

THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL
ARBITRATION

CRCICA Arbitration Case 382/2004

MALICORP LTD

Claimant

VS.

THE GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT

AND

THE EGYPTIAN HOLDING COMPANY FOR AVIATION AND THE
EGYPTIAN AIRPORT COMPANY

Respondents

AWARD

Members of the Tribunal:

Prof. Bernardo M. Cremades, President
Dr. Abdel Hamid El Ahdab, Arbitrator
Dr. Hatem L. Gabr, Arbitrator



This is the Final Award in a reference to arbitration pursuant to the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration («*CRCICA Rules*»).

I. PARTIES

§1.- The Claimant is: **MALICORP LTD**, a company having its head office in 3 B Aldenham Grove, Radlett, Hertfordshire, WD7 7BW United Kingdom, constituted under the laws of the United Kingdom (hereinafter «*Malicorp*» or «*Claimant*»). The Claimant is represented in these proceedings by:

Mr. Mohamad Amin Daouk
Sanayeh - Facing Radio Lebanon
Al Salem Building - 4th Floor
1105-2130
P.O. Box 14-6535
Beirut
Lebanon

Tel.: (00 961) 1 346080 / (00 961) 1 738245
Fax: (00 961) 1 346812
E-mail: daouklawfirm@terra.net.lb

§2.- The Respondents are:

(i) The Government of THE ARAB REPUBLIC OF EGYPT, and specifically,

The Minister of Transportation
Ministry of Transportation
105 Kasr Al Aini Street
Cairo
Egypt

Tel.: (00 202) 7957149 / (00 202) 7955566
Fax: (00 202) 7955564

The Minister of Civil Aviation
Ministry of Civil Aviation (Mr. Ahmad Shafiq)
Al Ourabat Street, Airport Road
Masr Al Jadidat
Egypt
Fax: (00 202) 2679470

(ii) The EGYPTIAN HOLDING COMPANY FOR AVIATION and THE EGYPTIAN AIRPORT COMPANY, as alleged successors to the Egyptian Civil Aviation Authority, and with the following addresses:

The Egyptian Holding Company for Aviation
Chairman of the Board (General Ibrahim El Manaa)
Al Ouroukat Street
Airport Road
Masr Al Jadidat
Egypt

Tel.: (00 202) 6350933 / (00 202) 6352442
Fax: (00 202) 6350933

The Egyptian Airports Company
Chairman of the Board (General Mohamad Fathallah Rifaat)
Al Ouroukat Street
Airport Road
Masr Al Jadidat
Egypt

Tel.: (00 202) 2739417
Fax: (00 202) 2739416

(i) The Arab Republic of Egypt are represented by:

Mr. Osama A. Abul-kheir (Prime Vice President of State Lawsuits Authority) and
Mr Assem M. Harb (State Counsel, Department of Foreign Disputes),
Arab Republic of Egypt
State Lawsuits Authority
Mogammaa Building
Tahrir Square
Cairo
Egypt

Tel.: (00 202) 7944595 / (00 202) 3036090
Fax: (00 202) 7951729 / (00 202) 3027860

(ii) The Egyptian Holding Company for Aviation and the Egyptian Airport Company are represented by:

Mr. Mahmoud Mohamed Fahmy
3, Abu El Fedaa St.
Abu El Fedaa Tower, 14th Floor

Zamalek
Cairo
Egypt
Tel.: (00 202) 7375010 / (00 202) 7375020
Fax: (00 202) 7375030
E-mail: falmylaw@gega.net

The Arab Republic of Egypt and the Egyptian Holding Company for Aviation and the Egyptian Airport Company are hereafter collectively referred to as the «*Respondents*».

§3.- The Claimant and the Respondents are jointly referred to as the «*Parties*»

II. REFERENCE TO ARBITRATION

§4.- This arbitration arises from a contract between the Claimant and the Respondents (described as 'The Government of the Arab Republic of Egypt, represented by the Egyptian Civil Aviation Authority) entitled 'Concession Contract for the building, operation and transfer of Ras Sudr Airport in accordance with the B.O.T. system' (hereafter the «*Concession Contract*» or «*Contract*»). The English text of the Contract was undated, although it was alleged by the Claimant and not denied by the Respondents that the Contract was signed on November 4, 2000.

§5.- The Contract was executed in English and Arabic texts. Article 22.8 of the Contract provided for the relationship between the two official texts as follows:

«22.8 Language

The, shall at all times exist two official versions of this Concession Contract in the English and Arabic languages respectively. In the event of any dispute as to the meaning or import of any of the terms of this Concession Contract, the Arabic language version shall prevail. It should be identical to the English version in meaning and construaance.»

§5.- Articles 21.3 and 21.4 of the Concession Contract provided for arbitration of disputes in the following terms:

«21.3 Resolution of Disputes

21.3.1 If a dispute of any kind whatsoever arises between the Concessor on the one hand and the Concessionaire on the other in connection with or arising out of the Concession Contract, including, but not limited to, any dispute as to any opinion, ins ruction, determination, certification or valuation of the Expert or the Expert [sic],

then either Party may send a notice to the other Party giving details of the dispute and requesting an amicable settlement thereof.

21.3.2 If the dispute is not resolved amicably within 35 (thirty five) Days of the notice referred to in Clause 21.3.1 or such shorter period as the Parties may agree, the Concessor and the Concessionaire shall meet and endeavour to resolve the dispute. The joint and unanimous written decision of such chief executive officers of the Parties shall be final and binding upon the Parties but if they do not meet or are unable to agree within 35 (thirty five) Days of the reference to them then the matter shall be referred to arbitration pursuant to Clause 21.3.3.

21.3.3 Any such dispute which cannot be settled amicably pursuant to Clause 21.3.1 and 21.3.2 of this Concession Contract within 70 (seventy) Days after receipt by one Party of the notice referred to in Clause 21.3.1, or within such shorter period as the Parties may agree, shall be settled by International Commercial Arbitration Rules in force on the date of this Concession Contract for a decision which shall be and binding [sic]. Such arbitration shall be conducted in Cairo Regional Arbitration Centre and arbitration law is the Egyptian Law.

21.3.4 Arbitration shall be conducted in the English language before a panel of three arbitrators. Each of the Parties shall select one arbitrator within 30 (thirty) Days after commencement of the arbitration and, within such 30 (thirty) Day period each Party shall notify the other Party in writing of the identity of the arbitrator so selected. Should either Party not appoint its arbitrator in this period, the other Party may so notify the appointing authority and request that the appointing authority appoint such arbitrator. The arbitrators selected in terms of this clause shall select in consultation with both Parties, the third arbitrator who shall act as chair of the arbitral panel. If the arbitrators do not agree on the selection of the chairperson of the arbitral panel within 30 (thirty) Days from the date of appointment of the second of the two arbitrators, then upon written request of either Party, the president of the arbitral panel shall be selected by the appointing authority. The third arbitrator shall not be a national of either Parties, nor of the domicile of any Shareholder holding more than 10% (ten percent) of the Concessionaire.

21.3.5 Notwithstanding any contrary provisions in this Concession Contract, any Party shall have the right to approach any court having appropriate jurisdiction for urgent or interim relief.

21.3.6 Any Party shall be entitled to apply for any arbitration award pursuant to this Concession Contract to be made an order of the Court.

21.4 Obligations During Arbitration

Pending any attempt at amicable settlement or any award of an arbitral panel, the Concessionaire shall, and shall cause the Contractor and Operator to, continue to perform its obligations hereunder unless otherwise instructed in writing by the Concessor. Pending any such settlement or award, the Concessor shall continue to perform its obligations under the Concession Contract.»

There are some differences between the official Arabic and English texts of Article 21.3. However, with the exception of an issue relating to the language of the arbitration (discussed below) there has been no dispute between the Parties as to the meaning and import of any of the terms of Article 21.3.

§7. This arbitration was commenced by the submission by the Claimant of a Request for Arbitration dated April 27, 2004 to the Cairo Regional Centre for International Commercial Arbitration on April 28, 2004. In the Request for Arbitration the Claimant appointed as an arbitrator:

Dr. Abdel Hamid El Ahdab
Attorney at law
Hazmieh, Fiyadieh -after Presidential Palace junction
Opposite Grundig -Gardenia Bldg.
Beirut-Lebanon
P.O. Box 443 Hazmieh-Lebanon

Tel.: (00 961) (05) 951 827
Fax: (00 961) (05) 951 973
Nationality: French and Lebanese.

The Respondents nominated in writing (specifically in letters dated May 17, 2004 from the Egyptian Holding Company for Airports and Air Navigation, a letter of May 31, 2004 from the State Lawsuits Authority, and letters from the Minister of Civil Aviation and the Egyptian Holding Company for Civil Aviation dated June 22, 2004,) as an arbitrator:

Dr. Hatem Ali Labib Gabr
16, Maamal El Sokkar St.,
Garden City
Cairo 11451
Egypt
Tel.: (00 202) 7954795 / (00 202) 7959228 / (00 202) 7952096
Fax: (00 202) 7958521
Nationality: Egyptian

Pursuant to Article 21.3 of the Contract and at a meeting in Cairo on May 31, 2004, Dr. Abdel Hamid El Ahdab and Dr. Hatem L. Gabr nominated in writing to preside the Arbitral Tribunal:

Professor Bernardo M. Cremades
B Cremades y Asociados
C/ Goya, nº 18, 2ª planta
28001 Madrid
Spain

Tel.: (00 34) 91 423 72 00



Fax: (00 34) 91 576 97 94
Nationality: Spanish

The members of the Arbitral Tribunal duly accepted their appointments in writing.

III. APPLICABLE LAW AND PLACE OF ARBITRATION

§8. Article 21.1 of the Concession Contract provides:

«21.1 Governing Law

This Concession Contract is deemed to be a civil law contract and governed by the civil laws of the Republic of Egypt.»

Article 2.3.3 provides that the applicable rules are CRCICA Rules 'in force on the date of this Concession Contract', and 'arbitration law is the Egyptian law'.

The arbitration legislation presently in force in Egypt is Law N° 27/1994 promulgating the Law concerning Arbitration in Civil and Commercial Matters (as subsequently amended) (hereafter «*Arbitration Law N° 27*»). The application of Arbitration Law N° 27 is defined in Article 1 (as amended by Law N° 9 of 1997 promulgated on May 19, 1997 and published on May 15, 1997) as follows:

«Article (1)

(As amended by Law No. 9 of 1997 promulgating on 19 May 1997 and published on 15 May 1997, adding a second paragraph to Article 1):

Without prejudice to the provisions of international conventions in force in the Arab Republic of Egypt, the provisions of the present Law shall apply to all arbitration between public law or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such arbitrations are conducted in Egypt or when the parties to an international commercial arbitration conducted abroad agree to subject it to the provisions of this Law.

In regard to administrative contract disputes, the arbitration agreement shall have the approval of the concerned minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall [be] authorized therefore.»

