

HELNAN INTERNATIONAL HOTELS A/S v. ARAB REPUBLIC OF EGYPT

(ICSID Case No. ARB/05/19)

DECISION ON

Claimant's Request for Provisional Measures

By the Arbitral Tribunal composed of:

Me. Yves DERAINS (President)
Professor Rudolf DOLZER (Arbitrator)
Mr. Michael LEE (Arbitrator)

Secretary of the Tribunal:
Mrs. Gabriela Alvarez-Avila

May 17, 2006

I. Legal Background

1. Helnan International Hotels A/S (hereinafter "Helnan") and the Egyptian Hotels Company, which became the Egyptian Organisation for Tourism and Hotels (hereinafter "EGOTH"), entered into a Management and Operation Contract on September 8, 1986 (hereinafter "the Contract") whereby Helnan was entrusted with the management of the Shepherd Hotel in Cairo, owned by EGOTH. The Contract was originally to remain in force for a period of 26 years. On October 15, 2002, an Amendment to this Contract was concluded in regards to the privatisation program of the State of Egypt and its consequences.
2. On June 24, 1999, a Bilateral Investment Treaty (hereinafter "the Treaty") was concluded between the Government of the Arab Republic of Egypt (hereinafter "Egypt") and the Kingdom of Denmark as to the promotion and reciprocal protection of investments.

II. Procedure

3. On December 30, 2004, an Award was rendered by the Cairo Regional Center for International Commercial Arbitration in an arbitration procedure filed by EGOTH against Helnan on the ground that Helnan had breached its contractual obligations under the Contract. In its Award, the Arbitral Tribunal ordered the Termination of the Contract as well as the handing back of the Shepherd Hotel by Helnan to EGOTH. Egyptian courts subsequently confirmed the Arbitral Tribunal's Award.
4. On March 8, 2005, on the basis of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereinafter "the Convention") and the Treaty, Helnan filed a Request for Arbitration against Egypt before the International Centre for Settlement of Investment Disputes ("the Centre") asserting that Egypt had violated Article 2, Article 3 and Article 5 of the Treaty which provides investments in another contracting party with "*full protection and security*", "*fair and equitable treatment*" and prohibits expropriation "*except for expropriations made in the public interest (...) against prompt, adequate and effective compensation*".

In its Request for Arbitration, Helnan requested the following:

"A. Provisional Measures

71. *Claimant, Helnan, respectfully requests that, upon constitution, the Arbitral Tribunal provide urgent interim relief:*
 - (i) *recommending that Egypt refrain from taking any action (through EGOTH or any other instrumentalities) to evict Helnan from the Shepherd Hotel on or after 30 March 2005; and*
 - (ii) *recommending that Egypt (through EGOTH or any instrumentalities) ceases immediately all procedures to sell the Shepherd Hotel to any third party, on terms that directly or indirectly interfere with Helnan's management and operation of the Shepherd Hotel, until the issuance of the final award in this arbitration.*

