Neutral Citation Number: [2015] EWHC 361 (Comm)

Case No: 2012 Folio 284

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 19/02/2015

Before :
THE HON MR JUSTICE WALKER

IN AN ARBITRATION CLAIM BETWEEN :

- -

MALICORP LIMITED **Claimant**
- and -
(1) GOVERNMENT of the ARAB REPUBLIC OF EGYPT
(2) EGYPTIAN HOLDING COMPANY FOR AVIATION
(3) EGYPTIAN AIRPORTS COMPANY **Defendants**

- -

Mr Subir Karmakar, of **Saunders Law Ltd,** solicitors for the Claimant, appeared for the **Claimant**, to the extent described in section A of the judgment within.
Mr Ali Malek QC and Mr Richard Brent, instructed by **Gibson & Co,** appeared for the **Defendants.**

Hearing date: 16 September 2014; written submissions were received during the period 26 September to 24 October 2014.

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Judgment

The Hon Mr Justice Walker:

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A. Introduction

1. This case concerns an arbitration ("the Cairo arbitration") brought by Malicorp Ltd ("Malicorp", a company registered in England & Wales). Malicorp had made a bid in

response to an Egyptian government invitation to tender for the design and construction of a new airport at Ras Sudr on the Red Sea coast, along with the operation of the airport for a period of 41 years. That bid had been successful, and in consequence Malicorp eventually entered into a written contract with "the Government of the Arab Republic of Egypt, represented by the Civil Aviation Authority". I shall refer to the Government of the Arab Republic of Egypt as "the Republic". The written contract was signed on 4 November 2000. I shall refer to it as "the concession contract".

2. Article 21.3 of the concession contract contained provisions for the resolution of disputes. It provided that initially an amicable procedure was to be followed. As regards disputes which could not be settled amicably it provided for arbitration under the auspices of the Cairo Regional Centre for International Commercial Arbitration ("the Cairo Centre"). I shall refer to article 21.3 as "the arbitration clause".

3. In April 2004 Malicorp invoked the arbitration clause by submitting a request for arbitration to the Cairo Centre, and appointing as its arbitrator Dr Abdel Hamid El Ahdab. In due course the respondents to the arbitration appointed Dr Hatem Ali Labib Gabr as their arbitrator. Dr El Ahdab and Dr Gabr nominated Professor Bernardo M Cremades as president of the arbitral tribunal.

4. A purported arbitration award in favour of Malicorp was rendered in Cairo on 7 March 2006. It had been signed in Madrid on that day by Dr El Ahdab and Professor Cremades. It attached a letter from Dr Gabr dated 27 February 2006 explaining his reasons for concluding that a 2006 Administrative Court decision, described further below, required him to suspend his participation as an arbitrator.

5. For convenience only, and without any implication as to their true status, I refer below to the purported award as "the Cairo award", to the two arbitrators who signed it as "the truncated tribunal", and to the three appointed arbitrators as "the full tribunal". The Cairo award found that the Republic was obliged to pay Malicorp a sum in United States dollars ("$") of $10m for loss of profits and $4,773,497 for costs and expenses, together with interest thereon at the rate of 4% p.a. from 28 April 2004 to the date of payment.

6. In the present proceedings Malicorp as claimant seeks to enforce the Cairo award against the Republic, which was the first respondent in the arbitration and is the first defendant in the present proceedings. Malicorp's claim in the arbitration had also been made against the second and third defendants in the present enforcement proceedings ("the Holding Company" and "the Airports Company" respectively). They were the successors to the Civil Aviation Authority, and in that capacity were the second and third respondents in the arbitration. However, the truncated tribunal found that they were not parties to the concession contract, and it dismissed the claims by Malicorp against them. For convenience references below to "Egypt" are, unless the context otherwise requires, references to the three defendants.

7. Separately from, or linked to, the arbitration, there have been proceedings which include:

(1) a decision ("the 2006 Administrative Court decision") on 19 February 2006 of the Judicial Administrative court of the Egyptian Council of State, setting aside the arbitration clause and suspending the Cairo arbitration;

(2) a decision ("the Paris 2008 decision") of the Paris Court of Appeal on 19 June 2008, upheld by the Cour de Cassation on 23 June 2010, refusing to enforce the Cairo award in France;

(3) a decision ("the ICSID 2011 decision") of an arbitral tribunal of the International Centre for Settlement of Investment Disputes ("the ICSID Centre") sent to the parties on 7 February 2011, rejecting a claim by Malicorp for expropriation and holding that Egypt's actions could not be considered a form of expropriation under international law; and

(4) a decision ("the 2012 Cairo Court of Appeal decision") of the Cairo Court of Appeal on 5 December 2012, currently under appeal to the Egyptian Court of Cassation, setting aside the Cairo award.

8. The present application by Malicorp for permission to enforce the Cairo award in England & Wales pursuant to section 101(2) Arbitration Act 1996 ("the 1996 Act") was made without notice in accordance with CPR 62.18. It came before Flaux J for consideration on the papers. By order dated 29 February 2012 ("the enforcement order") he granted permission, reserving to the defendants a right to apply to set the enforcement order aside.

9. The present judgment deals with Egypt's application to set aside the grant of permission to enforce. That application was fixed for hearing over four days from 15 to 18 September 2014 inclusive. Monday 15 September 2014 was a reading day. At the outset of Tuesday 16 September 2014 Mr Karmakar of Saunders Law Ltd appeared on behalf of Malicorp. He stated that his instructions to appear were limited to the making of oral submissions in support of an application dated 12 September 2014 by Malicorp seeking an adjournment of the hearing.