Article 9(1) of Arbitration Law N° 27 of 1994 states that if the parties «agree to apply the law of a specific state, then the substantive rules of that law, not those governing conflict of law, shall be followed, unless the parties agree otherwise», and that the tribunal «must, when adjudicating the merits of the dispute, take into account the conditions of the contract, subject of the dispute and the usages of commerce in similar transactions». Article 33 of the CRCICA Rules requires the

Arbitral Tribunal to 'apply the law designated by the parties as applicable to the substance of the dispute', and Article 33(3) states that the Arbitral Tribunal shall also *«decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.»*

§9.- By virtue of the agreement of the parties, the place of arbitration is Cairo, Egypt.

IV. LANGUAGE OF THE ARBITRATION

§10.- The English text of Article 21.3.4 states that the *«arbitration shall be conducted in the English language.»*

The Claimant in its Request for Arbitration (paragraph 35) stated that *«The language of this arbitration, as determined by the arbitration clause, is English.»* One of the counsel for the Respondents submitted on June 9, 2005 that Arabic was the language of the arbitration, referring to difference between the English text and the Arabic text of Article 21.3 with the Arabic text being silent on the language of the arbitration.

By letter dated June 14, 2005 the Arbitral Tribunal decided that the Respondents had waived the right to argue that English was not the language of the arbitration, for the reasons set out in that letter.

Accordingly, the language of the arbitration, by agreement of the Parties, is English.

V. PROCEDURAL HISTORY

§ 1.- This arbitration was commenced by the submission of the Request for Arbitration to the Cairo Regional Centre for International Commercial Arbitration on April 28, 2004. The Arbitral Tribunal was constituted in the manner already described.

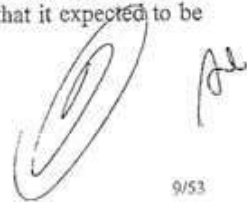
§12.- The first meeting of the Arbitral Tribunal with the Parties was held in El Cairo on December 19, 2004. As a result of this meeting and with the consent of the Parties, the Arbitral Tribunal issued its Procedural Order N° 1 (dated December 19, 2004 and corrected February 3, 2005) establishing a procedural timetable for the presentation of pleadings and supporting evidence, and dates for hearing of September 25, 26 and 27, 2005. Procedural Order N° 1 also recorded the

agreement that the period of the arbitration would be one year commencing on December 19, 2004, and that the Arbitral Tribunal would be able in its discretion to extend this period for such further time as it deemed appropriate. Finally, Procedural Order N° 1 recorded that a request for suspension of the arbitral proceedings for the reasons mentioned in the letter from the Office of the Attorney-General dated December 15, 2004 had been presented to the Arbitral Tribunal, and the Arbitral Tribunal had decided that it was not appropriate to suspend the arbitration proceedings.

§ 4.- The Parties presented their pleadings and supporting evidence to the Arbitral Tribunal in accordance with Procedural Order N° 1 as amended by the Arbitral Tribunal from time to time on the basis of applications and submissions of the Parties. As a result of various applications for extensions of the procedural timetable culminating in an application by the Claimant for rescheduling the hearing date, the Arbitral Tribunal on June 3, 2005 rescheduled the hearing for November 15, 16 and 17, 2005, and so advised the Parties.

§ 4.- By letter dated August 4, 2005 the Claimant complained of the intimidation of its witnesses and sought an order that this conduct be prohibited, and also sought a change of venue for the hearing to Paris or some other place than Cairo. The Respondents rejected the allegations of intimidation and opposed any change of venue. The Respondents also sought a suspension of the arbitral proceedings, on the basis of Article 46 of Arbitration Law N° 27 and certain criminal proceedings commenced in the Court of Felonies in Cairo involving persons associated with the Claimant and the Concession Contract. The Arbitral Tribunal issued decisions on September 19, 2005 that: (i) the Respondents' application for suspension of the arbitral proceedings was denied (by a majority), but that the Tribunal would keep the matter under review; (ii) the Claimant's application for orders relating to intimidation and the place of hearing were denied; (iii) the hearing in Cairo on 15, 16 and 17 November, 2005, and the timetable then in force were confirmed. Dr. Hatem Gabr issued a dissenting opinion dated September 28, 2005 in respect of the Respondents' application for the suspension of the arbitral proceedings.

§ 5.- By Procedural Order N° 2 dated October 31, 2005 the Arbitral Tribunal confirmed the date, time and place of the hearing, and required the parties to submit a signed statement of the evidence of each witness to be relied upon at the hearing. The Arbitral Tribunal also advised the Parties at this time of the proposed procedure for the hearing, and certain issues that it expected to be addressed by counsel at the hearing.



In accordance with the procedural timetable established in Procedural Order N° 1 (as amended by the Arbitral Tribunal) and Procedural Order N° 2 the Parties submitted the following pleadings, evidence and witnesses statements:

1. The Claimant's Request for Arbitration, with exhibits C1 to C10. (received by the Centre on April 28, 2004);
2. The Claimant's Memorial of Claim dated February 19, 2005, with exhibits C1 to C68;
3. The Claimant's PriceWaterhouseCoopers expert report dated April 3, 2005.
4. The Defence to Claim along with annexes E1 to E22 of the Arab Republic of Egypt (on behalf of the Ministries of Civil Aviation and Transportation) dated May 21, 2005 (with translations of various exhibits provided later).
5. The English and Arabic versions of the Memorandum of Defence to Claim containing exhibits R1 to R55 of the Egyptian Holding Company for Aviation and the Egyptian Airports Company dated May 21, 2005.
6. The Claimant's Rejoinder on the Claim with exhibits C69 to C133 dated July 26, 2005.
7. The Rejoinder of the Arab Republic of Egypt (on behalf of the Ministries of Civil Aviation and Transportation) dated September 21, 2005 (along with an English translation of annexes E10 and E12).
8. The Rejoinder in Rebuttal of the Claimant's Rejoinder on the Claim of the Egyptian Holding Company for Aviation and the Egyptian Airports Company dated September 21, 2005, together with exhibits R56 to R93.
9. Witness statements signed by Engineer Nagui Samuel (dated November 15, 2005), General Pilot Mamdouh Heshmat (dated November 12, 2005), Charles Leonidas Panayides (dated November 9, 2005), Trond Nordeng (dated November 13, 2005), Paul Towey (dated November 13, 2005) and a KPMG Expert Report (dated November 12, 2005), submitted by the Claimant and the Respondents.
10. The Claimant, the Arab Republic of Egypt as well as the the Egyptian Holding Company for Aviation and the Egyptian Airports Company all submitted Post-Hearing Submissions dated February 12, 2006. Claimant attached Exhibits C134 to C174 to its submission, and The Egyptian Holding Company for Aviation and the Egyptian Airports Company submitted Exhibits R-94 to R117;
11. The Claimant, the Arab Republic of Egypt as well as the the Egyptian Holding Company for Aviation and the Egyptian Airports Company all submitted Post-Hearing replies. The Claimant submitted Exhibits C174-

C175 with its reply, and the Egyptian Holding Company for Aviation and the Egyptian Airports Company submitted Exhibits R-118-R-139 with its reply.

In response to the different positions of the Parties on the appearance of witnesses by video-conference, the President of the Arbitral Tribunal by letter dated November 7, 2005 confirmed that justification had been shown to accept the evidence of three witnesses by video-conference, and that this would not affect the ability of the Respondents to fully present their case, particularly as there would be the opportunity to cross-examine these witnesses via video-conference.

§16.- The hearing was held in El Cairo on November 15, 16 and 17, 2005. Mr. Mohamed Amin Daouk, Mrs. Nadine Kaissi-Tayara, Mr. Bassem Daouk and Mr. Frédéric Soliman appeared on behalf of the Claimant. Mr. Osama A. Mahmoud Abul-Kheir and Mr. Ahmed Saad Mahmoud of the State Lawsuits Authority appeared on behalf of the Minister of Transportation and the Minister of Civil Aviation. Counsel Mahmoud Fahmy, Dr. Karim Hafez, Mr. Nabil Kenawi and Ms. Fatma Ibrahim appeared on behalf of the Egyptian Holding Company for Aviation and the Egyptian Airports Company.

At the hearing the Claimant called four witnesses, being Mr. Paul Towey, Mr. Trond Nordeng, Dr. Charles Panayides and Mrs. Ghada Ezzat El-Feky and the Respondents called three witnesses, namely Mr. Mamdouh Heshmat, Engineer Youssef Samuel and Mrs. Niveen Shahine. The Claimant's first three witnesses gave evidence by videoconference. The witnesses were all examined and cross-examined by counsel. The counsel for all parties also made legal and factual submissions, including addressing the issues that had been identified by the Arbitral Tribunal in its Procedural Order N° 2. In accordance with Article 33(4) of Arbitration Law N° 27 summary minutes of the hearing were recorded in a *procès-verbal* and subsequently delivered to the Parties. A full verbatim transcript of the hearing was also prepared and subsequently delivered to the Parties.

§ 7.- At the commencement of the hearing the Respondents raised two procedural matters for consideration by the Arbitral Tribunal. Firstly, the Respondents submitted that the representation of the Claimant by Mr. Mohamad Amin Daouk was invalid and his acts null and void pursuant to Advocacy Law N° 17 of 1983, because Mr. Mohamad Amin Daouk was a Lebanese and not an Egyptian lawyer. Secondly, the Respondents submitted again that the arbitral proceedings should be suspended, and produced a letter from the President of the

Cairo Court of Appeals to the Public Prosecutor in support of their position. The Arbitral Tribunal heard the oral submissions of the Parties on this issue.

At the conclusion of the hearing and after discussion with and with the consent of the Parties the Arbitral Tribunal fixed a timetable for the submission of Post-Hearing Memorials, and comments in reply to the Post-Hearing Memorials. This timetable was subsequently confirmed by a facsimile from the Arbitral Tribunal dated November 22, 2005, and amended on three occasions on the application of the Third and Fourth Respondents. Post-Hearing Memorials were submitted by all Parties on February 12, 2006, and comments in reply to the Post-Hearing Memorials on February 27, 2006. On January 30, 2006 the Arbitral Tribunal advised the Parties that it had decided to limit the period of this arbitration so as to terminate the arbitration by June 19, 2006.

In February 2006 on the application of the Minister of Civil Aviation an administrative court made a decision relating to the Concession Contract (*Minister of Civil Aviation v Malicorp Limited Company*, law suit N° 18,628 of the Judicial Year N° 95, before the Council of State Administrative Judiciary Court in Cairo, Sixth Circuit Contracts and Compensations; hereafter «*Administrative Judiciary Court Decision*»). The Arbitral Tribunal received a copy and a translation of the Administrative Judiciary Court Decision from the Respondents at the time of their Post-Hearing replies. The *dispositif* determines «...the nullity of the arbitration clause contained in the Concession Contract...with all effects resulted therefrom, especially the suspension of arbitral proceedings in the arbitral case N° 382 of the year 2004...before the Cairo Regional Centre for International Commercial Arbitration».

VI. FACTUAL BACKGROUND

§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.

§ 9.- 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 Mahmud 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 (dated September 29, 1999; Letter of Guarantee N° 32/99/A/114). 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.

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».

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».

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.

