutes the above allegations set out in the Defendants' final submission (dated 16/3/2013) and confirms that the non-compensation of the Plaintiff for the damages it suffered due to the confiscation and cancellation of its investment project is in reality the cause that would scare Arab investors away from the Arab market considering the risks that might jeopardize their investments. In fact, not compensating the Plaintiff for the damages it suffered due to the confiscation and cancellation of its investment project would actually *"start the collapse of Arab investment for generations to come"*, while rendering an award in favor of the Plaintiff that guarantees a fair compensation in conformity with the contract and the law proves the Arab States' adherence to the rule of law, to their contractual obligations, and to the regional and international conventions that they sign. The compensation of the damages suffered by the Plaintiff will reassure the Arab investors that their investments will be justly protected and will not be endangered, as nothing but justice reassures investors and encourages them to invest.

Consequently, it is imperative for the Arbitral Tribunal to refer to the doctrine and jurisprudence in interpreting the "lost profit" that can be compensated in the Libyan law.

The Arbitral Tribunal resorts to the explanation and interpretation given by the scholar Abdel Razzak Al-Sanhouri, who drafted the Libyan law, in his book entitled "Al Waseet in the Interpretation of the Civil Code" Volume One: The General Theory of Obligation - Page 730 - Section 574 (1), where he says:

***"It is established in the rulings of the Court of Cassation that the condition required to order the compensation of material damage is the breach of one of***

*the financial interests of the aggrieved party and that this damage should be certain and its occurrence in the future inevitable. The aim of proving the occurrence of the material damage to the person who claims it as a result of the death of another person lies in the need to verify that the victim, at the time of their death, was truly a provider for that person on a continuous and permanent basis, and that there was a certain possibility that this will continue. Then, the judge will have to evaluate the opportunities lost by the aggrieved party due to the death of their provider and will rule on their compensation accordingly. However, the mere likelihood of the damage occurrence in the future is not enough to rule on compensation, and if the opportunity is a probable thing, then losing it is a certain thing entitling the aggrieved party to claim compensation. The law does not prevent that the compensation elements include whatever gains that the aggrieved party was hoping to obtain whenever said opportunity is established provided that their hope is based on acceptable grounds. (Hearing of 13/2/2006 - Challenge No. 5175 of the Judicial Year 4)*

(Emphasis by underlining added)

Al Sanhoury also adds in Section 576 of his book:

*"Compensation of the lost opportunity: a distinction must be also made between the potential damage – that is not compensable as mentioned previously – and the lost opportunity (la perte d'une chance) that is compensable given that, if the opportunity is a probable thing, losing it is a certain thing, and consequently it should be compensated on this basis. Therefore, if the court bailiff neglects to serve the notice of appeal until it expires, or if a contest organizer neglects to inform any of the contesters of the contest date causing them to miss the contest, it is unacceptable to say that the appellant would have inevitably won the appeal had it been filed in due time, or that the contestant would have inevitably won the competition had he not missed it; it shall be equally incorrect to say that the former was inevitably losing the appeal and that the latter was inevitably not winning the contest. All that can be said is that both of them have lost an opportunity of winning, and that this is what represents the certain amount of the damage incurred. The judge will have to assess this damage by examining the degree of probability of winning the appeal or the contest, and will award a compensation commensurate with this probability. There is no doubt that this issue opens wide doors to jurisprudence and various estimations. The judge should take into consideration the minimum amount and avoid overestimating the probability of success of the opportunity.*

***It is established in the Egyptian jurisprudence that the loss of opportunity to pass an exam should be compensated as well as the loss of the opportunity of winning a case relating to a right of preemption, and of an employee's promotion to a higher position."***

Al Sanhoury adds:

***"If the loss of an opportunity constitutes a certain damage, even if the benefit resulting therefrom is a probable thing, it was decided that the appellants have filed their case to claim the compensation of the material damage caused by the respondent's abstention from printing their book, thus depriving them of their right to be paid throughout the whole period of the case, which made them lose an opportunity to market the book throughout said period of time and this constitutes a certain damage. The contested ruling, which rejected the claim for compensation on the basis that the damage is probable, misapplied the law".***

In light of this doctrinal interpretation of the Libyan Law, the Arbitral Tribunal has come to the following conclusions:

- 1- The mere probability of occurrence of a damage in the future is not enough to rule on compensation.
- 2- If the opportunity is a probable thing, then losing it is a certain thing that entitles the aggrieved party to claim compensation.
- 3- The law does not prevent that the compensation elements include whatever gains that the aggrieved party was hoping to obtain from the said opportunity, provided that their hope is based on acceptable grounds.
- 4- If the opportunity is a probable thing, then losing it is a certain thing.
- 5- The judicial ruling rejecting the compensation of the damage on the basis of the Plaintiff's lost opportunity, which constitutes a damage that is certain, misapplied the law; hence, the sound application of the law requires the compensation of the damage caused by the loss of a certain and real opportunity.
- 6- The compensable material damage is the damage that certainly occurred, or which occurrence in the future is certain.

Whereas the arbitral jurisprudence has adopted these results by applying the opinion of scholar Al Sanhoury who stated that:

***"It is established that if it is necessary to make a distinction between the potential damage – that is only compensable under specific conditions - and the***

**lost opportunity that is compensable, this is because the opportunity, if it is in itself a probable thing, then losing it is a certain thing and should therefore be compensated on this basis. The said compensation opens wide doors to jurisprudence and various estimations, and the judge, who has discretion to estimate it, should take into consideration the minimum amount thereof. (Abdul Razzak Al Sanhoury - Al Waseet in the Interpretation of the Civil Code - Volume I - Edition of 1964 - Section 576 - Pages 826-863)”**  
(Emphasis by underlining added)

**Awards of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) 1983-2000**

**Drafted, translated and commented by: Dr. Muhieddin Alameddin**

**First edition of 2002**

**Case No. 25/91- Final award dated 6/8/1995**

**Arbitrators: Three Egyptian arbitrators**

**Parties: The Plaintiff Company: A European company**

**The Defendant: An African public authority**

**Seat of arbitration: Cairo Regional Centre for International Commercial Arbitration (CRCICA)**

**Applicable Law: The Egyptian Law**

**Therefore,**

The Arbitral Tribunal, in its examination of the right of the Plaintiff Company to the claimed lost profit, will verify whether or not the claimed compensation is related to a damage resulting from real and certain lost opportunities. However, if these lost opportunities were probable, the Arbitral Tribunal will then verify whether or not losing them was certain, and consequently will rule on the compensation by taking into consideration the minimum amount thereof, as the Arbitral Tribunal enjoys discretion in this regard.

Whereas the Plaintiff claims compensation for a damage which it alleges was the result of real and certain lost opportunities, and alleges that the occurrence of this damage in the future was certain had the Libyan Minister of Economy’s Decision No. 203/2010 cancelling the investment approval granted to the Plaintiff company not been issued and deemed by the Arbitral Tribunal as entailing a contractual and legal liability since it violates the contract and the law, given that said decision annuls the Minister of Tourism’s decision authorizing the investment by virtue of a contract considered by the Arbitral Tribunal as a B.O.T. contract governed by the Private Law, authorizing the

Plaintiff Company to invest in the following tourist resorts and facilities for a period of 83 years following completion of the construction thereof by the Plaintiff Company:

- 1- A four-star hotel comprising 350 rooms with a conference hall, a health club, restaurants, a business center, and commercial shops, etc...
- 2- 30 hotel apartments
- 3- 15 residential apartments
- 4- 28 townhouses
- 5- 5 villas
- 6- A mall-type commercial center having a total area of approximately 20000 square meters and a net leasable area of 1600 square meters
- 7- Administrative offices
- 8- Reception hall having an area of 500 square meters
- 9- Parking lot extending on an overall area of 17500 square meters
- 10- Soft landscape and hard landscape having an area of 101250 square meters
- 11- Internal alleys
- 12- Sandy beach having an area of 69500 square meters
- 13- Technical and service buildings
- 14- Public squares and seats

Whereas the Plaintiff is claiming compensation for lost profits caused by lost opportunities resulting from the loss of real and certain opportunities of investing the aforementioned resorts; whereas the Plaintiff estimates the compensation at two billion American dollars,

Whereas the Plaintiff has supported its claim with the following four reports prepared by four auditors:

**First: Ernst & Young Report:**

Following an in-depth study of the project, the report concluded that the net profit that should have been realized from the investment of the project amounts to: **2,006,695,936 \$ (Two billion, six million, six hundred and ninety-five thousand, and nine hundred and thirty-six American dollars)** (as indicated in page 6, line 2, of the report).



