

Emirati investor wins damages over Algerian park project

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The Martyrs' Memorial, Algiers

An entity owned by Abu Dhabi's royal family has been awarded over US\$228 million plus interest and costs in an ICSID claim against Algeria over a failed project to develop a metropolitan park – as a dissenting arbitrator argues the case should have been rejected based on evidence of malfeasance.

A tribunal majority issued a final award yesterday ordering Algeria to compensate Algerian-registered Société des Parcs d'Alger (SPA) for breaches of an investment contract. The claimants had sought as much as US\$2.75 billion in the case, which had virtual hearings in December 2021 and May last year.

Tribunal chair **Klaus Sachs** of Germany formed the majority with Canada's **Stephen Drymer**, the claimants' appointee. Swiss arbitrator **Charles Poncet** dissented on jurisdiction and abstained from the merits. The award is yet to be published.

The tribunal declined jurisdiction over claims brought by SPA's parent entity Emirates International Investment Company (EIIC), which was not a signatory to the contract.

The claimants, which form part of the Abu Dhabi royal family-owned National Holding Company, were represented by King & Spalding in London, Paris and New York and Meltem Avocats in Marseille.

Algeria was defended by Gaillard Banifatemi Shelbaya Disputes in Paris, whose founders brought the case with them from their former firm Shearman & Sterling.

The dispute concerned the Great Winds Park, a US\$5 billion project to build a public park and urban development in the heart of Algiers. SPA signed an investment contract for the project with an Algerian government agency in 2011, but it ground to a halt in 2016 after an Algerian minister publicly announced the termination of various projects with the UAE.

The companies filed for arbitration in 2018, invoking an ICSID clause in the investment contract. While not a signatory, EIIC argued it should be considered a party. It also argued it could rely on protections in the UAE-Algeria bilateral investment treaty, based on a clause in the contract referring to Algeria's BITs.

Algeria argued the contract should be declared null and void because the project was obtained by "trading in influence" (or influence peddling) in violation of Algerian law. This argument rested on evidence that EIIC had made a payment of €14.75 million in 2007 to a British Virgin Islands-registered entity called Gallea for services rendered in connection with the project.

EIIC later brought various legal actions against former employees over the payment to Gallea, including a criminal complaint in Geneva – alleging the proceeds were laundered through Swiss bank accounts. After a seven-year investigation, Geneva authorities brought fraud charges in 2019 against three individuals – including a former EIIC director and a representative of Gallea – but they were all acquitted by the Swiss criminal courts.

In the award, Sachs and Drymer found that Algeria had not met its burden of establishing trading in influence based on compelling evidence.

Drawing support from the Swiss criminal courts' findings, the majority found that Gallea had performed some of the services contracted for and that the payment by EIIC was not undue or excessive. It also said Algeria had not identified any government decision maker as the potential target. The majority found it "quite unlikely" that Gallea was in a position to exert influence on the relevant government bodies.

Algeria pointed to various "red flags" concerning the transaction, including the use of offshore companies and a confidentiality clause in EIIC's contract with Gallea, but the majority said these weren't sufficiently indicative of illicit conduct.

The majority therefore also dismissed Algeria's counterclaim for damages based on the claimants' alleged fraudulent behaviour.

The tribunal was unanimous in declining jurisdiction over claims by EIIC. It said the common intention of the parties was not to include EIIC as a party to the contract, and EIIC had not played a sufficient role in its performance to conclude that Algeria implicitly consented to extend the contract to EIIC.

As for the contract's provision on BIT protection, the tribunal rejected arguments that this clause conferred rights to EIIC as a third-party beneficiary. It agreed with Algeria that the clause was a "simple reminder" of the protections available to SPA's foreign shareholders under Algeria's BITs. It was not contested that EIIC had not sought Algeria's consent to the ICSID arbitration as required by the UAE-Algeria BIT.