The Claimant's evidence, by contrast, was quite explicit that the intention always was to finance the project from outside sources. For example, Mr. Charles Leonides Panayides, the Group Development Director of Group Mediterranean Holding stated in his oral evidence:

«Our view was that we were being asked to arrange the financing for the project. We were told that there will be different stages in the project. That there will be the airport, which at the time, if I recall correctly because we are going back a few years now, was approximately 80-83 or 85 million, then there was the second stage, around 220 million, and then there will be the other projects involved, such as the housing, such as the light industrial. ...

...we were aware that there were other parties involved in Malicorp, who also had capabilities and one such party was GMP, a company which is quite well renowned and well-regarded in the Middle East as contractors. Now obviously they would be perhaps be interested in contributing, but in the event that there was no other contribution, our company stood ready to finance the project...

...We did not finalise the contribution of each of the parties. We were aware that we were being asked to contribute the bulk of the financing and we were willing to do so because we had faith in the project, as well as faith in Malicorp being able to effect this project. We had experience with individuals involved in Malicorp previous to that, which gave us a certain degree of confidence, and therefore I would say to you that it was not that essential for us whether Malicorp contributed or not.»

§2).- 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».*

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.

§:1.- 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. The Concession Contract included the following terms:

«3.1 Single Purpose Concessionaire

The Concessionaire shall be a single purpose corporation with the sole purpose of implementing the Project except as the Concessor may otherwise agree in writing and shall not assume any liability other than that in connection with the Project



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The Memorandum of Association of the Concessionaire shall include a provision to such effect.

«7.1. Delivery of the Site

The Concessor shall deliver the Airport Site to the Concessionaire free from any delaying works in 2 months from the Effective Date and after handing over the Performance Bond to the Concessor.

'Effective Date' is defined in Article 1 to mean *«the date of signing the final BOT Contract»*.

Article 17 relates to 'Material Adverse Government Action'. Article 21.1 relates to Governing Law (and is set out in §..., above). Article 22 comprises 'Miscellaneous Provisions' and includes the following:

«22.1 Primacy of this Concession Contract

The Concession Contract shall govern all aspects of and all contractual relationships relating to the Project as between the Parties. In the event of conflict between this Concession Contract and any Associated Agreement on a matter affecting the Parties including all questions of interpretation, this Concession Contract shall prevail.

«22.2 Entire Agreement

This Concession Contract, including the Annexures attached thereto, and the additions, amendments and variations agreed to as specified in the Tender documents as well as the contract initialed on May 28, 2000 represent the entire agreement between the two parties pertaining to the subject of this contract.

«22.12. General Undertakings

22.12.1 The Parties undertake to do all such things, perform all such acts and take all such steps to procure the doing of all such things, the performance of all such acts and the taking of all such steps as may be necessary, incidental or conducive to give effect to the terms, conditions and import of this agreement.

Article 23.1 related to the Representations and Warranties by the Concessionaire and states as follows:

«23.1 Representations and Warranties by the Concessionaire

The Concessionaire hereby represents and warrants to the Concessor as follows:

23.1.1 The Concessionaire is a company duly incorporated under the laws of United Kingdom with all requisite corporate power to carry out its obligations under this Concession Contract and to execute and deliver this Concession Contract, and acknowledges that, except as the Concessor may otherwise agree in writing, its sole purpose is to implement the Project. A true and

complete copy of the documents constituting the Concessionaire's Certificate of Incorporation, Memorandum of Association and Articles of Association and associated documents certified by the duly authorised representative of the Concessionaire, and in effect on the date hereof.»

- 23.1.2 In executing the Concession Contract, Malicorp Ltd. is acting for and on behalf of the Concessionaire.
- 23.1.3 This Concession Contract has been duly authorised by all necessary corporate action, is legally valid and binding upon it and does not require approval in any form in order to give full effect thereto, provided however that this Concession Contract is subject to the fulfillment of all the conditions set forth in this Contract.
- 23.1.4 The Concessionaire is not prevented or restrained legally, commercially or otherwise from entering into and undertaking the provisions of this Concession Contract in accordance with its terms.
- 23.1.5 All representations, warranties, information and data of the Concessionaire contained in any written statement (including financial statements), certificate, exhibit or schedule in connection with this Concession Contract, shall be true and correct as of the date hereof.
- 23.1.6 The Concessionaire should form a Company in Egypt according to the Law in Egypt, for the purposes of Construction, Management and Operation of the Airport. 25% of the Board Members will be appointed by the Concessor. The Concessionaire will make available to the Concessor all incorporation documents not more than 90 days from the date of signing the Contract, provided it shall furnish the Concessor with what proves its application for the incorporation of this company.
- 23.1.7 The Concessionaire agrees to increase the Bank Guarantee to an amount of Two Million Egyptian Pounds during the first two months from the date of signing the final Contract and before taking possession of the allocated site. The Concessor would release the Concessionaire's Bank Guarantee when proof of Construction work is in place and it approves release thereof.
- 23.1.8 The Concessionaire shall submit a Bank Guarantee 2 years prior to the end of the Concession period for handing over the Airport in an amount equivalent to 5% of the entire project value before the Concessor receives the Airport. It shall be valid for 6 months after the hand over of the Airport in accordance with Clause 3.8.»

Article 23.2 related to Representations and Warranties by the Concessor and includes the following:

- «23.2.1 The Concessor has the necessary power and authority to grant the Concession to the Concessionaire and to grant the Annexed Site Freehold to the Concessionaire.

23.2.2 *This Concession Contract has been duly authorised by all necessary action, is legally valid and binding upon the Concessor.*

23.2.3 *The Concessor is not prevented or restrained legally, commercially or otherwise from entering into and undertaking the provisions of this Concession Contract in accordance with its terms.*

Article 24 addressed the approval of the Council of State:

«24. Agreement by the Council of State

Insofar as this Concession Contract places obligations on the State and/or any Relevant Authority, such obligations shall be backed by the full faith and credit of the Egyptian Council of State. By signing this Concession Contract,

The State indicates its acceptance of its rights and obligations as herein set out and as a principal obligation guarantees the performance by the Concessor of all its obligations as herein recorded.

Both parties shall abide by the revision of the Council of States of this contract.»

§2.- The Concession Contract was signed in Cairo 'for and on behalf of Egyptian Civil Aviation Authority' by Pilot Abdelfaatah Mohamed Kato, and for and on behalf of Malicorp Ltd by Dr. Abbe Mercer.

§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.

§4.- 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). The «Third and Last Notice» dated February 18, 2001 read as follows (English corrected by the Arbitral Tribunal):

«THIRD AND LAST NOTICE

DR. ABBA MERCER
MALICORP COMP LMTD



6 ALDERS LADGES STEVENAGE ROAD SW6 LONDON, UK

REFERENCE TO THE CONTRACT BETWEEN ECAA [i.e., Egyptian Civil Aviation Authority] AND YOUR COMP TO BUILD, OPERATE, TRANSFER RAS SUDR AIRPORT (B.O.T) WHICH SIGNED ON 4/11/2000.

AND REFERENCE TO OUR FIRST NOTICE TO FULFIL THE FINAL LETTER OF CREDIT, FROM MALICORP COMPANY AND SUBMIT ALL DOCUMENT PROVING FINALIZATION OF ESTABLISHMENT [of] THE EGYPTIAN COMP. WHICH WILL CARRY ON THE PROJECT.

AND REFERENCE TO OUR SECOND NOTICE ON 7/11/2000 IN THE SAME CONCERN AS WE DIDN'T RECEIVE ANY OF WHAT IS REQUESTED.

WE URGE YOU TO FULFIL CONTRACT OBLIGATIONS A.S.A.P.

ANY MORE DELAY ECAA WILL BE OBLIGED TO TAKE ALL NECESSARY ACTIONS TO BREAK THE CONTRACT. BY THE END OF feb 2001.

A.Y.M. Abdel Fattah M. Kato
Chairman of ECAA»

The Claimant issued another bank guarantee for one million Egyptian pounds on February 5, 2001, thereby bringing the total amount guaranteed to two million Egyptian pounds. On March 12, 2001 the Claimant renewed its application for the incorporation of an Egyptian joint stock company 'according to the provision of Law N° 8 for 1997' for 'establishing and managing Ras Sidr International Airport'. The capital in this application was stated to be L.E. 20,000,000 of which the Claimant was to contribute L.E. 19,600,000 and two individuals (one of British nationality and the other Egyptian) were to contribute L.E. 200,000 each. This application also stated that the 'investment costs' of the company in its commercial activity would be '250,000,000 Egyptian Pounds', and that the Funding Sources would be '100,000,000: Capital' and '150,000,000: Loans and facilities'.

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»*. Second, the letter stated that as soon as the Investment Authority's approval was received, the Egyptian Company would *«issue a final letter of guarantee...and withdraw the initial two letters of guarantee in your possession»*. Thirdly, the letter requested nominations for the Board of the Egyptian Company (as envisaged in clause 23.1.6 of the Concession Contract). Fourthly the letter concluded:

«Fourth: We declare that we stand ready - after the Investment Authority's approval on the formation of the Egyptian company in compliance with the contract entered into between us - to proceed with the formalities of receiving the land in preparation of determining the final airport site, for which we hope that we can put the first stone in August 2001 as the starting of the construction works.»

§25 - Around this time the Egyptian Civil Aviation Authority was restructured and replaced by other entities or powers. Article 1 of Presidential Decree N° 72 of 2001 established the Egyptian Holding Company for Aviation and two subsidiaries, including the Egyptian Airports Company. Article 2 of Presidential Decree N° 72 of 2001 provided that:

«All real and personal rights of both the sector of airports and air utilities and the engineering sector of the Egyptian Civil Aviation Authority shall be vested in the holding company [i.e., the Egyptian Holding Company for Aviation] and the two subsidiaries, and all the obligations of the aforementioned sectors shall be devolved upon the holding company and the two subsidiaries...»

§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 notified as with the registration and publication documents, according to the applicable regulations and law...»*.

§27.- 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. The letter concluded:

«Therefore your Company must submit to us the following:

Autenticated contracts about the Company's situation which must be adopted and legitimized in the United Kingdom and adopted by the Ministry of Commerce and the Chamber of companies in London then adopted from the commercial attaché in the Embassy of the Arab Republic of Egypt in London.

The partnership contract between your honorable company and the Norwegian Company NFRG and this shall be to ensure its verity.

All the establishment documents which are adopted from the Public Authority for investment according to the applicable laws thereto.

Please send us the aforementioned on a date not exceeding 30 June 2001 or we shall be forced to terminate the signed contract with your company as this shall be deemed a final ultimatum thereof.»

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, 2001 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 stating:

«...we thereby inform you with regard to the meeting with Pilot/Chairman of the Holding Company of Civil Aviation dated 25/6/2001 during which all requested documents were delivered by virtue of the Authority's letter of 30/5/2001 addressed to your Excellency, he contacted your Excellency during the meeting and decided to extend the period of time as of 30/6/2001 one extra month until the obtaining of approvals of the formation of the Egyptian company, and he gave his oral instructions to the security officer in this regard who was contacted by the representative of the company from London and informed him that the Chairman of the Holding Company instructed him orally to extend the period for another month until the termination of the approval for formation of the Company.»

