

Kluwer Arbitration Blog

Investment Arbitrations Ready to Land at Florence Airport?

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It is our tentative prediction that a recent ruling from the Regional Administrative Court of Tuscany (TAR), which blocked the project to expand Florence Airport's runway – and hence, its passenger flow and corollary [revenue](#) – may “prepare the ground” for an investment arbitration dispute between Argentinian and Emirati investors and Italy.

Background

In 2009, the then Mayor of Florence, [Matteo Renzi](#) (future Italian PM), proposed the idea of building a runway of 2,400 meters and a new terminal for the Florence Airport (“Amerigo Vespucci”) with the view of increasing its passenger flow. That idea met the support of the Region of Tuscany and the Argentinian tycoon, Mr. Eduardo Eurnekian, the majority shareholder of [Corporación América Airports](#) (CAAP), the world leading company in owning and operating airports. In 2014 CAAP acquired the [majority](#) ownership of Florence airport in order to present the “2014-2029 Masterplan” to expand the airport. The [Masterplan](#) is estimated to cost approximately € 334,500,000 and aims at [doubling up](#) passenger flow of the airport. Of this 334.5 million, the State committed to put [150 million](#), while the remainder 184.5 million would be put by the private investors managing the company that operates the airport.

The authorization process for the works started in 2015. On 28 December 2017, the Decree-Law containing a favorable [Environmental Impact Assessment](#) (EIA) for the project was issued by the Ministry of Environment (MoE). On [21 March 2018](#), seven municipalities adjacent to the city of Florence challenged the EIA Decree-Law before the TAR in order to block the project.

In the meantime, on [25 July 2018](#), CAAP sold 25% of its participation in Toscana Aeroporti S.p.A. (hereafter TA, the local company set up to run both Florence airport and Pisa airport) to Matar Holdings 2 B.V., a company indirectly controlled by the [Investment Corporation of Dubai](#) (ICD), the sovereign wealth fund of the Emirate of Dubai.

On [6 February 2019](#), the decision-making body of the Conference of Services acknowledged that all the competent Administrations – including the Ministry for the Cultural Heritage – had given their favorable opinions for the Masterplan, despite the minority opposition of the seven municipalities. Accordingly, on [16 April 2019](#), the Minister of Infrastructure and Transport (MIT) ratified the outcome of the Conference of Services by issuing the Decree-Law that gave the green

light to start the works.

However, the whole project has suffered a setback because on [27 May 2019](#) the TAR rendered its [ruling n. 793/2019](#) upholding the challenge submitted by the seven municipalities, and thus annulled the EIA Decree-Law. The TAR found that the environmental assessment conducted by the MoE was not sufficiently exhaustive. Consequently, the MIT had to suspend its Decree-Law approving the Masterplan, while the Region of Tuscany, the municipality of Florence and TA have appealed the ruling to the [Council of State \(CS\)](#), the [highest Administrative Court](#). The MIT's Decree-Law will remain [suspended](#) until the resolution of the administrative dispute and so will the Masterplan for Florence airport. The CS is expected to rule on the matter in [January 2020](#).

Reactions

Bewildered by the TAR's ruling that quashed the EIA Decree-Law, TA issued a [press release](#) criticizing its contents. To the company's surprise, the administrative Judge:

“completely overturned the assessment given by the national ministerial commission of experts, supported and endorsed by the competent Ministers of three different national governments (Renzi, Gentiloni and Conte), regarding the suitability of the technical documentation to demonstrate the lack of negative impacts on the environment.”

