



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

*Academic Directors: Ignacio Torterola
Loukas Mistelis**

H&H ENTERPRISES INVESTMENTS, INC.

V.

**ARAB REPUBLIC OF EGYPT
(ICSID CASE NO. ARB/09/15)**

DECISION ON JURISDICTION

Case Report by Georgios Soumalevris**
Edited by Mona Davies ***

In its Decision on Jurisdiction of 5 June 2012, the Tribunal held that it had jurisdiction to hear the claim of a US company concerning an option to buy a hotel and its adjoining land in Egypt, under a bilateral investment treaty between the United States and Egypt.

Tribunal: Dr. Bernando Cremades, Dr. Hamid Gharavi and, Dr. Veijo Heiskanen.

Claimant's counsel: Mr. Arif Ali of Weil, Gotshal & Manges LLP; and, Mr. Baiju Vasani, Mr. Kassi Tallent, and Ms. Emily Alban from Crowell & Moring LLP.

Defendant's Counsel: Mr. Karim Hafez from Hafez; and, Mr. Mohamed Elshiekh, Mr. Amr Arafa and Ms. Fatma Khalifa from the Egyptian State Lawsuits Authority.

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Georgios Soumalevris is an associate with EUTRADEDEFENCE. He advises multinational clients and States on international trade and policy, including anti-dumping and anti-subsidy proceedings and foreign investment law.

*** Mona Davies is Assistant Director of International Arbitration Case Law (IACL).

Digest

1. Facts of the Case

In 1987, Mr. Alashmawy, a US and Egyptian national and President of H&H Enterprises Investments, Inc. (“Claimant”), was invited to inspect existing hotel properties in which the Government of the Arab Republic of Egypt (“Respondent”) was seeking foreign investment, and pieces of land that it had designated for tourism development. In 1989, Mr. Alashmawy made a proposal to Grand Hotels of Egypt (“GHE”), a state-owned company which at the time owned and managed a number of the country’s hotels, to purchase Ain El Sokha hotel and its adjoining land. The proposal which, according to Claimant, granted it an option to buy the resort was allegedly accepted by GHE. Two weeks after the submission of the proposal, Claimant and GHE signed a Management and Operation Contract (the “MOC”) followed by an addendum some months later. In 1990, Claimant was suspended by the US tax authorities for failure to pay taxes. In 1993, GHE commenced arbitration against Claimant in Egypt, under the MOC, seeking, among others, termination of the MOC for breach of contract. In response, Claimant filed a number of claims before the local courts. Following Claimant’s eviction from the resort in 2001, Claimant applied to the US tax authorities for a Certificate of Revivor, which was ultimately granted in 2008. In 2009, Claimant filed a claim before ICSID.

Respondent submitted its Jurisdictional Objections and Request for Bifurcation in June 2011, with Claimant filing its Response in September 2011. During a hearing on bifurcation in November 2011, the Parties agreed to bifurcate the proceedings into a jurisdictional phase followed by the merits phase. Following an exchange of Parties’ submissions in January and March 2012, and a hearing on preliminary jurisdictional issues in late March 2012, the Tribunal issued its Decision on Jurisdiction in June 2012.

2. Legal Issues Discussed in the Decision

(a) Jurisdiction Rationae Materiae

The main issues pertained to the following questions: (a) whether the Option to Buy constituted a valid and binding contract under Egyptian law; and, (b) whether it constituted an ‘investment’ under the United States-Egypt BIT or the ICSID Convention.

(i) Validity of the Option to Buy

Respondent argued that the Option to Buy did not exist under Egyptian law because Egyptian law requires a firm acceptance without alteration of the terms of the offer. (¶ 11) According to Respondent, the exchange of letters between Claimant and Respondent did not demonstrate a 'matching will', for the additional reason that key terms of the Option to Buy such as land and price were not agreed upon or specified in those letters. (¶ 12) Respondent also argued that the MOC was the only agreement between the Parties, either because the Parties did not consider the Option to Buy to be a valid contract, or in the alternative, because it was rescinded by the Parties' conduct following the conclusion of the MOC. (¶¶ 13-14). In any event, Respondent argued, with Claimant and GHE failing to incorporate a local company, the conditions precedent for the exercise of the Option to Buy were not satisfied. (¶ 15) Finally, Respondent argued that the State Council Advisor's opinion that the Option to Buy existed, was not binding upon public entities and state courts, and, therefore, Claimant could not rely thereupon. (¶ 16)