B. Final Award

72. *In the event that the urgent interim relief requested above is granted, and the Shepherd Hotel is not confiscated, Claimant shall seek an award on the merits:*
- (i) declaring that Helnan should be free to continue to enjoy its management rights to the Shepherd Hotel under the Management Contract until its expiry in December 2012 with similar co-operation and investment from EGOTH as accorded to other foreign hotel chains;*
 - (ii) ordering the Respondent to pay to Helnan damages, in an amount to be determined, as compensation for its share of the profits lost as a result of the downgrade of the Shepherd Hotel;*
 - (iii) ordering the Respondent to pay damages, in an amount to be determined, in compensation for reputational damages suffered by Helnan; and*
 - (iv) ordering the Respondent to pay interest on the amounts awarded in (ii) and (iii) above at an appropriate rate.*
73. *In the alternative, in the event that the Shepherd Hotel is confiscated from Helnan prior to the outcome of this arbitration, Helnan respectfully requests that the Arbitral Tribunal enter an award:*
- (i) ordering the Respondent to pay (a) damages in the amount of €10 million, subject to further revision, to indemnify Helnan for loss of its share in the total operating profits of the Shepherd Hotel during the remaining period of the Management Contract; or, in the alternative (b) damages in an amount to be quantified in respect of Helnan's lost investment in the Shepherd Hotel;*
 - (ii) ordering the Respondent to pay damages in the amount of €15 million, subject to further revision, in compensation for reputational damages suffered by Helnan;*
 - (iii) ordering Respondent to pay €15 million, subject to further revision, representing the balance in the accounts owing to Helnan for servicing the head office and financing the development and renovation works and the debt written off by Helnan on 15 October 2002;*
 - (iv) ordering the Respondent to pay all of Helnan's costs associated with the defence of the arbitration proceedings taken against it by EGOTH in Egypt, in the amount of approximately €150 thousand;*
 - (v) ordering the Respondent to pay all of Helnan's costs associated with this arbitration, including the arbitrator's fees and administrative costs fixed by ICSID, the expenses of the arbitration, any expert's fees and expenses, and the legal costs (including attorney's fees) incurred by the parties, in an amount to be quantified;*
 - (vi) ordering the Respondent to pay interest on the amounts awarded in (i) to (v) above at an appropriate rate; and*

- (vii) *granting Helnan any other relief that the Arbitrator sees fit.*"
5. On February 10, 2006, an Arbitral Tribunal composed of Professor Rudolf DOLZER, Mr. Michael LEE and Me. Yves DERAINS, President, was constituted in accordance with Rule 6 (1) of the ICSID Arbitration Rules (hereinafter "the Arbitration Rules").
 6. On February 22, 2006, Helnan filed a Request for Provisional Measures, pursuant to Article 47 of the ICSID Convention and Rule 39 (1) of the Arbitration Rules.
 7. In a letter of February 24, 2006, in accordance with Rule 39 (4) of the Arbitration Rules, the Arbitral Tribunal requested Egypt to file its comments on Provisional Measures by no later than March 6, 2006. Furthermore, the Arbitral Tribunal stated that it "*would appreciate it if the parties can abstain from taking any steps that might aggravate the dispute until the Tribunal has had the opportunity to listen to both parties and decide on the aforementioned request*".
 8. On March 6, 2006, Egypt answered to the Request for Provisional Measures.
 9. On March 9, 2006, Helnan confirmed its position of February 22, 2006 and the need for the Arbitral Tribunal to recommend Provisional Measures as a matter of emergency.
 10. By letter of March 14, 2006, the Arbitral Tribunal informed the parties that:
 - "1. *The Tribunal has carefully read the Claimant's request of February 22, 2006, as well as Respondent's letter of March 6, 2006 and Claimant's letter of March 9, 2006.*
 2. *The Tribunal considers that for it to make a decision on the Claimant's request, it would need to hear further from the parties on the issues raised in the above-mentioned correspondence.*
 3. *Accordingly, the Tribunal proposes to hear oral arguments from the parties at the first session of the Tribunal on April 14, 2006 and invites the parties to elaborate, in particular, on the legal status of EGOth and on the arbitration proceeding before the Cairo Regional Center.*
 4. *In this respect, it would be useful to receive from the parties the text of the arbitral award rendered on December 30, 2004 before the Cairo Regional Center as well as the court decisions relating to the arbitral proceedings.*
 5. *In the meantime, the Tribunal reiterates its invitation to the parties of abstaining from taking any steps that might aggravate this dispute until the Tribunal has had the opportunity to listen to both parties and decide on the aforementioned request.*"
 11. On March 23, 2006, Helnan was evicted from the Shepheard Hotel following the Award of December 30, 2004, of the Cairo Regional Center for International Commercial Arbitration.
 12. On April 4, 2006, Helnan filed an Amended Request for Provisional Measures.