10. For reasons given in my ruling on 16 September 2014 I refused the adjournment application. In summary, the adjournment application asserted that Malicorp, which had already had the benefit of substantial advice from leading and junior counsel, needed more time in order to put in place funding needed in order to brief counsel to attend the hearing. I refused the application because I considered that the hearing could continue without injustice to Malicorp, and that in all the circumstances the interests of justice would be best served by allowing the hearing to continue. In particular, it seemed to me that, if the hearing proceeded, case management directions could, in the first instance, enable the court to identify issues which Mr Karmakar on behalf of Malicorp would be adequately qualified to deal with. The court would then hear argument on those issues. Further directions could then be given depending upon whether the court's conclusions on those issues in themselves had the consequence that the Cairo award could not be enforced here. I added that it weighed with me strongly that Malicorp was in a position where it could have ensured that it would be represented by leading counsel under a conditional fee arrangement and appeared to have thrown that opportunity away without good reason.

11. After my ruling Mr Karmakar received further instructions from his client to remain in court. Accordingly he remained in court during the course of oral submissions by Mr Malek QC and by Mr Brent on behalf of Egypt, and during oral evidence by Dr Mohamed Badran, who was called by Mr Brent as an expert witness on Egyptian law. Egypt's case was completed that afternoon and I reserved judgment. On occasion Mr Karmakar intervened during the course of the oral submissions, but he did not at any stage during the afternoon suggest that his client wished for him to make more general oral submissions on its behalf.

12. On the evening of 16 September 2014 Mr Karmakar sent an email to my clerk, referring to a "draft incomplete version" of Malicorp's skeleton argument which had been supplied the previous day. In his email Mr Karmakar said that he intended to serve the remaining portions of that skeleton argument the following day unless "Mr Justice Walker decides that it is no longer necessary". My clerk replied that my preferred course would be for Malicorp to lodge written submissions in response to Egypt's written and oral submissions, and that Egypt should then lodge written submissions in reply.

13. The parties agreed to adopt my preferred course. They also agreed on a timetable, eventually revised so that Malicorp served (1) written submissions dated 26 September 2014 ("Malicorp's September submissions") in reply to Egypt's skeleton argument and (2) written submissions dated 17 October 2014 ("Malicorp's October submissions") in reply to Egypt's oral submissions. Egypt lodged written submissions in reply dated 24 October 2014 ("Egypt's reply").

14. It is common ground that the Cairo award is a New York Convention award, with the result that enforcement may only be refused if the case falls within s 103(2) to 103(4) of the 1996 Act. Egypt asserts that there are four independent grounds for holding that the case does indeed fall within those provisions. After reflecting on the oral and written submissions I consider that:

    (1) on each of the first two of Egypt's grounds, Egypt is right to say that the case falls within s 103(2), and that in so far as I have any discretion in the matter, I should exercise it so as not to enforce the Cairo award;

    (2) as to the first of Egypt's grounds, Egypt's set aside application succeeds because the Cairo award has been set aside by the 2012 Cairo Court of Appeal decision (see section D below);

    (3) as to the second of Egypt's grounds, Egypt's set aside application also and independently succeeds because as a matter of fact the Cairo award granted remedies to Malicorp on a basis which was neither pleaded nor argued (see section E below);

    (4) in these circumstances I need not consider an issue estoppel argument relied on by Egypt as an alternative way of advancing its second ground, nor need I consider the third and fourth grounds relied on by Egypt, and in the circumstances of the present case it is undesirable that I should do so.

15. Thus the result is that the enforcement order must be set aside. My detailed reasons are set out in sections D and E below. In sections B and C below I summarise the

background to the Cairo award and what was said in the Cairo award. In section F below I discuss the position in relation to other grounds advanced by Egypt in support of the application.

B. Background to the Cairo award

16. Section VI of the Cairo award, comprising paragraphs 18 to 33, dealt with the factual background. I set out relevant extracts below, adding sub-paragraph numbers in square brackets for convenience:

> §18.- The Claimant was incorporated pursuant to English law on August 6, 1997. Its share capital on incorporation was "... *£1000 divided into 1000 shares of £1 each*", and its object was stated to be to "... *carry on business as a general commercial company*". Its paid-up capital on incorporation was £2. The changes to its capital, and the confusion between its authorised and paid-up capital are a central issue in this case.
>
> §19.- [19.1] The Egyptian Civil Aviation Authority announced the tender for a new Airport of Ras Sudr, and made available the tender documents in August 1999. On October 1, 1999 the Claimant submitted an offer in response to the tender. The tender was signed on behalf of the Claimant by "Staff Major General Mahmoud Shakir Ibrahim, General Director". It was accompanied by a first demand guarantee to the amount of one million Egyptian pounds by MISR Bank in Cairo on behalf of "Mr Sayed Hanafi Mahmoud...for the construction of an International Airport in Ras Sudr", and addressed to the Egyptian General Civil Aviation Authority … it is not clear what documentation accompanied the bid, and in particular whether the Claimant presented an extract from the Companies Register in England and Wales in order to confirm its objects and capital.
>
> [19.2] The Claimant was invited to appear before a committee presided by the President of the Civil Aviation Sector, Mr. Mamdouh Mohamed Heshmat. The meeting took place on January 3, 2000 and the letter of invitation set out a list of six matters which the Claimant was expected to clarify. The Claimant was represented at this meeting by General Mahmoud Shakir Ibraim (or Ibrahim). The first question related to the details of the Claimant's 'issued and licensed' capital. The Minutes of this meeting record the response as follows.
>
> > *Upon their question concerning the first point: details of the capital he* [i.e.,General Mahmoud Shakir Ibraim] *responded by the following: "The Original Company with which the contracting shall be concluded and*

> *which submitted the offer is the British company Malicorp Ltd, a company established under the British law and its residence is in London with its capital of one hundred million Sterling pounds according to the attached commercial register which was reviewed by the Committee's members.*

[19.3] The Respondents state that the Claimant produced at this meeting an extract from the register of Companies House, Cardiff, in respect of Malicorp Limited, dated September 15, 1999. The object of Malicorp Limited was stated in this extract to be "*to build, develop and operate the Ras Sudr Airport and to develop associated sites for industrial and tourist purposes.*" In respect of capital this extract stated:

> *The company's share capital is £100 million divided into one million shares of £100 each.*

[19.4] Mr Heshmat confirmed in his oral evidence that he was appointed to head a committee to review the two bids, and that a meeting was arranged to clarify certain aspects of Malicorp's bid. General Shakir Ibraim was the only person who attended on behalf of Malicorp, and he [i.e., General Ibraim] told the Committee that Malicorp's "paid-up" capital was £100 million, and presented a commercial register issued in the United Kingdom to support this statement regarding the paid-up capital. This document was scrutinised by the reviewing committee.