Claimant responded that the Option to Buy constituted a binding contract under Egyptian law as the exchange of letters referred to all the necessary elements for the formation of an Option to Buy, i.e., the asset to be sold; the price; and, the period of time during which Claimant could exercise such Option. (¶¶ 26-27) Furthermore, Claimant argued that the Parties understood that the MOC would be finalized only upon the conclusion of the Option to Buy. (¶ 28) In response to Respondent's argument that the Option to Buy was rescinded, Claimant argued that its subsequent conduct demonstrated that it never intended to rescind the Option to Buy. (¶ 29) In any event, Claimant stated, the standard to establish such intention to rescind requires concrete evidence, which did not exist. (¶ 30) On the issue of conditions precedent, Claimant responded that it formed the local affiliate H&H Egypt, in which Respondent never acquired a shareholding in violation of its treaty obligations. (¶ 31)

The Tribunal decided to join the question of the validity of the Option to Buy to the merits as the matter would require an overall assessment of the merits of the dispute. (¶ 43)

(ii) Investment under the United States-Egypt BIT or the ICSID Convention

Respondent submitted that the Option to Buy did not constitute an ‘investment’ either under Article 1(c) of the United States-Egypt BIT or Article 25(1) of the ICSID Convention. (¶ 17) With respect to the criteria laid down by the ICSID Convention (as defined by the so-called *Salini* test), Respondent argued that the Option to Buy fails to satisfy them, as it has no duration; does not entail an investment risk; does not generate regular profit or return; there is no substantial contribution on the Claimant’s behalf; and, there is no contribution to the host State’s development. (¶¶ 18-23) Respondent further submitted that the Option to Buy is a purchase contract which does not qualify as an ‘investment’ due to the lack of an assumption of risk and the regularity of profit and return. (¶ 24) Finally, Respondent claimed that the doctrine of the unity of investment did not apply because the MOC and the Option to Buy were two separate and unrelated agreements. (¶ 25)

Claimant responded that the *Salini* test did not bind the Tribunal in its determination on jurisdiction. (¶ 32) In any event, even if the *Salini* criteria were to be considered, Claimant argued, the Option to Buy would still qualify as an ‘investment’. First, had there not been the Option to Buy, Claimant would have bought the resort for an unlimited period of time. (¶ 33) Second, the Option to Buy could only be exercised upon a payment of USD 7.4 million and only after the resort was fully renovated and operational, which, in turn, would require a multi-million dollar investment in the course of time. (¶¶ 33-34) Third, Claimant would manage and operate the resort with a sufficient return in order to be able to exercise the Option to Buy. (¶ 34) Finally, Claimant’s investment in the resort clearly contributed to Egypt’s development as tourism had been recognized by Egypt as a critical industry. (¶ 35)

Claimant also submitted that the Option to Buy was not a ‘purchase contract’, but rather constituted a contractual right, which has been considered a qualifying investment in the past. The language of the BIT, Claimant further argued, clearly covered the right to purchase an active hotel resort at Claimant’s option. (¶ 38) In any event, Claimant would be in the position of a buyer who would seek remuneration in the form of future expected profits. (¶ 39) Finally, Claimant submitted that the MOC and the Option to Buy were inextricably linked and, therefore, formed a single investment. (¶ 40)

The Tribunal noted that Respondent did not object to the Tribunal's jurisdiction *rationae materiae* regarding the MOC. The Tribunal decided to look at the contractual arrangements as a whole, which, in this case, included both the MOC and the Option to Buy. As a result, the Tribunal concluded that the Option to Buy constituted part of an overall investment, which was not contested by Respondent. (¶¶ 42-43)

(b) Jurisdiction Rationae Temporis

Respondent submitted that it did not consent to arbitrate disputes regarding investments that fell outside the temporal scope of the BIT. Respondent argued that Claimant's investment was not protected under the BIT, which allegedly excludes investments made prior to its entry into force, unless they were specifically accepted under domestic investment legislation. Such an acceptance never took place under Egyptian Investment Law 43, which Respondent contends it was confirmed by the Submittal Letter of the US Secretary of State. (¶¶ 44-46)

Claimant responded that the language of the BIT only excluded from its scope investments that are contrary to domestic legislation. (¶ 47) The object and purpose of the BIT, which is to promote economic development, clearly suggests that Claimant's investment is covered. (¶ 48) While stating that the Submittal Letter was not related to the scope of the BIT, Claimant argued that it was not obliged to register its investment under Law 43 for it to be 'accepted'. (¶¶ 49-50) Alternatively, Claimant asserted that Respondent was estopped by conduct from raising such a defence. (¶ 51)

