

## **ARBITRAL TRIBUNAL AWARDS US\$930 MILLION IN LIBYAN DISPUTE**

*Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. State of Libya & ors*

### **Introduction**

On 22 March 2013, an Arbitral Tribunal handed down its award in the case of *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya*, an ad hoc arbitration conducted pursuant to the Unified Agreement for the Investment of Arab Capital in the Arab States, awarding the claimant over US\$930 million in damages.

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

The Unified Agreement for the Investment of Arab Capital in the Arab States was signed on 26 November 1980 and entered into force on 7 September 1981. It was ratified by all members of the League of Arab States except Algeria and Comoros. It established an Arab Investment Court, open to States and investors, for the purposes of hearing investment disputes brought before it.

The Arab Investment Court is seated at the permanent headquarters of the League of Arab States in Cairo and is composed of at least five serving judges each with a different Arab nationality (which must not be the same nationality as either of the parties to the dispute).

Judgments rendered by the Arab Investment Court are final and binding and are enforceable in each of the contracting parties in the same manner as a judgment delivered by their national courts.

Since its inception in 2003, the Arab Investment Court has considered very few cases. The decision rendered by the Arab Investment Court was *Tanmiah for Management and Marketing Consultancy vs Tunisia* (1/1 Q, IIC 238) on 12 October 2004, over 20 years after the Unified Agreement for the Investment of Arab Capital in the Arab States was first signed.

### **Background**

In 2006, Mohamed Abdulmohsen Al-Kharafi & Sons Co. (the “Claimant”) entered into a contract with the Libyan Tourism Development Authority to establish a seafront resort in Tripoli, which included a 5 star hotel, hotel apartments and villas, and a shopping mall through a 90-year Build Operate Transfer concession (the “Contract”).

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

By 2010, the Claimant, which had spent significant sums of money on feasibility studies, design works, and management contracts, had not formally received the land from the Libyan government. The Contract was subsequently cancelled by way of Decision No. 203/2010 issued by the Minister of Economy which cancelled the investment licenses and annulled the decision of the Minister of Tourism which approved the project.

The Claimant commenced arbitration against the Respondents – the State of Libya, the Ministry of Economy, Ministry of Finance and the General Authority for Investment Promotion and Privatization Affairs – under the Unified Agreement for the Investment of Arab Capital in the Arab States.

## **Decision**

In a majority decision, the Arbitral Tribunal (comprising of Dr. Abdel Hamid El Ahdab and Dr. Ibrahim Fawzi, with Justice Mohamed El-Kamoudi El-Hafi refusing to sign the award) dismissed the Respondents' jurisdictional objections and found the Respondents to be in breach of their contractual and legal obligations.

The Arbitral Tribunal dismissed the objections to its jurisdiction, holding that:

- the project at the centre of the dispute was an investment project in accordance with the Libyan law in force at the time of the conclusion of the contract;
- the Arbitral Tribunal was competent to rule on its own jurisdiction;
- both parties had made attempts to settle the dispute amicably but had failed to do so, and accordingly the case was not filed prematurely;
- the arbitration clause contained in the Agreement was valid as against the State of Libya, the Libyan Ministry of Economy, the Libyan Ministry of Finance and the General Authority for Investment Promotion and Privatization Affairs; and
- the claims for compensation of damages submitted by the Claimant were covered by the arbitration clause which referred to the application of the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States, and accordingly the arbitration case fell under the jurisdiction of the Arbitral Tribunal.

The Arbitral Tribunal found the Respondents to be in breach of the Contract; the Libyan Civil Code; Libyan investment law; and the Unified Agreement for the Investment of Arab Capital in the Arab States.

### *Contract*

The Respondents were in breach of the Contract by failing to meet their primary obligation (as set out in Article 5 of that contract) to hand over the plot of land to the Claimant free of occupancies.

### *Libyan Civil Code*

Contrary to the position of the Respondents, the Arbitral Tribunal held that the Contract was not an administrative contract as it did not include any highly unusual clauses, did not include any factual or legal circumstances, did not aim at achieving a public interest and did not

revolve around a public utility. Accordingly, the Contract was a private law contract governed by the Civil Code.

The Arbitral Tribunal held that the Respondents had failed to comply with its obligations under the Libyan Civil Code, and in particular, the obligation to perform the contract in good faith.

#### *Libyan Investment Law*

The actions of the Respondents amounted to a breach of the Libyan Investment Law, which “prevents them from confiscating or freezing the project, or subject it to procedures having the same effect”. In particular, the Arbitral Tribunal held that the Decision No. 203/2010 issued by the Minister of Economy (which cancelled the investment licences and annulled the decision of the Minister of Tourism approving the project) was an arbitrary decision which should be considered as a procedure similar to freezing and confiscation

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

The Arbitral Tribunal held that the arbitrary cancellation of the investment project based on the decision of the Minister of Economy was a decision that violated the Unified Agreement for the Investment of Arab Capital in the Arab States. The Arbitral Tribunal further noted that the Unified Agreement for the Investment of Arab Capital in the Arab States was an integral part of the Libyan law and its provisions prevailed over other Libyan laws.

#### **Damages**

Having established the Respondents’ liability, the Arbitral Tribunal awarded damages under a number of different heads, including compensatory damages, moral damages and damages for lost profits and opportunities. The total award exceeded US\$930,000,000, with the overwhelming majority of that award (US\$900,000,000) being awarded as damages for lost profits and opportunities.

22<sup>nd</sup> October 2013