[19.5] The Claimant's evidence, by contrast, was quite explicit that the intention always was to finance the project from outside sources. …

§20.- [20.1] On February 8, 2000 the Chairman of the Egyptian Civil Aviation Authority advised the Claimant that its offer had been selected for the construction of the Ras Sudr Airport, adding that "*all the previous procedure of the brochure of terms, the Authority's specifications, your offer and all Minutes in relation to the operation shall be considered an integral part of the contract which shall be concluded in this respect.*"

[20.2] A preliminary contract or heads of agreement was signed on May 28, 2000 between the Arab Republic of Egypt, represented by the General Authority for Civil Aviation on one part, and the Claimant on the other part. This Heads of Agreement consisted of eight articles, and anticipated further investigation and negotiation between the parties of professional, technical, legal and scheduling matters leading to a detailed contract.

§21.- The Concession Contract was executed on November 4, 2000 by the Government of the Republic of Egypt represented by the Egyptian Civil Aviation Authority, as Concessor, and Malicorp Limited and Ras Sudr International Airport Ltd (a company to be formed) as Concessionaire. …

…

§23.- On January 17, 2001 an application was submitted in Egypt to establish a company pursuant to Law N°8 of 1997 (on investment guarantees and incentives) "*to build, manage, utilize and transfer Ras Sidr International Airport*". Its three shareholders included Malicorp Ltd, which was going to hold 9,800,000 of the 10,000,000 shares to a value of 10,000,000 Egyptian pounds. The same document stated that the "*Sources of Financing*" will be "*Capital LE 100,000,000, Loans LE 150,000,000*" giving a total of L.E. 250,000,000.

§24.- [24.1] Between the signing of the contract on November 4, 2000 and February 18, 2001 the Egyptian Civil Aviation Authority sent three notices to the Claimant regarding its contractual obligations to increase the bank guarantee to two million Egyptian pounds (clause 23.1.7) and to incorporate an Egyptian Company (clause 23.1.6). …

…

[24.3] On April 18, 2001 the Claimant wrote to the Egyptian Authority for Civil Aviation advising that the documents relating to the establishment of the Egyptian company according to Law N°8 of 1997 had been submitted and "*we are expecting the approval of the Investment Authority to finalise the formalities.*" …

…

§26.- On April 28, 2000 the Claimant wrote to the Egyptian Holding Company for Civil Aviation requesting "*approval to commence procedures for delivering the airport site*". The letter went on to advise that the Claimant was "*still following the procedures of registration of the Egyptian Company, [but] we cannot overcome the routine and the procedures followed by the Investment Authority…*". The response from the Egyptian Holding Company for Civil Aviation on May 5, 2001 was that the delivery procedures for the airport site could not commence "*unless the Concessionaire Company is published and notifies us with the registration and publication documents, according to the applicable regulations and law ...*"

§27.- [27.1] By letter dated May 30, 2001 the Egyptian Holding Company for Aviation first expressed serious concern

in writing regarding Claimant's "seriousness" and the truthfulness of information provided to Egyptian authorities. …

[27.2] There followed correspondence as the Claimant sought to expedite the formation of the Egyptian Company and the transfer of the Airport site, writing to the Investment and Free Zones Authority, to the Egyptian Holding Company for Aviation, the Minister of Transportation, the Prime Minister and to the President of the Republic. The Claimant wrote to the Egyptian Holding Company for Civil Aviation on June 13, 201 seeking extra time to obtain exceptional approvals of the Prime Minister and the Minister of Transport. It also wrote to the Minister of Transportation on June 28, 2001 …

[27.3] On July 21, 2001 there was a meeting of a Special Commission for the Ras Sudr Airport. This Special Commission was chaired by the Minister of Transport and was composed of senior Egyptian officials and legal counsel in the aviation and tourism sectors, as well as representatives of National Security and the Investment and Free Zones Authority. There was extensive discussion of the background and problems with the Concession Contract. …

[27.4] The meeting concluded with a decision to rescind the Concession Contract and call the letters of guarantee:

> *Based on the above the Commission adopted the resolution:*
>
> *1. To notify the Egyptian Holding Company for Aviation and Malicorp a letter from the Investment Authority informing about the non-approval on the formation of such company due to the rejection of the security on the formation.*
>
> *2. When the above-mentioned letter in paragraph (1) will be served to the Holding Company, the procedure of rescinding the contract and the cashing of the letter of guarantee will take place.*
>
> *3. To be prepared to face the legal consequences resulting from the cancellation and the seizing of the letter of guarantee.*

§28.- [28.1] On July 25, 2001 the two bank guarantees provided by or on behalf of the Claimant in respect of the Concession Contract were called in the name of the Egyptian Civil Aviation Authority. By letter dated July 28, 2001 the State Security Organism of Investigation formally advised the Public Authority for Investment that it did not approve the

Claimant for the establishment of Ras Sudr Airport. No reasons were given by the Security Organisation for this decision.