13. On April 7, 2006, the Arbitral Tribunal requested Egypt to provide its comments on the Amended Provisional Measures by April 12, 6.00 pm (Paris time).
14. On April 14, 2006, the First Session was held in Paris. The parties presented their respective oral arguments as to the Request for Provisional Measures. Such presentation was followed by rebuttals from both parties as well as by questions from the Arbitral Tribunal.

III. The position of the Parties

15. In its Request for Provisional Measures dated February 22, 2006, Helnan contended that its rights needed to be preserved to the extent that they were put in danger by the threat of its eviction by Egypt from the Shepherd Hotel.

- Firstly, it purported that not only proprietary rights but also contractual rights could be protected.
- Secondly, Helnan explained the role and influence of Egypt in the Termination of the Contract and emphasized the will of the State of Egypt to evict Helnan from the Shepherd Hotel.

16. Therefore, Helnan requested the following:

"44. *Claimant requests the Tribunal recommend the following, for the necessary preservation and protection of Helnan's rights:*

- (i) *Respondent desist from taking (through EGOTH or any other instrumentality) any action to evict Helnan from the Shepherd Hotel, or otherwise interfere with Helnan's continued right to manage and operate the Shepherd Hotel pending the issuance of a final award in this arbitration;*
- (ii) *Respondent refrain from all procedures (through EGOTH or any other instrumentality) to sell the Shepherd Hotel to any third party, on terms that interfere with Helnan's management and operation of the Shepherd Hotel until the issuance of the final award in this arbitration;*
- (iii) *Respondent refrain from any trespass (through EGOTH or any other instrumentality) of the Shepherd Hotel;*
- (iv) *Respondent refrain from any interference (through EGOTH or any other instrumentality) with Claimant's access to the Shepherd Hotel, for the purpose of its operation and management; and*
- (v) *Respondent take no other action of any kind (through EGOTH or any other instrumentality) that might aggravate or further extend the dispute submitted to the Tribunal.*

45. *Claimant further requests that:*

- (i) *The Tribunal grant any further relief it deems appropriate to preserve Claimant's rights; and*
 - (ii) *Respondent pay the full costs of this application, including legal costs and expenses.*
46. *Claimant recognizes that the Tribunal, in recommending provisional measures, is not bound by Claimant's specific requests, and may recommend measures other than those set out above.*
 47. *Claimant respectfully request that an urgent session of the Tribunal be convened within the next seven days in order to give consideration to Claimant's requests.*
 48. *Helnan remains available to the Tribunal to agree the procedural methodology for the proceeding relating to this Request."*
17. Egypt answered to the Request for Provisional Measures by a letter dated March 6, 2006 and stated that:
 - Egypt is not a party in the dispute between Helnan and EGOTH regarding the Hotel Management Contract. It recalled the different steps of the procedure before the Egyptian Courts and emphasized that Egypt never participated to these proceedings.
 - EGOTH is not an emanation of the Egyptian government. EGOTH is "*as an independent separate legal entity (...) simply exercising the rights conferred by the code of Procedures to all persons subject to the Egyptian private law legal system. In other words, there had been no action undertaken by whatever governmental authority to accord any special treatment to EGOTH or affecting the rights of Helnan in whatever manner*".
 - Egypt explained that it would raise an objection to the Tribunal's jurisdiction at the First Session of April 14, 2006, as it is obvious in its opinion that no investment's dispute exists.
 - Lastly, it concluded that "*it is inconceivable to order any Kind of preliminary measures prior to establishing that the Tribunal effectively has jurisdiction*".
 18. Subsequently to the taking over of the Shepherd Hotel, Helnan filed an Amended Request for Provisional Measures dated April 4, 2006. It asserted that Egypt had violated Helnan's rights protected under the Treaty and stressed again the relevant role of Egypt in the eviction of Helnan from the Shepherd Hotel.
 19. Therefore, in order not to have its rights eroded, Helnan requested the following:
 - "22. *Claimant requests the Tribunal recommend the following, for the necessary preservation and protection of Helnan's rights:*