## **Second: Prime Global Report:**

Following an in-depth study of the project, the report concluded that the net profit that should have been realized from the investment of the project amounts to: **2,242,451,000 \$ (Two billion, two hundred and forty-two millions, and four hundred and fifty-one thousand American dollars)** (as indicated in page 60, last line of the report).

Whereas this report based the calculation of the lost profit on an investment period of 90 years,

Whereas the investment period of the project is 83 years and not 90 years,

Therefore, the Arbitral Tribunal will do the necessary calculations to deduce the amount of the lost profit for a period of 83 years only based on this report:

$$\frac{\mathbf{83\ years\ x\ 2,242,451,000}}{\mathbf{90\ years}}$$

**Equals: 2,068,038,144.444 American dollars**

This amount of 2,068,038,144.444 American dollars will be adopted by the Arbitral Tribunal in its final calculation of the lost profit.

## **Third: Report of the Libyan expert Ahmad Ghatour and Associates:**

The submitted report indicates that the net profit that should have been realized from the investment of the project amounts to: **2,550,600,000 American dollars (Two billion, five hundred and fifty million, and six hundred thousand American dollars)** (Page 53 - last line of the chart set out in the report).

## **Fourth: Report of the sworn expert Habib Al-Masri:**

The report concluded that the lost profit amounts to: **1,744,242,521 American dollars (One billion, seven hundred and forty-four million, two hundred and forty-two thousand, and five hundred and twenty-one American dollars)** (Page 76, first line, of the report).

**Therefore,**

The financial reports prepared by international financial experts and submitted by the Plaintiff indicate that the value of the lost profit during the investment period of the project covered by the contract ranges between 1,744,242,521 American dollars (One billion, seven hundred and forty-four million, two hundred and forty-two thousand, and five hundred and twenty-one American dollars) and 2,550,600,000 American dollars (Two billion, five hundred and fifty million, and six hundred thousand American dollars).

Whereas these reports are prepared by highly renowned, specialized and expert accounting firms with vastly reliable and credible research, studies, and results,

Whereas these reports are considered among expertise works that the Defendants could have objected to and refuted by means of response expert reports prepared by specialized firms having an excellent professional reputation,

Whereas the Defendants did not submit any response expert report to refute the content of the reports submitted by the Plaintiff,

Whereas all financial experts have built on the data and documents provided by the Plaintiff to write their scientific and unbiased reports on the estimation of the company's 83-year-long lost profits, pursuant to the commercial practice and the international accounting and financial systems,

Whereas the Arbitral Tribunal, having perused and examined these financial reports submitted by the Plaintiff, and having heard the experts who explained the content of their reports during the examination of witnesses and the pleading, finds that the reports are sound and convincing, and that their estimation of the lost profit ranges between 1,744,242,521 American dollars (One billion, seven hundred and forty-four million, two hundred and forty-two thousand, and five hundred and twenty-one American dollars) and 2,550,600,000 American dollars (Two billion, five hundred and fifty million, and six hundred thousand American dollars), given that additional and detailed elements were taken into consideration to make the calculation in some of these reports while they were omitted in others,

Therefore,

The Arbitral Tribunal adopts an average of all the amounts reached by these reports and deducts the arithmetic average of the amounts set out in the four reports, being as follows:

$$\frac{1,744,242,521 + 2,550,600,000 + 2,006,695,936 + 2,068,038,144.444}{4}$$

4

**Equals: 2,092,394,150 USD**

The Arbitral Tribunal notes that:

- 1- The Defendants did not submit any response expert report to refute these four reports.
- 2- The Defendants' discussion of these four reports was limited to the form and did not tackle the details and calculations through the submission of reports characterized by the same level of expertise as the submitted four reports.
- 3- During the hearing of March 9 and 10, 2013 held in Cairo, the Arbitral Tribunal addressed to the two experts:
  - a- Habib Khalil Al-Masri
  - b- Khaled Abou El Faraj Ahmad Fahim Al Ghannam

**The following question:**

Do you think that the damages mentioned in your reports are the result of real and certain lost opportunities and constitute a lost profit?