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. The Minutes of this meeting include the following:

«So, what are the reasons that prevented the formation of the company?

- Colonel Hisham Al Bestaoul - delegate from the National Security replied that there was a difference between the names in the company that ratified the Contract and the names of the founders of the Egyptian company for the building and operation of the airport.

...

- Mr. Sayed Salam, legal consultant of the General Investment Authority said that he approves the erection of an airport in the Ras Sudr area and that the Authority consents on the formation of any investment company. However, the southern and northern areas of Sinai have a special status and require the approval of the National Security for the founders of companies in that area. And, that the

formation of the company was submitted to the National Security but it was refused. Therefore, the rest of the formalities were stopped, and he added that the names mentioned in the formation of the Egyptian company differ completely from those mentioned in the formation of the mother company and based on that it was rejected by the National Security...

Pilot Abdel Fattah Mohamad Kato, Chairman of the Egyptian Holding Company for Aviation, reviewed the beginning of the project when the Authority for the Development of Tourism requested that it was in need for an airport in the Ras Sudr region...

- The Egyptian General Authority for Civil Aviation declared the creation, operation, exploitation and transfer of Ras Sudr Airport under BOT system according to the list of conditions and specifications prepared by the Authority. Several companies submitted in this respect.
- A commission from the Authority was constituted to select the best and most suitable offers. Two companies were chosen from a technical point of view: ...
- Malicorp Ltd. was selected for being the best and most suitable offer technically and financially whereby it will accomplish the financial and technical result contemplated by the government in this respect.
- On 2/2/2000 the Authority submitted to ... the Minister, a memorandum concerning the selection of the best and most suitable offer submitted to build, operate, exploit and transfer Ras Sudr Airport under BOT system. Such memorandum concluded by requesting the approval to take the remaining of the formalities and executory steps to conclude a contract with Malicorp Ltd. [Norwegian] to build, operate, exploit and return the Ras Sudr Airport under BOT system according to the terms and specifications announced by the Authority.
- On 2/2/2000 his Excellency endorsed that memorandum as follows: "Approved, and the reasons of the acceptance of the Norwegian offer will be published. Whereas, I received complaints as if the matter took place on their basis directly and without assessing all the offers. The necessary steps will be taken for the remaining legal formalities."

... Based on this endorsement the Authority formed two commissions, technical and financial without including the names of the members who participated in previous commissions, for the purpose of re-assessing all the offers relating to it operation, either from a technical or financial point of view.

The two commissions concluded as follows:

4; Offer (4/5)

Presented by Malicorp Ltd. the Norwegian, the Commission concluded that it was the best offer technically, and acceptable financially for being in compliance with the conditions and specifications of the Authority.»

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.- 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.

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 30/2/2001 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 other 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.»

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 its 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.»

§2).- 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.

Respectfully,

The Minister of Transportation»

§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 9, 2005 was quantified in its Rejoinder on Claim dated July 26, 2005 as follows

1. 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.- 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.»

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.

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:

«Main Principal Request:

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 21.3.2005 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.

Auxiliary Request:

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.»

§12.- 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.



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§33.- 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...»*.

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...»*.

VII. REASONS

§34.- The Parties have made many arguments in this arbitration. The Arbitral Tribunal for convenience classifies these arguments as procedural, jurisdictional and substantive in nature, and proposes to deal with them in this order. It recognises that this classification is for convenience only, and many of the arguments are interrelated or have implications not confined to only one of procedure, jurisdiction or the merits.

(1) Procedural Issues:

§35.- The Parties to the Arbitration: The first party to the Concession Contract is described as *«The Arab Republic of Egypt, represented by the Egyptian Civil Aviation Authority...»*.

The Request for Arbitration (replicating the form of the Concession Contract), named the Arab Republic of Egypt as the Respondent represented by the Minister of Transportation, the Minister of Civil Aviation, the Egyptian Holding Company for Aviation and the Egyptian Airports Company *«all of the above replacing the Egyptian Civil Aviation Authority»*. The Request for Arbitration did not give an address for the Arab Republic of Egypt, but gave a contact address for each of its four 'representatives'. Under the heading 'Contract and Parties' the Claimant explained in detail the legal succession to the Egyptian Civil Aviation Authority



§36.- A contract (including an arbitration agreement) may be entered into by an agent and be binding on its principal. However, an arbitration arising from such contract is usually commenced against either the principal as the only party or (if an arbitration agreement can be established with the agent as well as the principal) against both principal and agent as **two separate parties**. In the present case the Claimant adopted neither of these possibilities, but rather has pretended to commence the arbitration against only one party (the Arab Republic of Egypt) through four 'representatives'.

This form was ambiguous as to the legal status of the four representatives in the arbitration, and in particular whether the Claimant sought to arbitrate a dispute with the Arab Republic of Egypt, or with the Arab Republic of Egypt and the four alleged successor entities to the Egyptian Civil Aviation Authority. The ambiguity of the Request for Arbitration was compounded by the Claimant's insistence that the four 'representatives' named in the Request for Arbitration confirm the nomination of the arbitrator nominated by the Government of Egypt.

§37.- The legal representation of the Arab Republic of Egypt and specifically the Ministers of Civil Aviation and the Minister of Transport was undertaken by the Egyptian State Law Suits Authority, which by virtue of Article 6 of Law N° 75 of 1963 is empowered to *«represent all of the public juridical persons with regard to the lawsuits that are filed by or versus the state before the courts...and before any other entity that is granted jurisdiction by virtue of law...»*. However, the Egyptian Holding Company for Aviation and the Egyptian Airports Company appointed separate counsel, and developed its own independent legal position and arguments. Both sets of legal counsel have participated fully in this arbitration, presenting separate submissions, evidence and witnesses and receiving copies of all submissions or evidence filed by the other counsel in the arbitration. Both sets of counsel appeared separately at the hearing, and defended the interests of their respective parties.

The Claimant accepted the separate legal representation of the Arab Republic of Egypt on the one part, and the Egyptian Holding Company for Aviation and the Egyptian Airports Company on the other in this manner.

§38.- The Arbitral Tribunal finds that although the Arab Republic of Egypt was a party to the arbitration agreement in the Concession Contract and named as Respondent in the Request for Arbitration, the Claimant, the Arab Republic of Egypt (specifically the Ministers of Transport and Civil Aviation), the Egyptian Holding Company for Aviation and the Egyptian Airport Company have all by their conduct agreed to participate in this arbitration and accepted the participation of all the others. All have been treated on an equal footing, and each

have been accorded an equal and full opportunity to present their cases within the meaning of Article 26 of Arbitration Law N° 27 of 1994 and Article 15 of the CRCICA Rules. Accordingly, the Arbitral Tribunal has jurisdiction to determine the dispute between the Claimant on the one part, and the Arab Republic of Egypt (specifically the Ministers of Transport and Civil Aviation), the Egyptian Holding Company for Aviation and the Egyptian Airport Company.

The Arbitral Tribunal emphasizes that his conclusion relates solely to the jurisdiction of the Arbitral Tribunal over parties that have voluntarily appeared and fully participated in the arbitration. Their implicit consent to arbitrate involves no admission of any substantive liability, which was vigorously denied. Accordingly, substantive liability under the Concession Contract must be separately examined, in light of the arguments of all counsel and the applicable principles of Egyptian law including Article 145 of the Egyptian Civil Code that confines the effects of a contract «to the parties and to their universal successors in title, unless it follows from the contract from the nature of the transaction or from a provision of the law, that the effects of the contract do not pass to the universal successor in title of a party».

§39.- The Time Period for the Arbitration: In its Post-Hearing Submission the Republic of Egypt made a submission based upon Article 45 of Arbitration Law N° 27 of 1994 which reads as follows:

«Article (45)

1. The Arbitral Tribunal shall issue the award finally ending the entire dispute within the time frame agreed by the parties, in the absence of such agreement, the award must be rendered within twelve months from the date of commencement of the arbitral proceedings. In all cases, the Arbitral Tribunal may extend the deadline provided the period of extension shall not exceed six months, unless the parties agree to a longer period.

2. If the arbitral award is not rendered within the period referred to in the preceding paragraph, either of the two parties to arbitration may request the president of the court referred to in Article (9) of this law, to issue an order setting a new deadline or terminating the arbitral proceeding. In such case either party may raise his claims to the court of original jurisdiction.»

The Arab Republic of Egypt submitted that it had not agreed to any extension of time, the award has not been issued within twelve months from the initiation of the arbitral proceedings, and therefore the arbitral proceedings should be discontinued and terminated as regards the Ministers of Transportation and Civil Aviation.

§4).- There was an agreement between the Claimant and the Egyptian Holding Company for Aviation and the Egyptian Airports Company at the first

procedural meeting on December 19, 2004 regarding the time limit for the award. The Republic of Egypt had been informed of this meeting but did not attend. The Ministers of Transportation and Civil Aviation, on behalf of the Republic of Egypt, also received a copy of Procedural Order N° 1 dated December 19, 2004 that included the following paragraphs:

«5. The Arbitral Tribunal records that the Claimant, The Egyptian Holding Company for Aviation, and The Egyptian Airports Company have jointly agreed that the period of the arbitration shall be one year commencing on December 19, 2004, and have further agreed that the Arbitral Tribunal may in its discretion extend this period for such further time as it deems appropriate.

...

7. The Parties shall ensure that copies of all pleadings and exhibits, as well as any communications with the Arbitral Tribunal are also forwarded to the Minister of Transportation and the Minister of Civil Aviation as representatives of the Government of the Arab Republic of Egypt. The Arbitral Tribunal requests that the Director of the Cairo Regional Centre for International Commercial Arbitration ensure that this Procedural Order N° 1 and the subsequent communications of the Arbitral Tribunal are until such time as the Government of the Arab Republic of Egypt notifies the Arbitral Tribunal of its appointment of legal counsel in this arbitration.»

The Egyptian State Law Suits Authority, on behalf of the Republic of Egypt, duly submitted its Defence to the Claim in accordance with the timetable established in Procedural Order N° 1. The Republic of Egypt did not object to any part of the Procedural Order N° 1 in its Defence to Claim and until its Post-Hearing submission had never raised any objection to the agreement of the Parties to extend the time limit in this arbitration and to empower the Arbitral Tribunal to further extend the time limit at its own discretion. The Arbitral Tribunal did in fact exercise this power (also recognised in Article 45(1) of Arbitration Law N° 27 of 1994) in extending the period for the arbitration by a further six months until June 19, 2006.

During the hearing on November 15, 16 and 17, the Arab Republic of Egypt requested additional time to make Post-Hearing Submissions, to a date beyond both the original twelve month period referred to in Article 45 of Law N° 27 of 1994 and also the initial twelve month hearing agreed at the first procedural meeting referred to above, demonstrating again its acceptance of extensions of the time period of the arbitration. This additional time for Post-Hearing Submissions was agreed by all Parties and approved by the Arbitral Tribunal.