- (i) Respondent reinstate Helnan as manager and operator of the Shepheard Hotel forthwith;
 - (ii) Respondent desist from taking (through EGOTH or any other instrumentality) any action to further interfere with Helnan's continued right to manage and operate the Shepheard Hotel pending issuance of a final award in this arbitration;
 - (iii) Respondent refrain from all procedures (through EGOTH or any other instrumentality) to sell the Shepheard Hotel to any third party, on terms that interfere with Helnan's rights to manage and operate the Shepheard Hotel, until the issuance of the final award in this arbitration; and
 - (iv) Respondent take no other action of any kind (through EGOTH or any instrumentality) that might aggravate or further extend the dispute submitted to the Tribunal.
23. Claimant further request that:
- (i) The Tribunal grant any further relief it deems appropriate to preserve Claimant's rights, and
 - (ii) Respondent pay the full costs of this application, including legal costs and expenses.
24. Claimant recognises that the Tribunal, in recommending provisional measures, is not bound by Claimant's specific requests and may recommend measures other than set out above.
25. Claimant further reserves the right to seek additional relief, in an award by the Tribunal on the merits, in the form of damages from Egypt, in an amount to be determined, as compensation for the harm caused to Helnan's other business operations in Egypt.
26. Claimant respectfully requests that the Tribunal address Claimant's Amended Request at the hearing scheduled for 14 April 2006."
20. On the Session of April 14, 2006, the parties expressed opposite views as to the Arbitral Tribunal's power to recommend Preliminary Measures prior to the establishment of its jurisdiction. Egypt contested Helnan's assertion that the Arbitral Tribunal has no need to wait for the jurisdiction's challenge to be decided upon before recommending Preliminary Measures.

IV. The Arbitral Tribunal's findings

21. On the power of the Arbitral Tribunal to examine this Request:
22. Egypt contents that the Arbitral Tribunal is unable to recommend Preliminary Measures until it has found that it has jurisdiction. This is objected to by Helnan which submits that a Request for Preliminary Measures must be treated with priority.

23. There is no dispute among the Parties as to the Arbitral Tribunal's jurisdiction to recommend Provisional Measures on the basis of Article 47 of the Convention that states:

"Except as the parties otherwise agree, the Tribunal may, if it considers the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party".

It appears from this article that Arbitral Tribunals have discretionary powers to determine whether the request for Provisional Measures is appropriate on the ground of the circumstances of the case and have discretionary powers to grant any measure they deem useful to protect the rights of any of the parties.

The parties disagree as to the possibility for an Arbitral Tribunal to make use of this power while its jurisdiction is under discussion, as it is the case in this Arbitration where Egypt is challenging the jurisdiction of the Arbitral Tribunal.

24. However, Rule 39 (1) of the Arbitration Rules states that:

"At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal (...)"

and Rule 39 (2) of the Arbitration Rules adds that *"the Tribunal shall give priority to the consideration of a request (...)"*.

25. As a result, a party's request for Provisional Measures under Rule 39 (1) may be filed *"at any time"*, even before the other party has been able to express its position as to the Arbitral Tribunal's jurisdiction or pending a decision of the Arbitral Tribunal in this respect in case its jurisdiction is challenged. Since the Arbitral Tribunal has to give priority to the consideration of a request for Provisional Measures, it has not only the power but also the duty to issue its decision on such request prior to making a ruling as to its own jurisdiction when it is challenged by one of the parties.

26. This finding is implicitly confirmed in the decision of the Arbitral Tribunal dated July 2, 1972 in the Holiday Inns S.A. and others v. Morocco's case which dealt with the link between the objection on jurisdiction asserted by a party and the ability of an Arbitral Tribunal to recommend Provisional Measures notwithstanding this objection. Indeed, the Arbitral Tribunal pointed out that:

"The Tribunal therefore considers that it has jurisdiction to recommend provisional measures according to the terms of Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the Parties still having the right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal on any other aspect of the dispute".