[28.2] The Egyptian Holding Company for Aviation gave notice to Malicorp of the cancellation of the Concession Contract by letter dated August 12, 2001:

> *To/ Malicorp Company*
>
> *Greeting,*
>
> *In reference to the Agreement signed with you about the construction and management of the Ras Sudr Airport on B.O.T basis, and notwithstanding the consecutive warnings sent on December 2000, January 2001 and the final notice dated 18/2/2001 for not completing the formation documents of the Egyptian company according to law number 8/97 and for not sending a draft on the execution of the project, and for not amending the letters of guarantee to become definitive, and after granting you another extension until 28/2/2001; and,*
>
> *Whereas the Company has submitted to the commission documents which authenticity is dubious, inciting the Commission to send you a letter dated 30/5/2001 to submit true and authentic documents and granting you a period of time until 30/6/2001 extended until 31/7/2001; and,*
>
> *Whereas the Company has submitted to the security authorities untrue documents concerning the names of the partners in the British company; and*
>
> *Whereas the Company was not able to form an Egyptian Company according to the Egyptian laws until 3/2/2001 as provided in the Agreement, in addition to others contraventions committed by the company; and,*
>
> *Whereas your lack of seriousness has been established from the signature of the Agreement on 4/11/2001 up to now, resulting in the non-starting of the project until today…*
>
> *Based on the above, it has been decided to cancel the agreement and seize the letter of guarantee, reserving the right to claim punitive damages for the prejudice incurred by the holding company and the Egyptian Government resulting from the non-starting with the execution of one of the vital and important projects*

> *included in the planning of the Government for the development of the economy.»*

[28.3] The Claimant responded in a letter dated August 13, 2001. The Claimant stated that the Egyptian Holding Company for Aviation was a private law entity without the power to unilaterally terminate the Concession Contract. The Claimant went on to rebut statements regarding the presentation of plans, the submission of dubious documents, and the alleged presentation of false documents concerning "the names of the partners on the British company". It stated that the delay in forming the Egyptian Company lay with the Investment Authority (and therefore indirectly with the Arab Republic of Egypt) and not with the Claimant, and denied any lack of seriousness. It added further reasons why there was no right to cancel the Concession Contract and concluded as follows:

> *We hereby inform you that the issuance of your decision to annul the Contract and is null and does not concern the Company nor affect it, it is an internal matter that concerns you solely and does not affect the Company concerning the Contract ratified by the Government of the Arab Republic of Egypt which is currently in force until now, and by considering your decision as null and void according to the contract and law, requesting the Government to deliver the airport site in order to start with the execution in the interest of the Company and of the Government.*

§29.- The cancellation of the Concession Contract by the Concessor was subsequently confirmed in two letters. The first letter, signed by Pilot Mamdouh Mohamed Heshmat as Chief Executive of the "Egyptian Authority for the Control of Aviation" was dated September 4, 2001. The second letter (in similar terms to the first) dated September 28, 2001 and signed by the Minister of Transport read as follows:

> *«Greetings,*
>
> *In reference to the Agreement signed by both parties, relating to the construction and management of the Ras Sudr Airport on B.O.T basis, and despite putting you on notice many times through the Egyptian Aviation Holding Company to complete the documents required to the formation of the Egyptian Company which will receive the site of the project and start the execution in accordance with law number 8/1997 on the guarantee and protection of the investments, and law number 3/1997 related to granting the concession of public utilities for building, managing and exploiting the airports and runways, but that your*

> *company has failed to execute the prerequisite and did not complete the formalities of formation of the Egyptian Company which should have been accomplished by 3/2/2001 in, accordance with the Agreement, which indicates your lack of seriousness in the execution of the entire Agreement entered into between the parties on 4/11/2000. We confirm the cancellation of the Agreement which was notified to you previously by the Egyptian Aviation Holding Company and the Egyptian Commission for the Control of the Civil Aviation and the seizing of the two letters of guarantee, reserving all and any other rights. … »*

§30.- On April 20, 2004 the Claimant commenced this arbitration by filing its Request for Arbitration. The relief claimed in its Memorial of Claim dated February 19, 2005 was quantified in its Rejoinder on Claim dated July 26, 2005 as follows:

> *l. Expenses in the amount of USD 12,416,574 (twelve million four hundred and sixteen thousand five hundred and seventy four USD).*
>
> *2. The value of the liquidated letters of Guarantee in the amount of USD 564,069 (Five hundred and sixty four thousand sixty nine USD).*
>
> *3. Loss of profits in the amount of USD 500,000,000 (Five hundred million USD).*
>
> *4. Damages in the amount of 1 (one) million USD to compensate the claimant for the moral damages.*
>
> *5. Interest on the amounts claimed at the legal rate.*
>
> *6. All costs and expenses caused by the present arbitration proceedings and any consequences thereof, including but not limited to the Cairo Regional Center's administrative expenses, fees and expenses of arbitrators, experts, witnesses and attorneys at an amount to be determined later on.*

§31.- [31.1] The Rejoinder of the Arab Republic of Egypt dated September 21, 2005 contained the following request for relief to the Arbitral Tribunal:

> *Egypt respectfully requests that this Tribunal:*

> *i) rule as a preliminary question that it does not have jurisdiction to rule on the claims made by Malicorp, and if this Tribunal finds that it has jurisdiction; Egypt respectfully requests that this Tribunal:*
>
> *rule that the claims made by Malicorp are entirely not admissible in opposition to the Egyptian Minister of Transportation and the Egyptian Minister of civil Aviation, and if this Tribunal finds that the claims made by Malicorp are admissible as regards both of the aforementioned Egyptian Ministers; Egypt respectfully requests that this Tribunal:*
>
> *reject the claims made by Malicorp in its entirety; and*
>
> *ii) in all events order Malicorp to reimburse all of the costs that Egypt has incurred in connection with these proceedings.*

[31.2] In its Post-Hearing Submission the Arab Republic of Egypt also requested the termination and discontinuance of this arbitration pursuant to Article 45 of arbitration Law N° 27 of 1994.