**To which the two experts replied:**

The compensation mentioned in our reports represents a lost profit resulting from lost opportunities. This compensation is certain and represents the minimum.

The Arbitral Tribunal re-asked the same question to the experts who replied once again by saying: These are certain profits that the Plaintiff has lost and which it would have otherwise certainly realized in the normal conditions currently prevailing in Libya.

The two experts reiterated that the estimation of these damages resulting from the lost profit represents the minimum.

Therefore,

The Arbitral Tribunal is persuaded that these reports are sound and that their results represent a certain profit that the Plaintiff could not realize due to the Minister of Economy's Decision No. 203/2010 annulling the Decision of the Minister of Tourism that approved the investment and led to the conclusion of the "Lease contract of a land plot for the purpose of establishing a tourism investment project" on 8/6/2006.

Whereas the Arbitral Tribunal has concluded, in the light of the four reports, that the average value of the damage suffered by the Plaintiff due to real and certain lost opportunities amounts to 2,092,394,150 American dollars,

Whereas the Plaintiff has only claimed the amount of two billion American dollars, the Arbitral Tribunal decides to decrease the amount from 2,092,394,150 American dollars to two billion American dollars.

However, the Arbitral Tribunal, using its discretionary power to estimate the compensation at its minimum, cannot but carefully examine the statement of the Defendants' attorney, Dr. Hisham Sadek, during the pleading:

*"... The Kuwaiti Company is professional in its area of specialization and enjoys a high level of expertise and professionalism. Likewise, the Libyan public authorities do not lack good faith and are truly determined to contribute to the success of the project, as revealed through the clear and logical evidence in their statement of defense, even if their performance is not characterized by a high-level professionalism in the investment field akin to other governmental authorities in most of the Arab World countries and even more in third world countries in general.*

*Though confident that the Arbitral Tribunal will rule on the dispute in conformity with the law and the considerations of justice, thus granting each party its right, I request the honorable Tribunal to take the following observations into consideration:*

*5. The Plaintiff Company, first party to this dispute, is a pioneering and renowned Arab company which was among the first to be established and the most capable of undertaking important investment projects in the Arab world that yield benefit for the region. This benefit is a joint benefit which importance, in my opinion, exceeds by far the profits that the Plaintiff Company could have realized for itself from the execution of the disputed investment project. No one can deny the Plaintiff Company's role in the real*

*contribution to the Arab development; it is therefore in its best interest and in the joint interest of Arab countries as well to have its role maintained in the future so that it remains capable of competing with other companies...*

6. *On the other hand, the Arab State hosting the investment, i.e. the Libyan State to which the Defendant authorities are affiliated, is no longer the Libyan Jamahiriya that we knew before the last revolution. It is now the young Libya who came back strong to its Arab world after this revolution and whose national interests, which became linked to the Arab world's interests, now demand further economic and investment cooperation with its Arab brethren.*
7. *... But what I wanted to clarify to the honorable Tribunal is that, regardless of the findings you reach in this case, I think that it is not in the best interest of any of the parties to the dispute to render an award that hinders any future cooperation between them. This is my fourth and last observation which I respectfully present for your consideration.*
8. *The basis of this final observation, Mr. the Chairman, is the fact that you are not presiding over one of the ordinary State courts of this or that State in view of settling this international dispute on the sole basis of the law applicable thereto, but you have been entrusted by the parties to the dispute to preside over this judicial, international and ad hoc tribunal pursuant to the arbitration rules set forth in the Unified Agreement for the Investment of Arab Capital in the Arab States. Even if this consideration does not ipso facto prevent your Honor from settling the dispute in line with the provisions of the applicable law and in light of the considerations of justice, thus necessitating to grant each party its right, however, the provisions of the law in this case are not sufficient and your Honor should, in the same time, interpret these provisions as understood by the ad hoc judiciary.*

*The interpretation of the provisions aims, in our case, at furthering joint Arab economic cooperation in the future and not stifling such nascent cooperation, in such a manner to create, God forbid, an obstacle that would once again prevent the achievement of the desired cooperation, thus undermining the ultimate goal that we are all supposed to uphold if we are truly still clinging to the hope of Arab countries to catch up with the times". (Pleading of Dr. Hisham Sadek, Hearing of March 10, 2013, Page 5 et seq.)*