27. On the basis of the above, the Arbitral Tribunal considers that jurisdiction's objections are not an obstacle to the recommendation by the Arbitral Tribunal of Provisional Measures and holds that pursuant to Article 47 of the Convention and Rule 39 (1) of the Arbitration Rules it has jurisdiction to examine and decide immediately the Provisional Measures sought.

28. On the Provisional Measures requested:
29. Subsequently to the taking over of the Shepherd Hotel, Helnan requested from the Arbitral Tribunal a recommendation that Helnan be reinstated in the Shepherd Hotel and on a subsidiary basis that Egypt be restrained from selling the Hotel to a third party or from taking any step that would aggravate the dispute.
30. Helnan contents that three categories of rights have to be preserved:
- significant investment rights such as Helnan's deprivation of its business at the Shepherd Hotel;
 - rights under the Treaty and the Convention; and
 - rights of non-aggravation of the dispute.
- Moreover, Helnan refers to other investments rights in Egypt that need to be protected, its reputation and the potential sale of the Shepherd Hotel.
31. After deliberation, the Arbitral Tribunal finds that it is not in a position to grant the Provisional Measures requested by Helnan.
32. First, it is only in exceptional circumstances that an Arbitral Tribunal, as any other jurisdiction, should grant provisional measures which amount in practice to the final relief sought by a party. In this case, the Provisional Measure requested by Helnan and the final relief it seeks, if not strictly identical, are the same to a large extent. In such circumstances, the requirement that the rights to be protected appear to exist (*fumus bonus juris*), which must be present in order for Provisional Measures to be granted, is particularly strong since the Provisional Measures requested by Helnan would put it to a large extent in the situation it would be in case it succeeds on the merits.
33. In this case, most of the "*property rights and contractual rights*" which, according to Helnan, deserve protection under the Treaty and the Convention, mainly derive from the Contract. However, the Award rendered on December 30, 2004 by the Cairo Regional Center for International Commercial Arbitration and upheld by the Egyptian jurisdictions decided that the Contract was terminated and, thus, that Helnan could not rely on it. Therefore, *prima facie*, most of the rights invoked by Helnan may have ceased to exist and the Arbitral Tribunal needs to enter into the merits of the case in order to find out whether in spite of such appearance, Helnan's alleged rights still exist.
34. Second, Helnan claims that in order to rectify its damages and especially the harm on its reputation, the sole solution would be the restatement of Helnan in the Shepherd Hotel. The Arbitral Tribunal is not convinced at this stage that such is the case and that monetary compensation, if deserved, would not be appropriate. This applies as well to damages on reputation which constitute a legitimate category of damages. Should damages to Helnan's reputation be established, the Arbitral Tribunal considers that monetary compensation would be an adequate remedy. But this question, if relevant, is to be examined with the merits.

35. Thus, the Arbitral Tribunal must decline to make the recommendations sought.
36. Helnan requested that the legal costs and expenses of this application be incurred by Egypt. This question will be examined in the Final Award.

ON THE BASIS OF THIS ABOVE
THE ARBITRAL TRIBUNAL

- 1) Dismisses Helnan's Request for Provisional Measures;
- 2) Declares that the costs of this phase of the proceedings will be allocated in its Final Award.

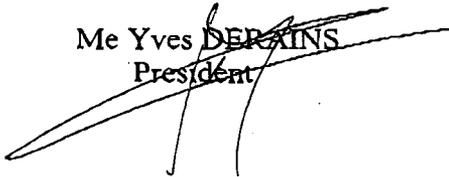
Place of Arbitration: Washington DC



Professor Rudolf DOLZER
Arbitrator



Mr. Michael LEE
Arbitrator



Me Yves DERAINS
President