§4.- It was during the period granted for Post-Hearing Submissions, on January 3, 2006, that the Arbitral Tribunal advised the Parties of its decision «to limit the period of this arbitration so as to terminate the arbitration by June 19,

2006». This extension was specifically acknowledged without objection by counsel for the Egyptian Holding Company for Aviation and the Egyptian Airports Company in its letter of February 11, 2006. The Egyptian State Lawsuits Authority, however, objected to the extension of time in its Post-Hearing Submission, although in its Post-Hearing Reply recognised the validity of the proceedings at least until March 10, 2006 in stating:

«Therefore the Egyptian State Lawsuits Authority on behalf of the Egyptian Minister of Civil Aviation and the Egyptian Minister of Transportation hereby notifies the Arbitral Tribunal and the Parties that it will regrettably resort to the competent domestic court in accordance to Article 45 of the applicable Egyptian arbitration Law No. 27 of 1994 and its amendments, unless the Arbitral Tribunal applies the aforementioned article and takes note of discontinuance and termination of the present arbitral proceedings for the First and Second Respondents on or before March 10, 2006.»

In these circumstances, the Arbitral Tribunal finds that the Republic of Egypt, by its conduct, has accepted the agreement of the other parties recorded in paragraph 5 of Procedural Order N° 1, and therefore the award is issued *«within the timeframe agreed by the parties»* in accordance with Article 45(1). Alternatively, the Republic of Egypt has failed to raise its objection to the alleged breach of Article 45 within a reasonable time, and therefore has waived its right to object in accordance with Article 8 of Law N° 27 of 1994, which reads as follows:

*«Article (8)
If one of the parties to a dispute pursues arbitral proceedings while knowing that a condition in the arbitral agreement or one of the mandatory provisions of the present law has been violated and does not raise an objection to such violation by the agreed deadline or within a reasonable period in the absence of the agreements, this shall be deemed a waiver by him of his right to object.»*

§42.- Therefore the Arbitral Tribunal does not accept the submission of the Republic of Egypt that the time period in accordance with Article 45(1) or Law N° 27 of 1994 has expired.

§43.- Claimant's Legal Representation in Egypt: The Egyptian Holding Company for Aviation and the Egyptian Airports Company submitted that the Request for Arbitration and all subsequent proceedings in this arbitration were null and void for breach of the Egyptian Advocacy Law N° 17 of 1983 in that the Claimant's counsel, a Lebanese lawyer, did not satisfy the mandatory requirements regarding legal representation in Egypt. Article 3 of Advocacy Law N° 17 states that no one except a lawyer as defined in this Law is entitled to practice law in Egypt, with practice of law including *«presence on behalf of competent parties before courts and arbitral tribunals...and the practice of pleadings and relevant judicial proceedings.»* A lawyer is a person whose name

is registered in the list of lawyers, and apparently Mr. Daouk, the Claimant's representative, is not so registered.

It is further submitted that the provisions of the Egyptian Advocacy Law N° 17 of 1983 relate to Egyptian public order «because it relates to the operation of the judiciary and justice which is a primary duty of the State, and the law profession is a free profession which contributes with the judicial power to administer justice, assert the rule of law and the right to defend the rights and freedoms of citizens, and the legislator has decided a criminal punishment for breach of the provisions of this law» (Egyptian Holding Company for Aviation and the Egyptian Airports Company, Post-Hearing Submission, paragraph 219).

§44.- The Claimant states that Advocacy Law N° 17 of 1983 does not apply to this international arbitration and states that the capacity of counsel in this arbitration does not raise any question of Egyptian public order. It refers to Article 4 of the CRCICA Rules which states that «the parties may be represented or assisted by persons of its choice», and state that if necessary Mr. Daouk can be simply considered as a representative of the Claimant and not as its lawyer.

§45.- The Arbitral Tribunal does not accept that the representation of a foreign investor by a lawyer not registered for practice in Egypt in an Egyptian arbitration raises any question of Egyptian public order. It is no doubt correct that one purpose of Advocacy Law N° 17 of 1983 is to ensure the rights and freedoms of parties are properly defended and to facilitate the administration of justice, but there is no reason to consider that a foreign Claimant in an international arbitration cannot be adequately represented by a foreign lawyer.

The Claimant's legal representative does not require detailed knowledge of Egyptian judicial practice and procedure in order to properly represent the Claimant's interests in an international arbitration. If for any reason judicial proceedings were commenced in Egypt relating to this arbitration then of course Egyptian-registered counsel would be required for those proceedings. Further, the Claimant might engage an Egyptian lawyer for assistance with Egyptian substantive law, as the Claimant in fact did in this case, but still prefer the case to be led by its international counsel.

It is common practice in international commercial arbitration for the parties to be represented by counsel of their choice. This freedom of representation is derived from the principle of party autonomy, upon which international arbitration is founded, and is so widely recognised that it could be said to form part of transnational public policy in international commercial arbitration. The Arbitral Tribunal is not convinced that in Egypt, a jurisdiction where international

arbitration is well-established, public policy is any way inconsistent with international standards in this regard.

Further, the public policy interest of any state of the proper representation of parties and administration of justice in legal proceedings held within its borders in fact favours the participation of international counsel in international arbitration. Such participation enables a foreign party to be represented by counsel of confidence, of past association, of knowledge of their business, of experience in international arbitration law and practice, and with the necessary linguistic skills for the proceedings. The narrow interpretation of the public policy of Advocacy Law N° 17 of 1983 proposed by the Egyptian Holding Company for Aviation and the Egyptian Airports Company would lead to the result, absurd from the public policy perspective of the administration of justice, of declaring these arbitral proceedings void and denying the Claimant all the work of its legal representative since April 2004.

§46.- Accordingly, the submission to declare the proceedings null and void because the Claimant has not been represented by a lawyer registered in Egypt is rejected. Whether there has or has not been a breach of Article 3 or the other provisions of Advocacy Law N° 17 of 1983 is purely a matter for the Egyptian courts. The Arbitral Tribunal is satisfied that the Claimant's representation raises no question of Egyptian public policy, and that Mr. Daouk's actions are valid and effective as the representative of the Claimant in this arbitration.

§47.- Failure to have Prior Recourse to Alternative Means of Dispute Resolution: Counsel for the Egyptian Holding Company for Aviation and the Egyptian Airports Company submitted in its Post-Hearing Submission that the Concession Contract contained a mandatory pre-condition to submit a dispute to an Expert appointed pursuant to Article 6 before submission to arbitration. Accordingly, the submission to arbitration was premature, and the Arbitral Tribunal does not have jurisdiction.

The Arbitral Tribunal cannot accept this argument on a number of grounds. Firstly, Article 6.1 mandates the appointment of an Expert when *«any decision is required to be made in terms of this Concession Contract»*, and the making of such a 'decision' is quite a distinct function from the resolution of disputes. Further, Article 21.3.1 clearly contemplates the submission of disputes to arbitration that have not previously been subject to an expert determination (*«If a dispute...including, but not limited to, any dispute as to any opinion, instruction, determination, certification or valuation of the Expert...»*, emphasis added).

The Arbitral Tribunal is satisfied that the nature of the dispute in this case, involving the termination of the Concession Contract, was not of a kind that required submission to an Expert. Further, the Arbitral Tribunal is satisfied that the Claimant made genuine efforts to reach an amicable settlement prior to commencing arbitration. Finally, in the present circumstances any requirement of prior recourse to alternative methods of dispute resolution should not be applied formalistically to frustrate the resolution of the dispute. The dispute in this case is of a very serious nature (including cancellation of the Concession Contract, allegation of fraud) and all Parties have fully participated in the arbitration, and so the jurisdiction of the Arbitral Tribunal cannot be called into question on this basis.

(2) Jurisdiction/Consent to Arbitrate:

§48.- The Respondents challenge the jurisdiction of this Arbitral Tribunal on the basis of the second paragraph of Article 1 of Arbitration Law N° 27 of 1994. This paragraph requires an arbitration agreement in an administrative contract to *«have the approval of the concerned minister or the official assuming his power, with respect to public juridical persons»*. This submission requires the Arbitral Tribunal to consider first whether the Concession Contract is an administrative contract in Egyptian law and, if so, to examine whether the arbitration agreement had the appropriate approval required by Article 1 of Arbitration Law N° 27 of 1994.

§49.- The Legal Nature of the Concession Contract: In Egypt there is a fundamental division between private law and administrative law. According to Article 172 of the Egyptian Constitution the Council of State is an independent judicial organisation competent in administrative disputes. The Council of State has built up a theory of administrative contracts distinct from civil contracts.

§50.- The nature of administrative contracts was considered (in the context of arbitration) by a General Meeting of the Council of State. The General Meeting's legal opinion presented three differences between administrative contracts and civil contracts (see Dr. Mohie Eldin I. Alam Eldin 'Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration, Case N° 2 (Commentary)):

- (1) Administrative contracts always include a party who represents public authorities;
- (2) Such contracts are not related to ordinary transactions such as sale or lease among private law persons, but they deal with the creation, development or maintenance of public utilities; and

(3) *Such contracts contain exceptional clauses not found in civil contracts.»*

§51.- The Parties substantially agree that the Concession Contract is an administrative contract, but disagree on its particular characteristics as an administrative contract and their legal consequences. The Respondents submit that the Concession Contract is a typical administrative contract. The Claimant submits that *«The Egyptian doctrine and case law consider the B.O.T. contracts as international administrative contracts and the international arbitration doctrine considers it as a contract of particular nature and therefore the regulation: of an ordinary administrative contract do not apply»* (Claimant's Rejoinder on Claim, paragraph 167 (emphasis original)).

The determination of the juridical nature of the Concession Contract must begin by considering the terms and conditions of the Concession Contract itself.

§52 - The Preamble of the Concession Contract states that the Concession Contract is *«based on the investment laws N° 3 and 8 both of the year 1997»*. The Preamble of the Heads of Agreement also refers to Laws N° 3 and N° 8 of 1997. Law N° 3 of 1997 is entitled 'On granting the concession of a Public utility for constructing, managing, and exploiting airports and landing lands' and contains specific provisions relating to the airport concessions *«without restriction by the provisions of law N° 139 for 1947 for the concessions of the public utilities and law N° 61 for 1958 concerning granting concessions related to the investment of natural resources and the public utilities...»*. Law N° 8 for 1997 relates to investment guarantees and incentives and their executive regulations, and includes, *inter alia*, detailed regulations relating to the incorporation and capital of investment companies, which are considered in further detail below. Both the Preamble to the Concession Contract and the Preface to the Heads of Agreement relate the construction of Ras Sudr airport to a plan at a national level to build new airports to take advantage of the development opportunities offered by air transportation. It was also conceived as part of a larger project potentially including *hotels, tourism, shopping centers, industrial agriculture etc in order to achieve the necessary demand for passengers needed by the airport for economic viability»*.

The Concession Contract is for a period of forty-one years. Article 24 of the Concession Contract provided that *«Both parties shall abide by the revision of the Council of State of this contract»*. This requirement accords with Article 5 of Law N° 3 of 1997 that provides that *«A decree of the Council of Ministers shall be issued upon the proposal of the competent Minister, awarding the concession, as well as determining or amending its conditions or provisions,...»*. Article 21.1 states that it is *«deemed to be a civil law contract and governed by the civil laws*

of the Republic of Egypt». Turning to the Egyptian Civil Code 1948, Article 668 provides:

«Art. 668 - A concession of a public utility service is a contract whose object is the management of a public utility service of an economic nature. Such a contract is concluded between the administrative authority in charge of the organisation of such a service and a private person or company to whom the exploitation of the service is entrusted for a fixed period.»