[31.3] The Rejoinder of the Egyptian Holding Company for Aviation and the Egyptian Airport Company dated September 21, 2005 requested the Arbitral Tribunal to rule as follows:

> *<u>Main Principal Request:</u>*
>
> *1. The Third & Fourth Respondents adhere to and hold the substantial pleas related to the Public Order that have been raised by them in their Memorandum of Defense of 21.5.2005 pertaining to the non jurisdiction and nullity in addition to all the pleas mentioned therein.*
>
> *2. After determination of all the substantial pleas pertaining to the Public Order, we pray the Arbitral Tribunal to dismiss the Claimant's case entirely i.e. to reject the claim of indemnity for the absence of its elements of fault and damage and the causal relationship between them and to obligate the Claimant with all the expenses and fees of the present arbitration.*
>
> *<u>Auxiliary Request:</u>*

> *1. To suspend the arbitral case in implementation of Article (46) of the Arbitration Law No. 27 of the year 1994, until the determination of the Felonies Case No. 327/2004 (Inclusive Public Funds), as "The Tribunal will keep the matter under review".*
>
> *2. In case of non responding to the previous request by the Arbitral Tribunal, then the Third and Fourth Respondents pray the permission to start and proceed upon the forgery challenging of Malicorp's commercial register and other documents that had been submitted by the Claimant according to the Article No. (49) and subsequent articles of the Egyptian Evidence Law.»*

§32.- On July 15, 2004 the Minister of Civil Aviation complained to the Public Prosecutor of fraudulent practices by the Claimant and officials of the Egyptian Authority for Civil Aviation. On August 17, 2005 the Public Prosecutor submitted an Order of Referral to the Court of Felonies in Cairo, including a supporting Memorandum of Facts produced by the Public Prosecutor dated July 13, 2005. The Order of Referral alleges various illegal and fraudulent acts on the part of persons connected with the Claimant as well as certain Egyptian officials involved in the review of the Claimant's bid.

§33.- [33.1] The accused include various Egyptian officials. They also include five "partners" in Malicorp, accused of colluding with the accused Egyptian officials in the execution of their illegal acts, and of cooperating with an unknown person in order to forge Malicorp's commercial register No. 3415415 "*through simulating and changing by agreeing with an unknown person to prepare and forge the abovementioned document...and thus the unknown person has edited in the forged document that the capital of the company is one hundred million sterling pounds, and this was contrary to fact ...*"

[33.2] There is also an accusation against three of the accused of 'attempting to turn a forged fact to be correct' by attending before the committee of evaluation of the bid on January 3, 2000 "*on behalf of Malicorp Limited…, and alleging that the capital of the said company amounts to one hundred million pounds sterling, and supported such allegation by submitting the forged commercial register.*"

C. The findings in the Cairo award

17. In sections VII to IX the Cairo award discussed the principal issues between the parties. I begin by listing, with the addition of letters in square brackets for ease of reference, those dealt with in section VII:

(1) Procedural issues as to:

[1a] the proper parties to the arbitration (paragraphs 35-38);

[1b] the time period for the arbitration (paragraphs 39-42);

[1c] whether Malicorp was lawfully represented before the arbitral tribunal (paragraphs 43-46);

[1d] whether prior recourse was duly made to alternative means of dispute resolution (paragraph 47).

(2) Issues as to jurisdiction/consent to arbitrate:

[2a] domestic rules concerning administrative contracts;

[2b] the effect of a decision of the Egyptian Administrative Judiciary Court; and

[2c] a requirement for approval by the Council of State (paragraphs 48-60).

(3) Jurisdiction: the significance of the United Kingdom-Egypt Bilateral Investment Treaty (paragraphs 61-64).

(4) Breach/Annulment of the concession contract:

[4a] whether the Republic was a party to the concession contract (paragraphs 65 to 67), and retention by the Republic of the power to cancel the concession contract (paragraph 68);

[4b] the reasons why the concession contract was in fact cancelled by the Republic (paragraphs 69 and 70);

[4c] Egypt's submissions that the concession contract was void as having been concluded as a result of "fraudulent artifices" (paragraphs 71 and 72);

[4d] findings as to "essential mistake" (paragraph 73);

[4e] consequences under Egyptian Civil Code art 142 (paragraph 74);

> [4f] principles concerning suspension of arbitral proceedings pending the resolution of criminal proceedings (paragraphs 75-77);
>
> [4g] whether it was necessary to make a decision on forgery or other criminal acts alleged (paragraph 78);
>
> [4h] decision not to exercise discretion to suspend the arbitral proceedings pending the resolution of criminal proceedings (paragraph 79).

18. Section VIII dealt with damages (paragraphs 80-87). Section IX dealt with costs (paragraphs 88-91).

19. Section X was headed "Award". It set out findings which included:

> [X.]3. The Concession Contract is an administrative contract in Egyptian domestic law. It is also an international contract involving a State party, and is subject to the principles applicable to such contracts;
>
> [X.]4. The Concession Contract was void for mistake. The Arbitral Tribunal also recognises that Arab Republic of Egypt had the power to cancel the Concession Contract, and did so on August 12, 2001;
>
> [X.]5. In lieu of reinstatement to its original position prior to the Concession Contract, the Arab Republic of Egypt shall pay to the Claimant the amount of FOURTEEN MILLION SEVEN HUNDRED AND SEVENTY-THREE THOUSAND AND FOUR HUNDRED AND NINETY SEVEN United States Dollars ($US14,773,497) by way of damages;

D. Effects of the 2012 Cairo Court of Appeal decision

20. As noted above, a challenge to the 2012 Cairo Court of Appeal decision is pending before the Egyptian Court of Cassation. It is elementary, and Malicorp has identified no ground for disputing, that under relevant principles of private international law this court must nevertheless treat the 2012 Cairo Court of Appeal decision judgment as final.

21. Egypt's primary assertion is that I should proceed on the basis that the 2012 Cairo Court of Appeal decision has the effect without more that there is no award. Reliance is placed in this regard on alleged principles expounded in van den Berg, "Enforcement of Arbitral Awards Annulled in Russia, (2010) *Journal of International Arbitration* vol 27(2), However, I do not need to decide whether the alleged principles are right. For present purposes I proceed on two assumptions. They are:

(1) that the word "may" in s 103(2) of the 1996 Act confers a discretion on this court to enforce an award even though the award has been set aside by a decision ("the set aside decision") of a court constituting a competent authority within s 103(2)(f); and

(2) it would not be right to exercise that discretion if, applying general principles of English private international law, the set aside decision was one which this court would give effect to.