**Therefore,**

**Drawing on the wise words of Dr. Hisham Sadek in his call for promoting joint Arab economic cooperation in the future and considering the recent developments in Libya which, as Dr. Sadek said, is no longer the Libyan Jamahiriya that we knew before the last revolution, but has now become the young Libya who came back strong to its Arab world after this revolution, and whose national interests, which became linked to the Arab world's interests, now demand further economic and investment cooperation with its Arab brethren,**

**The Arbitral Tribunal hopes that this arbitration will serve as an incentive to government agencies in charge of following-up governmental investment projects in the Arab countries to support the completion of investment projects successfully and without any obstacles, in the best interest of all Arabs, and to prevent "the collapse of the Arab investment for generations to come" (as indicated in the final submission submitted by the Defendants on 17/3/2013, p. 487).**

**Accordingly,**

**The Arbitral Tribunal, by virtue of its discretionary power, decides to reduce the amount of two billion American dollars to nine hundred million American dollars, and obliges the Defendants, jointly and severally, to pay nine hundred million American dollars in compensation (reduced to the minimum) for lost profits resulting from real and certain lost opportunities, which occurrence in the future was certain as established by the Arbitral Tribunal. These profits would have been realized from the investment of the aforementioned 14 touristic resorts and facilities throughout a period of 83 years had Decision No. 203/ 2010 of the Minister of Economy not been issued annulling Decision No. 135/2006 of the Minister of Tourism that approved the investment and led to the conclusion of a lease contract of a land plot for the purpose of establishing a tourism investment project.**

## **Section Six: The Interest:**

**Whereas the Plaintiff claimed interest on the amounts requested in its memoranda based on the applicable rate as of the date of issuance of the final arbitral award until the date of full settlement,**

Whereas the Arbitral Tribunal, in order to determine the nature and rate of the interest as well as the date at which that interest begins to accrue, refers to Article 229 of the Libyan Civil Code and to the jurisprudence of the Supreme Court in Libya,

Whereas said Article 229 of the Libyan Civil Code provides the following:

***“When the object of an obligation is the payment of a sum of money of which the amount was known at the time when the claim was made, the debtor shall be bound, in case of delay in payment, to pay to the creditor, by way of compensation for the delay, an interest at the rate of four per cent in civil matters and five per cent in commercial matters accruing from the date of its judicial claim, unless the contract or the commercial usage fixed another date for its accrual, and all this unless otherwise provided for in the law.”***

Whereas the Libyan Supreme Court has decided, in application of this legal provision, the following:

***“Whereas the criterion for differentiating between commercial and non-commercial debts is the examination of the capacity of the debtor; whereas the subject of the claim is the printing and supply of documents for the benefit of one of the public authorities; whereas the State is the debtor in this relationship and the debt is considered a debt of civil nature with regard to the State, even if the transaction is commercial for the creditor; consequently, the interest rate is (4%) and not (5%).”***

**(Supreme Court in Libya, Civil Challenge No. 144/56J, dated 19/3/2012 A.D.)**

**Therefore,**

**The Arbitral Tribunal decides to apply an interest rate of 4% to the compensation awarded, given that the debt or sum due from the Defendants is, with respect to them, a civil debt or sum taking into consideration that they constitute the Libyan State. The interest shall accrue from the date of issuance of the arbitral award until the full settlement of the compensation amount.**

## **Section Seven: Arbitration costs and expenses:**

Whereas the Plaintiff claims an amount, to be determined by the Arbitral Tribunal, equivalent to the arbitration costs and expenses it paid in the present arbitration case, especially that the Plaintiff paid its own share of the arbitration costs and expenses as well as the share of the Defendants who declined to pay contrary to the requirements of the applicable arbitration rules,

Whereas the Plaintiff has paid the arbitration costs as follows:

- On 5/7/2012, Mohamed Abdulmohsen Al-Kharafi & Sons Co. deposited, in the bank account opened for this arbitration case, the amount of 220,000 USD (Two hundred and twenty thousand American dollars).
- On 25/7/2012, Mohamed Abdulmohsen Al-Kharafi & Sons Co. paid in lieu of the Defendants the amount of 220,000 USD (Two hundred and twenty thousand American dollars) to remedy the non-payment thereof from their part.
- On 24/10/2012, Mohamed Abdulmohsen Al-Kharafi & Sons Co. deposited, in the bank account opened for this arbitration case, the amount of 400,000 USD (Four hundred thousand American dollars).
- On 2/11/2012, Mohamed Abdulmohsen Al-Kharafi & Sons Co. paid in lieu of the Defendants the amount of 400,000 USD (Four hundred thousand American dollars) to remedy the non-payment thereof from their part.
- On 13/2/2013, Mohamed Abdulmohsen Al-Kharafi & Sons Co. deposited, in the bank account opened for this arbitration case, the amount of 350,000 USD (Three hundred and fifty thousand American dollars).
- On 25/2/2013, Mohamed Abdulmohsen Al-Kharafi & Sons Co. paid in lieu of the Defendants (The Government of the Libyan State - The Libyan Ministry of Economy - The General Authority for Investment Promotion and Privatization Affairs (formerly known as the General Authority for Investment and Ownership) - The Libyan Ministry of Finance - The Libyan Investment Authority) the amount of 350,000 USD (Three hundred and fifty thousand American dollars) to remedy the non-payment thereof from their part;

Whereas the Arbitral Tribunal has decided that the Defendants are contractually and legally liable for the damages caused to the Plaintiff,

**Therefore,**



**The Arbitral Tribunal orders the Defendants to pay all the arbitration costs amounting to:**

**220,000 USD + 220,000 USD + 400,000 USD + 400,000 USD + 350,000 USD +350,000 USD**

**Totaling: 1,940,000 USD (One million, nine hundred and forty thousand American dollars)**

**Therefore,**

**The Defendants should pay all arbitration costs and expenses amounting to 1,940,000 USD (One million, nine hundred and forty thousand American dollars).**

### **Section Eight: Attorneys' Fees:**

The Arbitral Tribunal decides that every party should assume the fees of its own attorneys.

### **Section Nine: Overall Compensation:**

In light of all the above, the compensation awarded by the Arbitral Tribunal to the Plaintiff is as follows:

First, the Plaintiff is entitled to receive the amount of 30,000,000 USD (Thirty million American dollars) in compensation for the moral damages it incurred as a result of the damage caused to its reputation in the stock and business market in Kuwait and around the world. The Arbitral Tribunal orders the Defendants to pay the said amount to the Plaintiff.

Second, the Plaintiff is entitled to receive the amount of 6,292,350.00 Dinars (Six million, two hundred and ninety-two thousand, and three hundred and fifty Dinars), which is equivalent to 5,000,000 USD (Five million American dollars), as per the exchange rate applicable at the Central Bank of Libya. This amount represents the value of losses and expenses the Plaintiff Company incurred for the opening of its office in Tripoli following the issuance of Decision No. 135/2006. The Arbitral Tribunal orders the Defendants to pay the said amount to the Plaintiff.

Third, the Arbitral Tribunal orders the Defendants to pay the amount of nine hundred million American dollars (900,000,000 USD) to the Plaintiff in compensation for the certain profits (minimum value) that it should have realized from investing in the project's 14 resorts and facilities throughout a period of 83 years.

Fourth, the Arbitral Tribunal orders the Defendants to pay to the Plaintiff all arbitration costs and expenses amounting to 1,940,000 USD (One million, nine hundred and forty thousand American dollars).

Fifth, a 4% interest rate shall apply to all amounts awarded from the date of issuance of the arbitral award until the full settlement of said amounts.

**Therefore,**

**The total of the amounts awarded is:**

30,000,000 USD (thirty million American dollars)

(+)

5,000,000 USD (five million American dollars)

(+)

900,000,000 USD (nine hundred million American dollars)

(+)

1,940,000 USD (one million, nine hundred and forty thousand American dollars)

= 936,940,000 USD (nine hundred and thirty-six million, and nine hundred and forty thousand American dollars) with a 4% interest rate applicable as of the date of issuance of the arbitral award until full settlement.

The Arbitral Tribunal decides to reject all other claims for compensation, especially those related to attorneys' fees which should be assumed by every party with respect to their attorneys.

**Therefore,**

The Arbitral Tribunal orders the Defendants, jointly and severally:

- 1- The Government of the Libyan State
- 2- The Ministry of Economy
- 3- The General Authority for Investment Promotion and Privatization Affairs (formerly known as the General Authority for Investment and Ownership)
- 4- The Ministry of Finance

to pay to the Plaintiff the amount of 936,940,000 USD (nine hundred and thirty-six million, and nine hundred and forty thousand American dollars).