§53 - The proper description of the contract is a legal question (and therefore not within the exclusive power of the parties to designate, so that Article 211 of the Concession Contract cannot be considered determinative of the nature of the Concession Contract). Accordingly, the Arbitral Tribunal concludes that the Concession Contract is a public concession within the meaning of Article 668 of the Civil Code, and also an administrative contract in Egyptian law. The factors demonstrating its administrative nature include (i) One party is the Egyptian state, represented by a public authority (namely the Egyptian Civil Aviation Authority which is described as a public authority in Presidential decree N° 2931 of 1971; (ii) The contract is a concession contract relating to a public utility (namely airports and landing grounds which are described as a public utility concession, for example, in Law N° 3 of 1997); (iii) The Concession Contract raises issues of state sovereignty and national policy in respect of air traffic, safety, tourism and infrastructure development; (iv) The Concession Contract is subject to a specific regulatory framework (Law N° 3 of 1997); (v) The Concession Contract contains exceptional clauses not found in civil contracts (most importantly the requirement of approval by the Council of State and the granting in Article 2.6.5 of «all rights, privileges and warranties as stated in Law 8 of the year 1997»).

§54 - The International Character of the Concession Contract: The Claimant has submitted that the Concession Contract should be described as an *international* administrative contract. The Claimant has not identified any particular rules or exemptions applicable to the Concession Contract as a matter of domestic Egyptian administrative law by reason of its international nature. Counsel for the Egyptian Holding Company for Aviation and the Egyptian Airports Company submitted that the international element in an administrative contract is irrelevant where there is an explicit choice of law, as there is of Egyptian law in this case.

This Concession Contract is properly described as an international contract. The Claimant is an English company (specifically recognised in Article 23.1.1), the Contract relates to an international airport (expressly recognised, for example, in Article 11.5.5), and the Claimant must ensure the Airport complies with the

international obligations imposed by the Warsaw Convention (Article 22.12.3). Further, the arbitration agreement within the Concession Contract is international within the meaning of Article 3 of Arbitration Law N° 27 of 1994.

The importance of the characterisation of the Concession Contract as international does not lie within the domestic Egyptian legal order. Its international nature means that some aspects of the Contract –most significantly the arbitration agreement—are also part of international legal relations and therefore may be subject to rules outside the domestic Egyptian legal order. In the present case, the international nature of the Concession Contract and arbitration agreement has consequences for the rules applicable to certain issues raised in this arbitration.

§55 - Jurisdiction: Article 1 of the Arbitration Law N° 27 of 1994: The Respondents challenge the jurisdiction of this Arbitral Tribunal on the basis that, being an administrative contract, the arbitration agreement did not *«have the approval of the concerned minister or the official assuming his powers with respect to public juridical persons»* as required by the second paragraph of Article 1 of Arbitration Law N° 27 of 1994.

§56 - The Claimant submits that the arbitration agreement in the Concession Contract complies with the second paragraph of Article 1 of Arbitration Law N° 27 of 1994. The Claimant states that pursuant to Presidential Decree N° 2931 of 1971 the Egyptian Civil Aviation Authority was a public juridical person, with its own juridical personality and patrimony and represented by its Chairman. Further, the Chairman of the Egyptian Civil Aviation Authority was the official who in fact signed the Concession Contract. The Claimant also states that the Minister of Transportation clearly approved the Concession Contract, even if he did not sign it.

Egypt does not dispute that the Minister of Transportation approved the Concession Contract, but states that Article 1, second paragraph, requires the approval of the arbitration agreement, which as a matter of Egyptian law is separate from the Concession Contract, and the arbitration agreement has not been approved by the Minister.

§57 - Presidential decree N° 2931 of 1971 created the Egyptian Civil Aviation Authority. Article 7 states that the Egyptian Civil Aviation Authority is managed by its Chairman in accordance with *«the terms of this decree and under the supervision of the State Minister for Civil Aviation matters»*. Article 7 goes on to state that *«The Chairman represents the Authority in its relations with*

other Authorities, third parties and the judiciary». The Chairman has in fact signed the Concession Contract, and every page of the Concession Contract is initialled by its signatories, including the page containing the arbitration agreement.

The Arbitral Tribunal also note that Dr. Suleman Mohamed El Tamaoui in *Administrative Law: A Comparative Study* (ed. Dar El Fikr El Araby) at page 335-336 includes the Egyptian Civil Aviation Authority in the category of Egyptian public authorities.

Accordingly, the Arbitral Tribunal is satisfied that the Chairman of the Egyptian Civil Aviation Authority was an official empowered under Egyptian law to enter into an arbitration agreement with respect to an administrative contract. It follows that the arbitration agreement is binding and effective and the Arbitral Tribunal has jurisdiction over this dispute. The Arbitral Tribunal is also satisfied that the Minister of Transportation knew and approved of this arbitration agreement for the reasons set out in §66 below.

§58 - As a final point, the Arbitral Tribunal notes that while Article 1, second paragraph is clearly part of Egyptian domestic law and arbitration, its status in an international commercial arbitration with a foreign investor is less certain. There is ample indication in this case that the Arab Republic of Egypt has sought to establish a secure regime for the protection of foreign investment in Egypt (for example, the protections in Laws N° 3 and 8 of 1997 and the UK-Egypt BIT and Arbitration Law N° 27 of 1994), so that in normal circumstances this right to arbitrate should not be lost on the basis that a senior official lacked the appropriate authority. Such a result would be contrary to good faith (*pacta sunt servanda*). Indeed the Cairo Court of Appeal in its judgment of March 3, 1997 has recognised the importance of good faith in this context.

The Arbitral Tribunal also refers to the well-recognised principle in public international law that a State is bound by the acts of an official vested with government authority when that person acts in his official capacity, even if he exceeds his authority or contravenes instructions (see for example, article 7 of the International Law Commission's *Articles on State Responsibility*) and to the principle of transnational public policy that a State party or public entity should not invoke, after having signed an arbitration undertaking, its own domestic incapacity.

§59 - Jurisdiction: The Administrative Judiciary Court Decision: The Administrative Judiciary Court Decision found that under Egyptian law this Court shared jurisdiction with an arbitration tribunal to rule on a challenge to the validity of an arbitration agreement («While [Article 22 of Arbitration Law 27 of

1994] conferred upon the arbitral tribunal the authority to rule on these challenges and pleas, it does not and should not deprive the judge of the authority to rule on such challenges and pleas should they be raised before him... If the Legislator wanted to limit the competence to the arbitral panels, it would have been easy for it to add the expression 'exclusively'»). It went on to find that there was no Ministerial approval of the arbitration agreement in this case, as required by Article 1, second paragraph, of Arbitration Law N° 27 of 1994, and therefore the arbitration agreement was null and void.

Article 22(1) of Arbitration Law N° 27 of 1994 reads as follows:

«1- The arbitral tribunal is empowered to rule on motions related to its non-competence, including motions based on the absence of an arbitral clause, its expiry or nullity, or its failure to include the subject or the dispute.»

Article 22(1) reflects the internationally recognised principle of *kompetenz/kompetenz* in arbitration. In accordance with Article 22(1) and this principle this Arbitral Tribunal, for the reasons set out above, finds the arbitration agreement in this Concession Contract binding and effective on the Arab Republic of Egypt. This Tribunal also considers that it has the sole and exclusive jurisdiction to make this decision.

The effect of the Administrative Judiciary Court Decision is that one state organ (the Administrative Judiciary Court) is seeking to release the State from an international obligation entered into by another State organ (the Chairman of the Egyptian Civil Aviation Authority) on the basis of a failure to comply with the State's own administrative law. Domestic legal obligations might be dealt with in this manner, but where senior officials of the State enter into obligations with the citizen of another State (in this case, an arbitration agreement with a British company) then the resulting responsibility of the State is to be determined according to international rules and principles, and not domestic law.

§60 - Jurisdiction: Article 58 of Council of State Law N° 47 of 1972: The Egyptian Holding Company for Aviation and the Egyptian Airports Company submitted that Article 58 of Council of State Law N° 47 of 1972 required the Egyptian Civil Aviation Authority to submit the Concession Contract and the arbitration agreement for approval by the Council of State, and as this was not done the Concession Contract is a nullity.

Article 24 of the Concession Contract specifically provided for the agreement and revision of the Concession Contract by the Council of State. The substantive effects of this Article 24 are considered below. At this point the Tribunal notes that the doctrine of the separability of the arbitral agreement is established in Egyptian law, and insofar as Article 58 is relied upon to annul the arbitration

agreement itself, refers to principle of transnational public policy already mentioned by which in respect of an international contract a State party cannot invoke its domestic law to escape the effects of an arbitration agreement entered into by its officials.

(3) Jurisdiction/the Significance of the UK-Egypt BIT:

§61.- The Arbitral Tribunal in Procedural Order N° 2 specifically asked the parties to clarify at the hearing the «significance (if any) of the United Kingdom-Egypt Bilateral Investment Treaty to the matters at issue in this arbitration». The Claimant in its Post-Hearing Submissions stated that the Respondents have not only abusively cancelled the Concession Contract, but have also breached their obligations under the Egypt-UK BIT, and referred to the 'wide reaching' of 'umbrella clauses' in investment treaties. «However, Claimant has requested from the present arbitral tribunal compensation for this abusive cancellation as a contractual breach and has reserved its right to further recourse to ICSID if necessary.» (Claimant's Post-Hearing Submission, paragraph 424). Egypt in its Post-Hearing Submission (paragraph 30, emphasis added) stated that «the Concession Contract includes a forum selection clause which govern all the claims of the parties under the contract, and not under the Treaty Thus all the treaty based claims fall outside the scope of the Tribunal's jurisdiction.»

§62 - The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments («UK-Egypt BIT») entered into force on February 24, 1976. The UK-Egypt BIT establishes the investor protections customary in such treaties such as national and most-favoured-nation treatment (Article 3), the right to compensation in the event of expropriation (Article 5) and repatriation of investment (Article 6). Article 8 addresses disputes between a State Party and an investor, which establishes a right to conciliation or arbitration pursuant to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Washington, 1965), after attempts to resolve the dispute by other means during a period of at least three months.

The significance of the UK-Egypt BIT to the present dispute arises from the final sentence of Article 2(2). Article 2(2) reads as follows (emphasis added):

«Promotion and protection of investment

(1)

(2) Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and

security in the territory of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.»

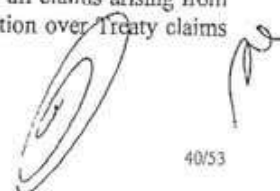
The final paragraph of Article 2(2) is a *pacta sunt servanda* clause (sometimes called an 'umbrella' clause) that purports to bring within the Treaty the breach of obligations not specifically created or enumerated in the treaty. In this case 'any obligation' in Article 2(2) refers principally to contractual obligations as it is followed by the expression 'may have entered into', which suggests an agreement or at least a formal undertaking.

