

## **ENGLISH COMMERCIAL COURT SETS ASIDE ORDER FOR ENFORCEMENT OF CAIRO ARBITRATION AWARD**

*Malicorp Ltd v Government of the Arab Republic of Egypt & Ors* [2015] EWHC 361  
(Comm)

### **Introduction**

By a decision handed down on 19 February 2015 in *Malicorp Ltd v Government of the Arab Republic of Egypt & Ors* [2015] EWHC 361 (Comm), the English Commercial Court refused enforcement of a foreign arbitration award on the grounds that the award had already been set aside by a properly recognisable foreign judgment and the tribunal had acted in such a way as to render the Defendant unable to present its case.

### **Background**

The Claimant company had entered into a concession contract with the Defendant Egyptian Government to design and construct an airport at Ras Sudr on the Red Sea coast and to operate it for 41 years. The concession contract contained a dispute resolution clause providing that disputes which could not be settled amicably were to be referred to arbitration under the auspices of the Cairo Regional Centre for International Commercial Arbitration.

By a letter dated 12 August 2001, notice was given to the Claimant of the cancellation of the concession contract.

### **The Arbitration**

The Claimant invoked the arbitration clause contained in the concession contract and sought compensation for breach of contract. The Defendant contended that the Claimant had committed fraud and accordingly the Defendant was entitled to cancel the concession contract.

The Tribunal chose not to rule on the Claimant's claim for breach of contract. Instead the Tribunal held that there had been an 'essential mistake' as to the concession contract.

By a purported arbitration award dated 7 March 2006 ("the Cairo Award"), the Tribunal used Article 142 of the Egyptian Civil Code, which allowed an award of damages in a case of a void or cancelled contract to return the parties to their pre-contractual positions.

### **Post-Award**

By a decision dated 5 December 2012, the Cairo Court of Appeal set aside the Cairo Award. That decision was under appeal to the Egyptian Court of Cassation at the time of the handing down of the English court's decision.

The Claimant applied to the English Commercial Court for enforcement of the Cairo Award

pursuant to Section 101(2) of the Arbitration Act 1996 (“the 1996 Act”). The application for enforcement was granted, reserving the rights of the Defendant to apply to have it set aside.

The Defendant contended that the Cairo Award should be set aside because:

- (a) Section 103(2)(f) of the 1996 Act provided that enforcement of an award may be refused if it is proved that the award has been set aside by a competent authority of the country in which it was made. The Cairo Award had been set aside by the Cairo Court of Appeal;
- (b) Section 103(2)(c) of the 1996 Act provided that enforcement of an award may be refused if it is proved that the party opposing enforcement was “unable to present his case” in the arbitration. The Tribunal had granted remedies to the Claimant on a basis that was never pleaded or argued during the arbitration process.

The Claimant argued before the English Commercial Court that the decision of the Cairo Court of Appeal was not credible or competent as the Egyptian judges had a bias in favour of the Government of Egypt.

### **The Decision**

Walker J (“the Judge”), in the exercise of his discretion, set aside the decision granting enforcement of the Cairo Award.

The following factors militated in favour of this decision:

- (a) Although it was open to the English courts to enforce an arbitration award even where it had been set aside by a competent court authority, it would not be right to do so unless the decision of that court offended “basic principles of honesty, natural justice and domestic concepts of public policy”;
- (b) Applying that principle, and in the absence of any evidence suggesting that the Egyptian judges had a bias towards the Defendant, the mere suggestion that the decision of the Cairo Court of Appeal was wrong was insufficient to persuade the English court not to respect that decision;
- (c) As regards the inability of the Defendant to present its case in the arbitration, the award of damages under Article 142 of the Egyptian Civil Code “must have been a complete surprise”. The Claimant had never claimed damages under Article 142 and it was never discussed in the arbitration proceedings;
- (d) It was not clear whether the English court had a discretion to enforce an arbitration award under such circumstances, but if there was such a discretion then it should not be exercised because the consequences to the Defendant of the Tribunal’s adoption of this course were too grave.

### **Concluding Remarks**

The Decision is an illustration of the balance struck by the English courts in its respect for both arbitral awards and the decisions of foreign courts.

Further, the Decision highlights that, notwithstanding the pro-arbitration nature of the English courts, where an arbitral tribunal acts in excess of its jurisdiction significant problems can be caused for the successful party in the arbitration.

15 April 2015

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