A summary final arbitral award to be immediately enforced, issued by the majority of votes of the Arbitral Tribunal members and not subject to appeal (pursuant to Article 2(8) of the Conciliation and Arbitration Annex of the Unified Agreement for the Investment of Arab Capital in the Arab States). A 4% interest rate is applicable as of the date of issuance of the arbitral award until full settlement of the compensation awarded.

A final arbitral award issued in accordance with and in implementation of the Unified Agreement for the Investment of Arab Capital in the Arab States and the Libyan Law.

In light of all the above,

And whereas the Arbitral Tribunal settled the different points of the dispute as follows:

**First:** On the question of knowing whether the project covered by the lease contract of a land plot is an investment project governed by the Unified Agreement for the Investment of Arab Capital in the Arab States, the Arbitral Tribunal decides that the project covered by the lease contract is an investment project pursuant to the Libyan law in force at the time of conclusion of the contract, i.e. Law No. 5 of 1997, and pursuant to Law No. 9 of 2010 and is governed by the Unified Agreement for the Investment of Arab Capital in the Arab States.

**Second:** On the question relating to the competence-competence principle and to whether the Arbitral Tribunal is competent to rule on its own competence, the Arbitral Tribunal decides that it is competent to rule on its own competence and on the scope of extension of the arbitration clause to the claim for compensation of the damages incurred as a result of Decision No. 203/2010 issued by the Minister of Economy annulling Decision No. 135/2006 issued by the Minister of Tourism approving the

investment and leading to the conclusion of a contract entitled “Lease contract of a land plot for the purpose of establishing a touristic investment project.”

**Third:** On the question relating to the attempts to settle the dispute amicably prior to resorting to arbitration and to whether the case was filed prematurely, the Arbitral Tribunal decides that both parties have made amicable endeavors prior to filing the arbitration case, however without leading to any solution. Consequently, the present case was filed in due time in accordance with the procedures provided for in the arbitration clause and is not premature.

**Fourth:** On the question relating to the personal scope of the arbitration clause as to the parties: Extension of the arbitration clause to the State of Libya and to the Ministry of Economy, the Arbitral Tribunal decides the validity of invoking the arbitration clause contained in the disputed contract against:

- 1- The State of Libya
- 2- The Libyan Ministry of Economy
- 3- The General Authority for Investment Promotion and Privatization Affairs, formerly known as the General Authority for Investment and Ownership, and formerly known as the Tourism Development Authority
- 4- The Libyan Ministry of Finance  
And the rejection of the request of joinder of the Libyan Investment Authority.

**Fifth:** On the question relating to the substantive scope of the arbitration clause, the Arbitral Tribunal decides that the claims for compensation of damages submitted by the Plaintiff are covered by the arbitration clause which refers to the application of the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States. Therefore, the present arbitration case falls under the jurisdiction of the Arbitral Tribunal.

**Sixth:** On the question of knowing whether the plot of land was handed over and taken over in accordance with the “Minutes of handing over and

taking over of a touristic investment site” dated 20/2/2007, the Arbitral Tribunal decides that the minutes entitled “Minutes of handing over and taking over of a touristic investment site” dated 20/2/2007 do not prove that the Plaintiff Company has taken over the disputed land pursuant to Article 5 of the “Lease contract of a land plot for the purpose of establishing a tourism investment project”.

The Arbitral Tribunal decides to reject all the allegations of the Defendants in this regard and to hold them contractually liable given that they breached their primary obligation imposed thereon by virtue of Article 5 of the abovementioned contract which obliges them to hand over the plot of land to the Plaintiff free of occupancies, something the Defendants failed to do.

- Seventh: On the question relating to the legal nature of the disputed contract and the applicable law, the Arbitral Tribunal decides that the following is applicable to the contract:
- a- Law No. 5 of 1997 on the Promotion of Foreign Capital Investment and its executive regulations and Law No. 7 of 2004 on Tourism and its executive regulations concerning the privileges and exemptions granted by Law No. 9 of 2010 that abrogated Law No. 5 of 1997 and replaced it.
  - b- Law No. 9 of 2010 that abrogated Law No. 5 of 1997 on the Promotion of Foreign Capital Investment which also abrogated Article 10 of Law No. 7 of 2004 on Tourism, without prejudice to the privileges and exemptions granted prior to its promulgation, i.e. which are included in Law No. 5 on the Promotion of Foreign Capital Investment and in Law No. 7 on Tourism.
  - c- Libyan Civil Code.
  - d- Unified Agreement for the Investment of Arab Capital in the Arab States.