22. This approach, which I would describe as "the preferred approach", is supported by the discussion in *Dicey, Morris & Collins*, 15th edition, at Rules 50-5 and paragraph 16-148. It was adopted by Simon J in *Yukos Capital S.a.r.L v OJS Oil Company Rosneft* [2014] EWHC 2188 (Comm) at paragraph 20. On this basis I should give effect to the 2012 Cairo Court of Appeal decision unless it offends "basic principles of honesty, natural justice and domestic concepts of public policy".

23. Malicorp has not explicitly contended that the preferred approach is wrong. There are passages in the September and October submissions opposing a course under which this court would be "deferring to the supervisory court". If those passages are intended to advocate an approach which differs from the preferred approach, then it seems to me that, for the reasons identified in *Dicey, Morris & Collins*, they go too far.

24. Thus the only question becomes whether the set aside decision was one which this court would give effect to. In this regard Malicorp objects that the decision should not be given effect to because (1) it was tainted by bias, (2) it was contrary to natural justice and the Egyptian Court deliberately misapplied relevant Egyptian law and (3) the grounds on which it set aside the Cairo award were wrong and misconceived.

25. Malicorp's objection (3) can be dealt with shortly. As observed by Egypt, an assertion that a foreign judgment is "wrong" is not a sufficient basis to refuse to recognise it. When considering whether to recognise a foreign judgment this court acknowledges that the determination of foreign law is a matter for the foreign court. Thus evidence relied on by Malicorp that the 2012 Cairo Court of Appeal decision is wrong does not address the relevant issues. As Egypt points out, there is no suggestion in that evidence that the 2012 Cairo Court of Appeal decision is perverse. Allegations that there was a failure "to take account of" Malicorp's submissions merely because those submissions were not repeated in the judgment, or that the judgment gave reasons which were "insufficient and contradictory" do not assist Malicorp in this regard.

26. As to objections (1) and (2), the detailed matters relied on are in my view insufficient to make good these complaints. The central assertion made by Malicorp is that the judges responsible for the 2012 Cairo Court of Appeal decision were guilty of pro-government bias. Such a claim cannot be accepted by this court without positive and cogent evidence: see *Altimo Holdings and Investment Ltd v Kyrgz Mobil Tel Ltd* [2011] UKPC 7, para 97 and *Yukos Capital S.a.r.L v OJS Oil Company Rosneft (No 2)* [2012] EWCA Civ 855 para 73. A report of Professor Stilt is relied on by Malicorp as providing the necessary evidence. While I do not criticise Professor Stilt, I have no doubt that the evidence she has been able to assemble does not approach the high level of cogency that is required. It does not go beyond generalised, anecdotal material. In so far as Malicorp places reliance on a newspaper report concerning the

team working on behalf of the government, the report does not on its face say that the relevant judges were part of the team, and there is no apparent basis to think that this was implied by the report. Reference is made by Malicorp to a letter from the President of the Cairo Court of Appeal to the Public Prosecutor concerning suspension of the Cairo arbitration while criminal proceedings were on foot, but in so far as complaint is made about this letter nothing in the letter is identified to support any such complaint.

27. I add a particular comment in so far as Malicorp relies upon a claim that the Cairo Court of Appeal judges who handed down judgment were not on strike during a constitutional dispute between then President Morsi and some of the judiciary. In my view this claim, even if true, could not possibly warrant the serious allegation made.

28. The preferred approach which I have described above applies, in the present context, well established principles as to the recognition of foreign judgments. It does not seem to me that they leave room, as a matter of discretion, to give effect to the Cairo award once it is established, as here, that a set aside decision of the supervisory court meets the tests for recognition. If, however, there were such a further discretion I would not exercise it in favour of Malicorp. In so far as Malicorp relies on comments in the ICSID 2011 decision which are said to be supportive of Malicorp's case on the merits, I observe that the ICSID 2011 decision was concerned only with jurisdiction and whether there had been expropriation. In so far as Malicorp suggests that the present case should be adjourned to await the outcome of its appeal to the Court of Cassation, I do not consider that there is good reason to depart from the normal approach under which the 2012 Cairo Court of Appeal decision is, unless and until overturned by the Court of Cassation, treated as a final decision.

E. Egypt's inability to present its case

E1. Overview

29. Under the 1996 Act section 103(2)(c) will apply so as to permit a refusal to enforce where those against whom the award is invoked prove that they were not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or were otherwise unable to present their case.

30. Egypt puts its case in this regard in two alternative ways. The first is that the Paris 2008 decision gives rise to an issue estoppel on the point. For reasons given in section F below I do not consider it necessary or desirable to examine this alternative in the present judgment. The second, which I deal with in the remainder of this section, is that in any event the factual material before the court demonstrates that Egypt were unable to present their case within the meaning of s 103(2)(c).

E2. Relevant legal principles

31. There can in my view be no doubt that a grant of remedies on a basis which was neither pleaded nor argued will be capable of falling with this subsection. Nor can there be any doubt that under principles of English private international law the test as to ability of the party to present its case involves an application of relevant English

principles as opposed to those of Egypt or anywhere else: see *Cukurova Holdings AS v Sonera Holding BV* [2014] UKPC 15, para 32.

32. Malicorp asserts that the "character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates" have to be taken into account when considering if the procedure adopted was fair and in compliance with the requirements of natural justice. I accept that relevant English principles require consideration of these matters. I do not accept, however, that the applicable arbitration procedures in the present case called for any lessening of the essential need for Egypt to have notice of the basis on which the tribunal would grant any remedy and approach the quantification of any monetary award. Nor can I accept that there is anything arbitrary in requiring, before permitting enforcement here, that the foreign arbitral procedure respected this essential need.