The Tribunal concluded that Law 43 did not set the exclusive procedures for the acceptance of foreign investments. Moreover, the Tribunal found that Egypt had accepted Claimant's investment by its subsequent conduct. (¶ 53) It also stated that even if Law 43 set exclusive procedures for accepting an investment, Egypt had waived such acceptance by way of its conduct. (¶ 54)

(c) Jurisdiction Rationae Personae

Based on Article 1 of the BIT, which stated that Claimant 'must own or control' the asset that comprises the protected investment, Respondent argued that Claimant could not 'own or control' the hotel resort because it was suspended under Californian law for failure to pay taxes, deprived of all rights, powers and privileges. (¶¶ 57-60) Respondent further claimed that, instead of Claimant, it was Mr. Alashmawy, who actually owned or controlled the investment and

Tribunal should pierce the corporate veil. In this case, Respondent argued, the Tribunal would lack jurisdiction as Mr. Alashmawy is a dual national of both the United States and Egypt. (¶ 61)

Claimant responded that the ICSID Convention does not require an inquiry into control at the time of investment; rather, the Tribunal's jurisdiction *rationae personae* is determined at the time at which the Request for Arbitration is filed. (¶ 62) According to applicable Egyptian law, Claimant denied that its rights ceased to exist because of its tax suspension. (¶ 63) It also argued that it owned and controlled the investment at all times and that the Tribunal should not pierce the corporate veil. (¶¶ 64-65)

The Tribunal denied that Californian law could apply extraterritorially so as to affect the validity of Claimant's transactions abroad. (¶ 67) The Tribunal also ruled that Claimant fulfilled the criteria of the ICSID Convention and considered Respondent's request to pierce the corporate veil unjustifiable. (¶ 68)

(d) Fork-in-the-road objection

Respondent argued that the fork-in-the-road provision of the BIT bars Claimant from bringing any treaty claims, as it has already brought a counterclaim in the Cairo arbitration and several claims before local courts. (¶¶ 69, 77) While arguing that the triple identity test should not be interpreted strictly, Respondent submitted that the present dispute (a) had the same fundamental basis as the as the disputes submitted to local courts; (b) had the same cause of action; and, (c) the treaty claims were linked to the contract claims. (¶ 71) Finally, Respondent submitted that the MFN provision did not apply to the dispute resolution clause as this was not the intention of the Parties. (¶ 72)

Claimant tried to distinguish the contract claims submitted to local courts from the treaty claims submitted before the Tribunal. (¶¶ 73-75) It argued that the local proceedings related to its attempt to enforce the MOC and the Option to Buy and not to any compensation on grounds of alleged treaty breaches. (¶ 73, 75) It also claimed that the present claims could not have been brought before local courts as they would fall outside their jurisdiction. (¶ 74)

The Tribunal concluded that the fork-in-the-road issue requires a thorough analysis and, therefore, joined its decision on this issue to the merits. (¶¶ 79-80)

(e) Equitable prescription

Respondent invoked equitable principles of prescription to bar Claimant's claims from being heard by the Tribunal. Respondent argued that (a) Claimant delayed unreasonably in bringing the present claims; (b) material facts were lost or in doubt and material witness had retired or passed away; and, (c) Claimant's delay prejudiced Respondent's ability to defend itself on equal footing to Claimant. (¶ 81) Respondent also noted that it was first notified of the dispute when Claimant filed for ICSID arbitration. According to Respondent, the Cairo arbitration or the local court proceedings did not constitute notice of the present dispute. (¶ 82)

Claimant, in turn, responded that a delay of seven years cannot lead to a presumption of negligence, as claims based on the same facts could still have been brought before Egyptian courts. (¶ 83) Claimant also stated that the mere fact that it provided a handful of documents and five comprehensive witness statements trumped Respondent's assertion on lost material facts and lack of witnesses. (¶ 84) Finally, Claimant argued that Respondent was not prejudiced by delay as it had sufficient notice and opportunity to gather facts relevant to its defence at the time of the underlying events. (¶ 85)

The Tribunal denied Respondent's objection on prescription of Claimant's claims as Respondent failed to prove the existence of such a rule under the ICSID rules or the BIT. (¶¶ 87-88)

3. Decision

The Tribunal rejected Respondent's jurisdictional objections on *rationae materiae*, *rationae temporis*, *rationae personae*, and equitable prescription. The Tribunal decided to join the question of validity of the Option to Buy and Respondent's fork-in-the-road objection to the merits. (¶ 89)