- Eighth: On the question relating to liability, the Arbitral Tribunal decides that the Defendants committed contractual and delictual faults ascertaining their contractual and legal liability for violating the contractual obligations, for violating Law No. (5) of 1997 which was replaced by Law No. (9) of 2010, and for violating the Unified Agreement for the Investment of Arab Capital in the Arab States which is an integral part of the Libyan law and which provisions prevail over other Libyan laws.

**Ninth:** On the question relating to the request to issue a summary award to be immediately enforced, the Arbitral Tribunal decides to grant the arbitral award the summary and immediate enforcement.

**Tenth:** On the question relating to the compensation due to the Plaintiff Company, the Arbitral Tribunal decides to compensate the Plaintiff for:

- a- The direct damages
- b- The moral damages
- c- The lost profits resulting from real and certain lost opportunities
- d- The interest
- e- The arbitration costs and expenses
- f- Rejected the request for compensation of attorneys' fees

## FINDINGS

### **The Arbitral Tribunal:**

- First:** Decides that the project covered by the lease contract is an investment project pursuant to the Libyan law in force at the time of conclusion of the contract, i.e. Law No. 5 of 1997, and pursuant to Law No. 9 of 2010 and is governed by the Unified Agreement for the Investment of Arab Capital in the Arab States.
- Second:** Decides that it is competent to rule on its own competence and on the scope of extension of the arbitration clause to the claim for compensation of the damages.
- Third:** Decides that both parties have made amicable endeavors prior to filing the arbitration case, however without leading to any solution. Consequently, the present case was filed in due time in accordance with the procedures provided for in the arbitration clause and is not premature.
- Fourth:** Decides the validity of invoking the arbitration clause contained in the disputed contract against the State of Libya, the Libyan Ministry of Economy, the General Authority for Investment Promotion and Privatization Affairs, and the Libyan Ministry of Finance, and the rejection of the request of joinder of the Libyan Investment Authority in the present arbitration case.
- Fifth:** Decides that the claims for compensation of damages submitted by the Plaintiff are covered by the arbitration clause and fall under the jurisdiction of the Arbitral Tribunal.
- Sixth:** Decides that the Defendants committed contractual and delictual faults ascertaining their contractual and legal liability.
- Seventh:** Orders the Defendants, i.e. the Libyan State, the Ministry of Economy, the General Authority for Investment Promotion and Privatization Affairs and the Ministry of Finance in Libya, jointly and severally, to pay to the Plaintiff Company, i.e. Mohamed Abdulmohsen Al-Kharafi & Sons Co. – a Kuwait company, the following amounts:

- 7-1 //USD 30,000,000// thirty million US dollars only in compensation for the moral damages.
- 7-2 //6,292,350.00 Dinars// which is equivalent to //USD 5,000,000// five million American dollars only, representing the value of losses and expenses.
- 7-3 //USD 900,000,000// nine hundred million American dollars only in compensation for lost profits resulting from real and certain lost opportunities.
- 7-4 //USD 1,940,000// one million, nine hundred and forty thousand American dollars only for the arbitration costs and expenses.
- 7-5 A 4% interest rate shall apply to all amounts awarded from the date of issuance of the arbitral award until the full settlement of said amounts.

**Eighth:** Decides to grant the arbitral award the summary and immediate enforcement.

**Ninth:** Decides to reject all the remaining additional or violating allegations and claims, given that they have been explicitly or implicitly replied to in the motivation and in these findings.

A summary final arbitral award to be immediately enforced, issued in Cairo on 22/3/2013.

Chairman of the Arbitral  
Tribunal  
Dr. Abdel Hamid El Ahdab  
(signature)

Arbitrator  
Dr. Ibrahim Fawzi  
  
(signature)

Arbitrator  
Justice Mohamed El-  
Kamoudi El-Hafi  
(refused to sign)