E3. The tribunal's reasoning as to remedy

33. It is common ground, and indeed the truncated tribunal recognised in paragraph 64 of the Cairo award, that Malicorp requested compensation only for breaches of the concession contract. The Cairo award, however, rejected that request. On the contrary, it accepted Egypt's contention that the concession contract had been validly avoided. This appears from paragraphs 68 to 70 of the award:

> §68.- The Concession Contract was expressly subject to 'revision' by the Council of State (Article 24). The introduction (page 9, 'General') of the Concession Contract recognised that it was subject to a feasibility study and "*may be cancelled if the relevant Feasibility Study shows the Airport Project and Annexed Projects cannot be carried out in a sound economic manner*". Further, the Concession Contract was expressly subject to the Laws No 3 and No 8 of 1997, and Article 5 of Law No 3 of 1997 requires a decree from the Council of Ministers "*upon a proposition by the competent minister concerning granting the concession, defining its terms and provisions, or amending them…*". The Claimant has not demonstrated that any such decree was ever promulgated in respect of the Concession Contract. Accordingly, the Arbitral Tribunal is satisfied that the Concession Contract, although binding on Egypt, was not unconditionally effective, and Egypt retained the power to cancel the Concession Contract.
>
> §69.- The evidence satisfies the Arbitral Tribunal that the Concession Contract was in fact cancelled by Egypt for a combination of reasons, including: (i) concerns regarding the delay in incorporating the mandatory Egyptian subsidiary, and doubts regarding the accuracy or authenticity of information provided for this purpose; (ii) concerns regarding the identity of the shareholders and associates of the Claimant and its proposed Egyptian subsidiary; (iii) a perceived lack of professionalism ('seriousness') and suitability of the Claimant for a project of this nature arising from delays and the problems in the provision of information; (iv) that the Claimant had failed to comply with its obligations under the Concession Contract.
>
> §70.- The Republic of Egypt also submitted that the Concession Contract could be cancelled because of the breaches of contract of the Claimant (*exceptio non adimpleti contractus*) and for breach of good faith. The Arbitral Tribunal is

not required to enter into these arguments in detail in light of its other decisions in this award, particularly regarding mistake.

34. The truncated tribunal then went on to state in paragraphs 71 to 74:

> §71.- The Respondents submit that the Concession Contract is void for the "*fraudulent artifices which led to the conclusion of a contract, and [which] were of such gravity that, but for them, the contracting party would not have concluded the contract*". (Post-Hearing Submission of the Egyptian Holding Company for Aviation and the Egyptian Airports Company, paragraph 230). The allegations of fraud relate to the capital of the Claimant, and include a serious allegation that a forged 'commercial register' of the Claimant company, fraudulently misrepresenting its capital, was used to obtain the Concession Contract. The Arbitral Tribunal has reviewed exhaustive submissions of the Parties on this question. It notes that these allegations of fraud in relation to this contract were not relied upon at the time of the termination of the Concession Contract and were not raised until after this arbitration was commenced.
>
> §72.- [72.1] The importance of the capital of the Claimant, the incorporation of the Egyptian subsidiary and the approval of the Investment Authority arises from certain provisions of Law No 8 for 1997. Article 4 of the Law provides as follows:
>
> *Article (4)*
>
> *The competent administrative department shall undertake revising the contract of the companies articles and memoranda of association. It should be indicated in the contract of establishment and by-laws the names of the contracting parties, the legal form of the company, its name, the subject of its activity, its duration, its capital, the share of contribution of the Egyptian and non Egyptian parties, the means of subscription therein and the partners rights and obligations must be stated in the articles and memoranda of association. And the preliminary contracts and the articles of association of the joint stock companies and the limited partnerships shall be prepared according to the forms of which a decree from the council of ministers shall be promulgated.*

> *The signatures on the companies contract must be authenticated, whatever be their legal form in return of an authentication fee…*
>
> *And the license for the association of companies shall be issued from the competent administrative department, according to the provisions of this law and shall have the right in its benefits. And these companies shall have the legal person from the date of their entry in the commercial register. And the articles of association of the company and its memorandum of association shall be published according to the rules and procedures which the executive statutes of this law shall define.*
>
> *And the above provisions shall apply to each amendment of the company's system.*

[72.2] Article 4 has strict and detailed requirements relating to the revision of the articles and memorandum of the articles and memorandum of association, the corporate activities, its capital, the share and contribution of Egyptian and non-Egyptian parties, the means of subscription, and the authentication of signatures. However, by contrast, Law No 3 of 1997, the law most directly connected with the construction and management of airports, does not contain any explicit requirements relating to the capital of an investor. In fact, Article 1 of Law No 3 of 1997, by providing that airport concessions may be granted to Egyptian or foreign investors "whether natural or juridical persons" suggests there is no mandatory capital requirements.

§73.- [73.1] The issue here was the method of financing of the project. The Claimant considered that the capital requirements were satisfied, at least provisionally, by increasing the authorised capital to £100 million. Whether this capital was subscribed and issued, or finance was arranged from alternative sources, was an issue that might be addressed during the performance of the Concession Contract. By contrast, the Egyptian officials considered this to be an important substantive requirement at the outset.

[73.2] The different perceptions of this issue led to confusion. The Claimant was casual in the presentation of its documentation and in response to questions, and did not distinguish between authorised (and not paid) and issued (paid-up) capital. The Egyptian officials for their part, in an issue of this importance, could have made further independent inquiries. The different importance referred to

above given to the capital requirements of investors in Laws No 3 and 8 of 1997 may have contributed to these distinct perceptions.

[73.3] The Arbitral Tribunal is satisfied that the Arab Republic of Egypt committed an essential mistake in entering into the Concession Contract in that it believed that the registered and paid-up capital of the Claimant was £100 million. Further, it is satisfied that the Claimant could have, and should have, detected this mistake, and that the mistake is of such gravity that had it not been committed the Arab Republic of Egypt would not have entered into the Concession Contract.

[73.4] Article 120 and 121 of the Civil Code provide for essential mistake. These Articles read as follows:

> Art. 120 – A party to a contract may demand the avoidance of the contract if he committed an essential mistake, if the other party committed the same mistake or had knowledge thereof, or could have easily detected the mistake.
>
> Art. 121 – A mistake is an essential mistake when its gravity is of such a degree that if it had not been committed, the party who was mistaken, would not have concluded the contract.
>
> The mistake is deemed to be essential more particularly:
>
> (a) when it has a bearing on the quality of the thing, which the parties have considered essential or which must be deemed essential, taking into consideration the circumstances surrounding the contract and the good faith that should prevail in business relationships.
>
> (b) when it has a bearing on the identity or on one of the qualities of the person with whom the contract is entered into, if this identity or this quality was the principal factor in the conclusion of the contract.