§63 - The Claimant has not submitted any request to arbitration under the UK-Egypt BIT, and so at present there is not parallel arbitral proceedings considering issues arising between the same parties or relating to the same dispute.

Article 21.3.1 of the Concession Contract confers jurisdiction over this Arbitral Tribunal in respect of *«a dispute of any kind whatsoever...between the Concessor...and the Concessionaire...in connection with or arising out of the Concession Contract»* (emphasis added). The jurisdiction of this Arbitral Tribunal is very wide and it certainly has jurisdiction over 'any obligation' that 'may have been entered into' by the Arab Republic of Egypt in connection with or arising out of the Concession Contract.

By virtue of Clause 21.3 of the Concession Contract the Parties have submitted to this Arbitral Tribunal the dispute arising from the Concession Contract. The fact that Article 2(2) of the UK-Egypt BIT on its face might allow the Claimant to submit the present dispute (or some parts of the present dispute) to another forum does not affect or in any way limit the jurisdiction of the present Tribunal. The Claimant has elected to submit these disputes (arising out of or connection with the Concession Contract) to the jurisdiction of this Arbitral Tribunal, and these same disputes have not already been submitted to or determined by any ICSID tribunal established pursuant to the UK-Egypt BIT. Therefore this Tribunal does not need to consider and is not in any manner constrained by issues of *lis pendens* or *res judicata*.

§64 - Accordingly, the Arbitral Tribunal accepts the position of the Republic of Egypt, and finds that it has jurisdiction over all claims arising from the Concession Contract, and does not have any jurisdiction over Treaty claims



under the Egypt-UK BIT. It also notes that the Claimant has only requested compensation for breaches of the Concession Contract.

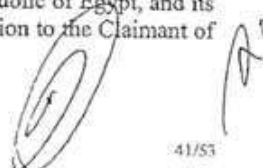
(4) Breach / Annulment of the Concession Contract:

§65.- The first substantive issue relates to the Parties to the Concession Contract. Article 145 of the Egyptian Civil Code confines the effect of a contract *«to the parties and to their universal successors in title, unless it follows from the contract from the nature of the transaction or from a provision of the law, that the effects of the contract do not pass to the universal successor in title of a party»*.

The Republic of Egypt submits that it is not a party to this 'municipal' Concession Contract. It states that the Egyptian Civil Aviation Authority was a separate legal entity, and had no authority to conclude a contract on behalf of the Minister of Transport or the Minister of Civil Aviation, and therefore could not bind the Republic of Egypt. Counsel for the Egyptian Holding Company for Aviation and the Egyptian Airports Company submit that the Egyptian Civil Aviation Authority was representing the Ministry of Transport by virtue of Presidential Decree N° 360 of 1999 and so Egypt, and not the successor entities to the Egyptian Civil Aviation Authority, is a party to the Concession Contract.

§66.- The Arbitral Tribunal finds that the Concession Contract binds the Republic of Egypt, within the framework of restrictions imposed both by its own terms and by applicable Egyptian administrative law. The evidence clearly establishes that the Egyptian Civil Aviation Authority was acting with the knowledge and under the control of the Minister of Transport, and that this situation persisted for eighteen months between the signature of the Heads of Agreement and the termination (by the Minister of Transport) of the Concession Contract. For example, the Minister of Transportation expressly invited the Norwegian ambassador to the signing ceremony and appeared at the ceremony (Exhibits C20 and C22 respectively). The Minister of Transport chaired the Special Commission that on July 21, 2001 made the decision to cancel the Concession Contract. The Minister of Transport confirmed the cancellation of the Concession Contract by letter dated September 28, 2001. Finally, the Letters of Guarantee were called by the Head of the Financial and Administrative Department of the Ministry of Transportation (Exhibit C106).

§67 - The Egyptian Civil Aviation Authority has an express role in the Concession Contract as the representative of the Arab Republic of Egypt, and its signature on the Concession Contract is a clear representation to the Claimant of

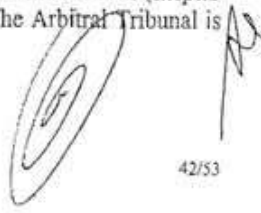


its power and authority to enter into the Concession Contract on behalf of the Arab Republic of Egypt. It also has express rights under the Concession Contract (such as the right of access to Air Traffic Navigation Facilities under Article 7.2.1.3). The evidence establishes that the successors in title to the Egyptian Civil Aviation Authority, particularly pursuant to Presidential Decree No. 72/2001, include the Egyptian Holding Company for Aviation and the Egyptian Airports Company. As the Egyptian Civil Aviation Authority was at all times acting as an agent and was not a party to the Concession Contract, the claims against the Egyptian Holding Company for Aviation and the Egyptian Airports Company are accordingly dismissed.

§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 N° 3 and N° 8 of 1997, and Article 5 of Law N° 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.

§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 allegation of fraud relate to the capital of the Claimant, and include a serious allegation that a forged 'commercial register' of the Claimant company, fraudulantly 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.- The importance of the capital of the Claimant, the incorporation of the Egypt in subsidiary and the approval of the Investment Authority arises from certain provisions of Law N° 8 for 1997. Article 4 of the Law provides as follows:

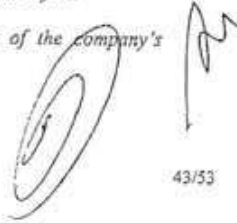
«Article (4)

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.»



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 N° 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 N° 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.

§72.- 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.

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 N° 3 and 8 of 1997 may have contributed to these distinct perceptions.

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.

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.»

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 - 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. 42.- 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.»

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.

§75 - Article 46 Arbitration Law N° 27/Suspension for Criminal Proceedings: The Respondents have submitted that the Arbitral Tribunal must suspend these arbitration proceedings pursuant to Article 46 of Arbitration Law N° 27 of 1994 until a final judgment is issued in the criminal proceedings relating to the Concession Contract. This request was made during the proceedings and was the subject of a majority ruling of the Arbitral Tribunal dated September 19, 2005. The Egyptian Holding Company for Aviation and the Egyptian Airports Company in its Post-Hearing Submission renewed this request for an Article 46 suspension, submitting that as a matter of Egyptian public order the criminal proceedings must take precedence.

In considering the relationship between criminal proceedings and arbitral proceedings the Arbitral Tribunal notes that the principle of "*le penal tient le civil en état*" does not apply in any absolute way in Egyptian law. The Claimant referred the Arbitral Tribunal to the decision of the High Constitutional Court (Cassation N° 8 of the Judicial Year 22; hearing of August 4, 2001) which concerned the conflict between an arbitral award finding in favour of a party that had cancelled a cheque, and a decision of a criminal court condemning the same party for issuing a bad cheque. The High Constitutional Court decided that the arbitral award should prevail stating that the analysis of the transaction by the criminal court *«consists in a usurpation of the competence of the arbitral tribunal despite the consent of the parties to submit to arbitration within the limit of the law»*. In fact, in a recent conference at Sharm El Sheikh the President of the Egyptian Parliament, Dr. Ahmad Fathi Srour referred to this decision as an example of the efficient role of the Egyptian judiciary in arbitration matters.

§76 - An arbitral tribunal sometimes must consider whether a party has committed any criminal act. For example, if a contract (or an investment treaty) requires a party to act 'according to law', and the submission is made that there is a breach of the contract (or the treaty) because one party has acted illegally, the arbitral tribunal has the jurisdiction and the duty to determine whether a particular act occurred, and whether it breached a penal provision of the applicable law. It then determines the contractual consequences of these findings for the dispute between the parties. It does not make any decision as to the guilt or innocence of a particular individual, or determine the criminal consequences or sanctions for particular behaviour, which are matters for the domestic criminal courts. An arbitral tribunal might therefore consider the same conduct as a criminal court, although for different purposes and with different consequences.

§77 - Whenever the same facts are before an arbitral tribunal and any other tribunal, the arbitral tribunal must proceed with care, and doctrines such as *res judicata* and *lis pendens* may be significant. When criminal proceedings are involved the arbitral tribunal also needs to consider whether the existence of criminal proceedings might compromise the ability of one party (particularly the party facing prosecution) to fully present its case in the arbitration. However, it is for the arbitral tribunal itself and not the domestic court (whether directly or indirectly) to decide how best to respond to the parallel proceedings, and whether a suspension is justified. Accordingly, the decision of the Egyptian criminal courts to initiate criminal proceedings against the Malicorp employees and Egyptian officials must be carefully considered by this Arbitral Tribunal, but as a matter of principle should neither bind this Tribunal nor automatically suspend these proceedings.

A provision such as Article 46 that seeks to automatically suspend an arbitration simply because criminal proceedings have been commenced that require investigation of the same facts amounts to an interference with the jurisdiction of the arbitral tribunal. In the present case, the reliance by the Respondents on Article 46 arguably amounts to the reliance of the State on its own law to defeat an arbitral agreement, and this is contrary to international public policy.

§78.- In the present case the Arbitral Tribunal has found that there was a mistake relating to whether the paid-up capital of the Claimant amounted to £100 million, and according the Concession Contract was void. Forgery, if proved, would mean that the Claimant was also guilty of fraudulent misrepresentation. However, the civil consequences of fraudulent misrepresentation under Article 125 of the Civil Code are the same as those for a mistake; that is, the contract is void and damages may be awarded pursuant to Article 142. On this basis, it is unnecessary for the Arbitral Tribunal to make any decision on forgery or the other criminal acts alleged, and so Article 46 has no application to the present arbitration.

§79.- There remains the question of whether the Tribunal in its discretion should suspend these proceedings because of the criminal proceedings commenced in Egypt. The Arbitral Tribunal considers that in the circumstances of this case no suspension is required, and in reaching this decision notes the following: (i) No party to this arbitration has been prosecuted with any criminal offence (the Claimant is a British company and not any of the individuals named in the prosecution); (ii) the offences alleged are serious, and some of the individuals involved are closely connected with the Claimant; (iii) the alleged offences are closely connected with the making of the Concession Contract, and so with the matters at issue in this arbitration; (iv) nevertheless, the Arbitral Tribunal is satisfied that the matters at issue in the arbitration can be decided without making determinations as to whether the Claimant have committed criminal acts of fraud, theft or criminal collusion in the breach of duty by Egyptian public officials; (v) the Claimant opposes any suspension and (subject to the accommodation made to take the evidence of certain witnesses by video conference) considers that it can and has been fully able to present its case in this arbitration; (vi) the prosecutions did not take place immediately after the alleged criminal actions or after the suspicion of irregularities contributed to the decision to cancel the Concession Contract, but four years later and during an intense phase of activity in this arbitration; (vii) the criminal proceedings are of an indefinite and maybe lengthy duration; (viii) a suspension of this arbitration and consequent delay might prejudice the Claimant in the exercise of its right to arbitration in terms of uncertainty and increased costs.