According to the TAR, the Administration should have requested further details about the project before issuing the relevant EIA Decree-Law. The competent Administration instead concluded – wrongly, according to the TAR – that the assessment had been thorough and complete. However, Article 5 letter g of Legislative-Decree No. 152 of 2006 does [allow](#) the MoE to issue the EIA Decree-Law for a project having a level of details that are at least equivalent to that of the feasibility plan (as defined in the [Legislative-Decree No. 50 of April 18, 2016](#)), and in any event a sufficient level of details to permit a thorough assessment of the environmental impacts. And, indeed, the Department of Environmental Assessment of the MoE informed the Italian Civil Aviation Authority that it reached the following conclusion: *“The planning documentation in the procedure's archives may be regarded as adequate for the purposes of Environmental Impact Assessment rules.”*

Moreover, the company has emphasized that it was not TA that came to the conclusion that the details of the project were sufficiently adequate for obtaining a favorable EIA; it was the competent technical departments of the Ministry that came to that conclusion. TA has affirmed that it did everything it was asked to in the course of the administrative procedure. Further, the company complained about the arbitrariness of the judgement, which does not address legal points; rather, it assesses technical matters of the project. Apparently, the TAR — without any court-appointed expert — discarded a complex two-and-a-half-year study conducted by qualified ministerial technical experts on the same day as the hearing, which is when the judgement was rendered. In that judgment, the TAR also suggests that the ministerial Environmental Observatory (tasked with verifying compliance with the requirements) should have been more inclusive towards the municipalities opposed to the project, even if the Observatory was not mandated by the law to do so.

Potential Arbitrations

TA's [largest shareholders](#) are indirectly Argentinean and Emirati investors. To be precise, CAAP is incorporated in Luxemburg, however, its main shareholder is the Argentinean mogul, Mr. Eurnekian; while Mataar Holdings 2 B.V is a Dutch registered company controlled by the Emirati ICD.

Both [Argentina](#) and the [United Arabs Emirates](#) have a BIT in force with the Italy. Both shareholders meet the definition of qualified investors under the legal instruments in question: Mr. Eurnekian as an Argentinean citizen pursuant to Article 1(2)(a) of the Argentina-Italy BIT, whereas the UAE-Italy BIT specifically protects also State-owned entities, such the sovereign wealth fund of Dubai at Article 1(2).

Mr. Eurnekian's and ICD's indirectly owned shares in TA meet the definition of a qualified investment as per Article 1(b) of both BITs. Accordingly, both foreign shareholders could avail themselves of the protection under the corresponding BITs made effective through the investor-State arbitration contemplated in both Treaties.

Article 2 of both BITs provides for a fair and equitable treatment (FET) that shall be accorded to the foreign investors of the other Contracting Party.

Admittedly, TAR's ruling has frustrated Mr. Eurnekian's and ICD's' [legitimate expectations](#) of doubling up the passenger flow and, accordingly, the revenue of their asset. Arguably, those frustrated legitimate expectations have been built up on various approvals by the local and central Administration. Three different ministers over a period of three years and three successive governments have endorsed investors' project to increase the airport's capacity. Consequently, the Italian State has fully backed-up investors' legitimate expectations with respect to their qualified investment.

Finally, either the TAR arbitrarily came to the wrong conclusion (because the Administration had sufficient details about the project to issue the EIA) or the TAR was correct (because the Administration negligently did not request further details about the project before issuing the EIA). In either scenario, the Italian State first encouraged and then let down investors' legitimate expectations by failing to ensure a favorable, stable and predictable legal framework for the investment at hand. Therefore, Italy could be held liable for breaching its [FET obligation](#) before the arbitral tribunals constituted under the Italy-Argentina/UAE BITs.

Additionally, an [umbrella clause](#) claim could be available by combining the Most-favored Nation (MFN) clause of the Italy-Argentina/UAE BITs with the Italy-Panama BIT. Arguably, Italy breached also that clause by rolling back the *fair value* over the construction services that would have been provided by the private investors in TA corresponding to the adequate margin over [184.5 million euros](#) worth of construction services.

From investors' perspective, a double investment arbitration would be more appealing than just appealing to the CS in terms of claimable damages. A favorable decision to the investors by the CS is not going to compensate the loss of profits that has already materialized due to the postponement of the works. Legitimate interests do not receive the same level of protection under national law as they do under investment law. In this sense, an international arbitration is more attractive as the

applicable law to the dispute takes into account such future loss of profits. Therefore, an hypothetical award quantifying the damages may **realistically** range from several dozen million euros (in case the Masterplan is simply delayed) to several hundred million euros (in case the execution of the Masterplan is rejected once and for all by the CS).


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