[73.5.] The responsibility for this mistake rests primarily with the Claimant for the ambiguous information it provided in circumstances when it should have realised the importance of the issue of paid up capital to the Egyptian officials. However, there is also some responsibility of the Egyptian officials in failing to clarify the importance of this

> issue or to make independent inquiries. The Arbitral Tribunal assesses the respective responsibility of the Parties as ninety percent with the Claimant and ten percent with the Respondent.
>
> §74.- [74.1] The Arbitral Tribunal therefore declares the Concession Contract is void for mistake. The consequences are described in Articles 138-144 to the Egyptian Civil Code and particularly Article 142 which reads as follows:
>
> > *Art. 142 – When a contract is void or annulled, the parties are reinstated in their position prior to the contract. If such reinstatement is impossible, damages equivalent to the loss may be awarded.*
>
> [74.2] The Arbitral Tribunal notes that the Concession Contract contains express provisions for compensation in the event of cancellation of the Contract by the Republic of Egypt (see Article 19.1.3). However, as the Arbitral Tribunal has found that the Concession Contract is void for mistake it considers that the damages should be calculated in accordance with Article 142 of the Civil Code on the basis of damages in lieu of reinstatement.

E4. Analysis: a basis that was neither pleaded nor argued?

35. As can be seen from section E3 above, the truncated tribunal did not rule on Egypt's claim that it was entitled to avoid the concession contract for fraud. Instead it held that it was sufficient to rule that there had been an "essential mistake". It was on that footing that the truncated tribunal then proceeded to grant damages to Malicorp – but not to Egypt. For this purpose the truncated tribunal relied on a power under art 142 of the Egyptian Civil Code to award damages where a contract is void or annulled, and reinstatement of the parties to their position prior to the contract is impossible.

36. On the face of the award there is no suggestion that Malicorp ever claimed damages under article 142. Nor has Malicorp identified anything in writing which makes such a claim. Nor does the transcript record any indication during the course of the hearing that anyone had in mind an award of damages under that article. As to what Malicorp sought, right up to the time of the award, the truncated tribunal made the position clear in paragraph 64: Malicorp's claim was for compensation only for breaches of the concession contract.

37. Malicorp has relied on a passage in the transcript as indicating that the Chairman was asking Egypt what their view would be if the arbitral tribunal, without seeking to prejudge any issue, were to find that there was no proven evidence of fraud or forgery and that what they simply found instead was that there had been a misrepresentation. I am prepared to accept that this question is similar to asking what the position would

be if there had been an error but no fraud. What it does not show, however, is that Egypt had any notice of a proposal to award damages under article 142.

38. There is also a suggestion by Malicorp that the transcript is unreliable and that they should be permitted to supplement it by relying on a witness statement of Mr Frederic Soliman, a member of Malicorp's legal team at the hearing. In response Egypt has advanced a number of criticisms of the witness statement. In large part, however, I need not examine these criticisms, and I consider it undesirable to do so. For present purposes I can assume that, with an exception identified below, what is said in the witness statement is accurate.

39. Mr Soliman's statement draws attention to an opinion of Mr Yassin dated 12 September 2005. That opinion was relied on by Malicorp in the course of the Cairo arbitration. It discusses entitlement under Egyptian law to annul a contract both for significant error and for fraud. The opinion specifically cites articles 120, 125, 138, 139 and 140 of the Egyptian Civil Code. It does not cite any article subsequent to article 140, and in particular does not cite article 142. There is a suggestion by Mr Soliman that the opinion set out how relevant issues were covered under articles 120 to 142 of the Egyptian Civil Code, but in stating that Mr Yassin's opinion went beyond article 140 Mr Soliman is plainly mistaken.

40. Mr Soliman adds in paragraph 17 of his statement that Malicorp's counsel referred at the hearing to article 141. This takes matters no further. Nowhere in Mr Soliman's statement is there any identification by him of any specific occasion when, during the course of the Cairo arbitration, there was a suggestion that article 142 had any relevance or might give rise to any award of damages against Egypt.

41. In these circumstances I have no doubt whatsoever that the award of damages under article 142 must have been a complete surprise to Egypt. So, too, must have been the basis upon which such an award was made – apportioning to the Republic 10% responsibility for the relevant mistake, and allowing as the major part of the award a substantial sum for loss of profit. It would have been astonishing, if there had been any suggestion that this was in contemplation, that Egypt would fail to protest that the tribunal ought to make a finding on its case on fraud rather than allocate responsibility on the footing of a good faith mistake on the part of Malicorp. It would similarly have been astonishing, if there had been any suggestion that damages in place of reinstatement were contemplated, that Egypt would fail to protest that such damages could not properly incorporate an element for loss of profit. There were undoubtedly strong arguments for Egypt to advance in these respects among others. The notion that, in the absence of any mention of these matters, Egypt could and should have anticipated the basis of proceeding adopted in the Cairo award, is to my mind manifestly repugnant to elementary principles of fairness.

42. The failure of the tribunal to ensure that Egypt had warning of these matters can only constitute a serious breach of natural justice. In so far as I have any discretion to enforce the award despite that breach, I decline to do so: the breach is too serious, and the consequences for Egypt are too grave. It is suggested that the hearing be reconvened so that Mr Soliman can give evidence and be cross-examined. I decline to take this course: for the reasons given above, Mr Soliman's statement cannot assist Malicorp.

F. Egypt's other grounds for setting aside

43. My conclusions in each of sections D and E above have the consequence that it is not necessary to consider either Egypt's alternative case based on issue estoppel in relation to inability to present its case, or Egypt's third and fourth grounds for resisting enforcement. In my view the issues which would or might fall for consideration on those matters are not necessarily straightforward, and are best left to be dealt with in a context where they would be determinative of the outcome.

G. Conclusion

44. For the reasons given above I grant Egypt's application to set aside the order for enforcement of the Cairo award.