VIII. DAMAGES

§80.- The Claimant submitted as evidence of the loss it had suffered a report by PriceWaterhouseCoopers dated April 3, 2005. The Egyptian Holding Company for Airports and the Egyptian Airports Company submitted a report in reply by KPMG Hazen Hassan. At the hearing, Mrs. Ghada Ezzat El-Feky of PriceWaterhouseCoopers gave oral evidence and answered questions on behalf of the Claimant, and Mrs. Niveen Shahine of KPMG Hazen Hassan gave oral evidence and answered questions on behalf of the Egyptian Holding Company for Airports and the Egyptian Airports Company.

§81 - The Arbitral Tribunal has already decided that the general principle of compensation for the Claimant in this case should be that stated in Article 142 of the Civil Code for cases of annulment of a contract. Article 142 gives the Claimant a right to be 'reinstated in their position prior to the contract', and where such reinstatement is impossible, 'damages equivalent to the loss may be awarded'

§82 - The Claimant's major claim in monetary terms is for loss of profits, amounting to \$US500,000,000. The elements and calculation of this claim have been the subject of submissions and expert evidence. It includes loss of profits from the operation of the airport, loss of profits from the exploitation of the airport site, and loss of profits relating to freehold land (including proposed projects such as hotels, tourism, shopping centers and industrial agriculture). After a careful review of the expert evidence, the Arbitral Tribunal has decided that the profits of the Claimant, had the Concession Contract been performed, would not have exceeded \$100 million.

In this case, however, the Arbitral Tribunal has already found that the Claimant should have realised that the Arab Republic of Egypt was entering into the Concession Contract under the influence of an essential mistake. The Arbitral Tribunal has already found that the responsibility of the Claimant for this mistake amounted to ninety percent. Accordingly, the damages for lost profit must be reduced by this percentage. The resulting figure of \$US 10 million is accordingly awarded by the Arbitral Tribunal in the concept of lost profits.

The Claimant also seeks moral damages of \$US1,000,000. Moral damages may be claimed under Article 222 of the Civil Code, and here are based on the allegation that the purpose of the Respondents' behaviour was to defame and affect the Claimant's reputation. The Tribunal does not accept that the purpose of

effect of the conduct of the Arab Republic of Egypt justifies any award of moral damages, and notes in this regard its earlier finding that the Arab Republic of Egypt exercised its power to cancel the Concession Contract for economic and security reasons. Accordingly, damages under this heading are refused.

§83.- As regards the claim for the return of the letters of guarantee, damages to the amount of the present value of these letters of guarantee (estimated by the Claimant's expert witness as \$US564,069.00 and by the Respondents' expert witness as \$US514,000.00), clearly fall within the principle of damages equivalent to reinstatement. However, the Republic of Egypt relies upon Article 26 of the Law N° 89 of 1998 in connection with Tenders and Bids which specifically authorises the confiscation of performance bonds in circumstances such as the present. Accordingly, Egypt has established a legal right to retain this sum and the Claimant's claim under this heading is denied.

§84.- There remains the claims for the Claimant's expenses, invoices, and the salaries of its employees amounting to \$US12,416,574.00 consisting of (i) claim for general expenses (\$US1,704,370); (ii) expenses for four invoices (\$US2,115,204); (iii) salaries (\$US8,597,000).

§85.- As regards the first of these claims, the KPMG Hazen Hassan report submits, and the Arbitral Tribunal accepts, that these expenses should only be calculated for the period of 1999 to 2001 (and not to 2004 as claimed) resulting in a figure of \$US562,793.

As regards the four invoices totalling \$US2,115,204, the PriceWaterhouseCoopers report submitted by the Claimant does not explain the nature of these expenses. It simply states, after discussing the general expenses referred to above, that *«additionally, copies of four invoices sum up to an amount of \$US2,115,204 were presented to us by Malicorp. Malicorp will provide the original invoices on request»*. The Respondents made no submissions in respect of these invoices, its own expert report did not refer to them, and they were only raised in passing during the searching cross-examination of Mrs. Ghada Ezzat El-Feky of PriceWaterhouseCoopers by counsel for the Respondents at the hearing. On the basis of the uncontradicted evidence of the existence of four invoices to this amount, offered for review to the Respondents, the Arbitral Tribunal considers that this element of the claim is proved.

In contrast, the claim for salaries was challenged by the Respondents in cross-examination. Mr Hafez (on behalf of the State Law Suits Authority) questioned the reasonableness and coherence of the alleged payments. Mrs. Ghada Ezzat El-

Feky of PricewaterhouseCoopers referred to the assumptions expressed in the report. The assumptions within the report shows that such agreements exist, but specifically disclaims any review of the 'reasonableness' of these contracts. The Arbitral Tribunal, applying the principle in Article 142, finds that the Claimant should only recover the costs for the period between the signing of the Heads of Agreement and the termination of the Concession Contract (that is, approximately fifteen months from May 2000 until August 2001), and not for a period of up to sixty-five months as presently claimed. Applying this standard to the monthly salary figures provided in the PricewaterhouseCoopers report produces a figure of \$US2,095,500. Accordingly, the Arbitral Tribunal awards this sum under this heading.

§86.- For these reasons, the Arbitral Tribunal finds that the costs and expenses of the Claimant of \$US562,793, \$US2,115,204, and \$US2,095,500, as well as a loss of profits of \$US10,000,00 are established, and consequently awards damages in lieu of reinstatement to their original position amounting to \$US 14,733,497.


§87.- The Claimant has also sought interest. Article 226 of the Egyptian Civil Code reads as follows

«When the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made, the debtor shall be bound, in case of delay in payment, to pay to the creditor, as damages for the delay, interest at the rate of four per-cent in civil matters and five per-cent in commercial matters. Such interest shall run from the date of the claim in Court, unless the contract or commercial usage fixes another date. This article shall apply, unless otherwise provided in law.»

The Concession Contract (Article 21.1) provides that this is a civil law contract. Accordingly, the Tribunal fixes interest in accordance with Article 226 on the damages at the rate of four per cent per annum from the date of filing the claim with the Cairo Regional Centre for International Commercial Arbitration on April 28, 2004, until the date of payment.

IX. COSTS

§88.- Article 40 (bis) of the CRCICA Rules provides for a general rule in respect of costs that unless otherwise agreed by the parties *«the determined fees and expenses shall be equally borne by them, until the arbitral tribunal decides which party shall bear the fees and expenses.»*



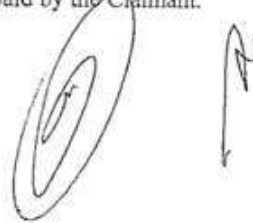
The Director of the Cairo Regional Centre for International Commercial Arbitration requested a provision of funds to cover the registration fees, administrative fees, arbitrators' fees, and arbitration expenses to a total amount of \$US 366,000.00. In accordance with Article 40(bis) each party was required to deposit \$US 183,000.00. The Respondents made initial deposits amounting to \$US 35,950.00 but then refused to make further deposits. Accordingly, the Claimant was required to deposit the Respondents' outstanding share of its costs. The result is that the Claimant has in fact deposited \$US 330,050.00.

§85.- The Claimant has sought to recover its full costs and expenses in this arbitration, which it quantified in its Post-Hearing reply at \$US 3,842,357.00 which included all legal fees and expenses, and witnesses and expert expenses, as well as the full amount of its deposit of costs. The Respondents also made general claims for costs in this arbitration.

§90.- This has been a complex arbitration involving many procedural jurisdictional and substantive issues. The Arbitral Tribunal has considered all the circumstances of the arbitration in reaching a decision on costs, and particularly the following: (i) The Claimant has largely succeeded on the procedural and jurisdictional issues raised in this arbitration; (ii) The Claimant's ambiguous manner of identifying the Parties in this arbitration has contributed to increased costs in this arbitration; (iii) The Respondents have successfully established that the Republic of Egypt had a right to cancel the Concession Contract and also that the Concession Contract was null and void for fraudulent misrepresentation; (iv) The Claimant has established a right to compensation notwithstanding the cancellation and nullity of the Concession Contract.

In these circumstances, the Arbitral Tribunal finds that the Claimant on one hand, and the Respondents on the other shall each bear one half of all the fees, costs and expenses of the arbitration, and each party shall remain responsible for its own legal costs.

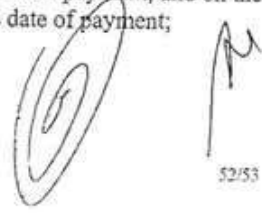
§91.- In accordance with this decision, the Respondents are ordered to pay to the Claimant ONE HUNDRED AND FORTY-SEVEN THOUSAND AND FIFTY UNITED STATES DOLLARS (\$US 147,050.00), being the part of the Respondents' half share of the fees and expenses of the arbitration already paid by the Claimant.

Handwritten signature and initials in black ink, consisting of a large circular scribble and a vertical line with a hook at the top.

X. AWARD

In light of the above and having taken cognizance of all the claims and defences of the Parties this Arbitral Tribunal finds that:

1. The Arbitral Tribunal has jurisdiction in respect of all claims arising from the Concession Contract, and in particular the Claimant's claims in this arbitration against the Arab Republic of Egypt, and the Egyptian Holding Company for Aviation and the Egyptian Airports Company;
2. The Parties to the Concession Contract are the Claimant and the Arab Republic of Egypt. Accordingly, the claims against the Egyptian Holding Company for Aviation and the Egyptian Airports Company are dismissed;
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;
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;
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;
6. The Claimant on the one hand, and the Respondents on the other shall each bear one half of the costs and expenses of the arbitration (which total THREE HUNDRED AND SIXTY-SIX THOUSAND UNITED STATES DOLLARS (\$US 366,000.00)). Accordingly, the Respondents are hereby ordered to pay to the Claimant the sum of ONE HUNDRED AND FORTY-SEVEN THOUSAND AND FIFTY UNITED STATES DOLLARS (\$US 147,050.00), being the part of the Respondents' half share of these costs and expenses already paid by the Claimant. Each party shall pay its own legal costs;
7. The Claimant is entitled to interest at the rate of four percent per annum on the damages from April 28, 2004 until the date of payment, and on the costs from the date of this Final Award until the date of payment;



8. The Respondents' application for the suspension of the arbitration pursuant to Article 46 of Arbitration Law N° 27 of 1994 is refused;
9. All other claims and requests are dismissed.

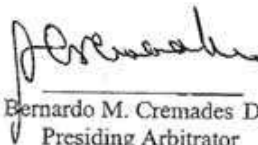
This Final Award was signed in Madrid and rendered in Cairo by the Arbitral Tribunal this 7th day of March 2006;

Place of Arbitration: Cairo, The Arab Republic of Egypt

THE ARBITRAL TRIBUNAL



Dr. Abdel Samid El Ahdab
Arbitrator



Bernardo M. Cremades
Presiding Arbitrator

Dr. Hatem Ali Labib Gabr
Arbitrator

Note on the Failure to sign this Final Award by Dr. Hatem Ali Labib Gabr, Arbitrator: The Arbitral Tribunal unanimously agreed to deliberate in Madrid on March 5 and 7, 2006 regarding this Final Award. Dr. Hatem Ali Labib Gabr suspended his participation in the deliberations of the Arbitral Tribunal for the reasons set out in his letter to the Cairo Regional Centre for International Commercial Arbitration dated February 27, 2006, a copy of which is attached.