On the merits, the majority found Algeria breached its obligations by failing to provide project land and support to SPA. They also found the state had failed to perform the contract in good faith, including by failing to remove site obstructions, grant permits or connect external utilities to the project site.

It found Algeria's conduct amounted to a repudiation of the contract and declared it terminated.

SPA claimed for US\$2.75 billion in lost profits based on a discounted cashflow method, including for the sale of residential units and lease of office and retail space. But the majority said there was far too much uncertainty about the project's execution and commercial performance to grant this claim.

It also said SPA's alternative claim for US\$854 million for "lost opportunity" was too speculative, and that a sunk costs approach proposed by Algeria was not appropriate either. It ultimately awarded compensation of over US\$228 million plus interest on the basis of the business plans for the project. Interest was set at 3-month USD LIBOR + 2% from July 2013.

Algeria was also ordered to pay 75% of the claimants' legal fees and expenses, or around US\$7.7 million, as well as two-thirds of the arbitration costs.

In his dissent, Poncet said he would have declared the claim inadmissible in light of the payment to Gallea, saying he saw "evidence of malfeasance all over the file". He said the Swiss criminal proceedings had demonstrated a "thick forest of red flags" in respect of the transaction, and that the majority had overlooked the fact that the Swiss proceedings had focused exclusively on whether EIIC had been defrauded into making payments rather than whether there had been trading in influence.

Poncet argued that, instead of condemning "blatant misconduct", the majority had effectively given its approval to "a scheme by which two (or more) wheeler-dealers received millions of dollars for 'services' never invoiced and with the money paid into secret Swiss bank accounts operated by offshore companies pursuant to spurious contracts 'executed' by a ghost director".

Even if he had agreed with the majority on jurisdiction, Poncet said he would still have disagreed as to quantum. He said the sum awarded was disproportionate and excessive.

Counsel to Algeria, GBS Disputes founding partner **Yas Banifatemi** tells GAR she is "pleased" with the tribunal's ruling on jurisdiction in relation to EIIC and says the company's "attempt to bring an arbitration against Algeria based on seriously flawed grounds was nothing short of abusive." She says this is the first time an investment arbitration tribunal has rejected the extension of an arbitration agreement to a third party, including a parent company.

However, Banifatemi says she finds it "improper, if not very concerning" that the tribunal "did not do what it was asked to do and had the duty to do: recognise, name and sanction true corruption, notwithstanding overwhelming evidence before it on the claimants' engagement in trading of influence."

King & Spalding declined to comment.

Tribunal

- **Klaus Sachs** (Germany) (president) (appointed by chairman of ICSID administrative council)
- **Stephen Drymer** (Canada) (appointed by claimants)
- **Charles Poncet** (Switzerland) (appointed by Algeria)

Counsel to the claimants

- King & Spalding

Partners **John Savage KC** in London and **James Castello** and **Mehdi Haroun** in Paris, and counsel **Cedric Soule** and **Emma Iannini** in New York

- Meltem Avocats

Partner **Rami Chahine** in Marseille*

* Stayed on the case after leaving King & Spalding in January 2023

Counsel to Algeria

- Gaillard Banifatemi Shelbaya Disputes

Partners **Emmanuel Gaillard***, **Yas Banifatemi**, **Coralie Darrigade** and **Thomas Parigot**, counsel **Paschalis Paschalidis**** and senior associate **Pierre Viguiet** and associates **Arianna Rosato** and **Carolina Barro** in Paris

* Until his death in April 2021

** Until his [move](#) to Arendt & Medernach in September 2021

Expert witnesses

For the claimants

- **Mostefa Trari Tani** (on Algerian law)
- **Richard Boulton KC** of One Essex Court (on quantum)
- **Sid Ahmed Yemboul** of Properties Management (on real estate)

For Algeria

- **Ali Bencheneb** (on Algerian law) (later withdrew from the case)
- **Christophe Schmit** and **Jean-Baptiste de Courcel** of Accuracy (on quantum)

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