

Kuwait sees off claims over health screening services

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The Kuwait Towers in Kuwait City (Credit: Shutterstock/Fredy Thuerig)

UPDATED: An UNCITRAL tribunal has dismissed an US\$86 million investment treaty claim over the termination of contracts for health-screening services – after a related US\$800 million treaty claim was also discontinued.

In an award on 9 June, the tribunal at the Permanent Court of Arbitration dismissed with prejudice the claim brought by Conseil Economique Des Pays Musulmans (Economic Council of Muslim Countries), a Swiss entity that describes itself as a charitable organisation.

The claimant had asked for the claim to be withdrawn in the wake of allegations by Kuwait that the jurisdictional basis for the claim was fraudulent. Conseil Economique denied the allegations.

The tribunal dismissed the case while stating that it “makes no determination regarding the jurisdictional and merits issues in this case, and therefore neither credits nor discredits” the allegations raised by the state and the investor in their submissions.

The tribunal is understood to have awarded Kuwait legal fees and costs.

The Hague-seated tribunal was chaired by US arbitrator **Jean Kalicki** and included Indian national **Kewal Singh Ahuja**, of counsel at SRD Legal in New Delhi, and **Attila Tanzi**, Italian professor of international law at the University of Bologna. The claimant changed its counsel a number of times during the case. It initially retained Kuwaiti lawyer **Manal Ben Heyder** before turning to Belgian boutique DMDB Law. It finished the case using Dechert.

Curtis Mallet-Prevost Colt & Mosle represented Kuwait throughout the dispute.

The claim was one of two UNCITRAL arbitrations brought by alleged shareholders in a Kuwaiti entity called Public Services Company (PSC), which partnered with Kuwait’s Ministry of Health in 2003 to provide health services to foreign expatriates. Among other things, PSC conducted health screening in India, Jordan and Egypt which people were required to undergo before they could emigrate to Kuwait.

All the claimants said they invested in PSC when it was privatised in 2017. In the same year, however, Kuwait’s Minister of Health cancelled various contracts with PSC, including those relating to expatriates. The investors argued the minister’s actions damaged their investment in PSC and breached their right to fair and equitable treatment under the BITs.

Conseil Economique and others filed the first claim under the Switzerland-Kuwait bilateral investment treaty in 2018, while Spanish entities Alcosa Shareholding and Lucidos De Yeso Proyectoado launched their own treaty claim the following year.

In the *Conseil Economique* claim, there were initially up to seven claimants including Danish and Irish nationals who also said they were shareholders in PSC.

The original claim also named PSC as a respondent, despite having been brought under a treaty.

At that time, the claimants in the first case were seeking up to US\$1 billion.

After DMDB came on board, the other claimants in the *Conseil Economique* case withdrew and PSC was removed as respondent, while the damages claim was reduced to around US\$86 million.

In a request to bifurcate the proceeding last year, Kuwait alleged that Conseil Economique's investment in PSC was a fraud. It said that the claimant had never undertaken any charitable activities and was only formed for the purpose of bringing the claim. The state alleged that a Swiss investment treaty specialist had even helped to set up the entity – something disputed by the claimant.

Conseil Economique maintained that the shares it held in PSC were donated to it by an Irish national. However, Kuwait alleged that the timeline for the purported purchase and donation of the shares was not credible and that the claimant had relied on forged documents and doctored records.

Kuwait also said it had uncovered that PSC and Conseil Economique are controlled by the same person, Kuwaiti national Aly Dha Alshamali. The Irish national who donated the shares is his wife, something Kuwait said the claimant never disclosed.

The tribunal agreed to bifurcate the proceedings last year and DMDB withdrew as counsel shortly after, to be replaced by Dechert. Conseil Economique then sought to withdraw its claim and proposed a costs settlement. Kuwait rejected the settlement proposal and the tribunal proceeded to render a final award.

Counsel to the parties have given conflicting characterisations of the final award and the circumstances in which the claim was withdrawn.

Curtis partner **Charles Buderl**, lead counsel to Kuwait, says the firm is "very pleased with the tribunal's award, which validates Kuwait's determination to vigorously resist meritless, and in this case manufactured and fraudulent, claims."

Dechert arbitration co-head **Arif Hyder Ali**, who represented Conseil Economique, observes that the award expressly made no determination on jurisdiction or merits or about the truth of the allegations raised by the parties.

Ali also says his client “requested that the claim be withdrawn with prejudice in light of offers of settlement by Kuwait.”

Buderi says that the state was willing to enter into an agreement whereby Conseil Economique publicly withdrew its claims on a with prejudice basis and paid Kuwait’s full costs, without the state making any payment. However, he says this was never realised. “Characterising that as a settlement offer by Kuwait is very misleading,” he adds.

According to Buderi, the claimant’s decision to withdraw its claim before it reached the merits stage came about after “overwhelming evidence of the claimant’s fraud had been submitted to the tribunal”. He also points to the fact that the tribunal ordered the claimant to pay Kuwait’s legal expenses and costs.

Alcosa and Lucidos also withdrew their claim late last year after DMDB withdrew. It is unclear if Dechert also appeared in that case. Kuwait used Lalive in that proceeding.

It is understood that the claimants appointed Dutch arbitrator **Melanie van Leeuwen** of Derains & Gharavi and Kuwait appointed **Toby Landau QC** of Essex Court Chambers. A chair was never selected.

Alshamali is also understood to have been behind a failed PCA claim brought against Saudi Arabia by Indian investor Khadamat Integrated Solutions, of which he is a director. That case, understood to be worth US\$2.76 billion, followed an almost identical procedural path as the claim brought by Conseil Economique.

Khadamat initially retained an Indian advocate and then DMDB, which again made way for Dechert.

Khadamat sought to withdraw the claim without prejudice but Saudi Arabia – represented by Curtis – pushed for a final award. The claim was dismissed with prejudice and the state won costs.

This is the second win that Curtis has chalked up for Kuwait recently. In November, it helped the state knock out a US\$320 million treaty claim brought by Egyptian tourism investor Almasryia after an ICSID tribunal ruled it was manifestly without legal merit and had been filed before a cooling-off period had ended. Almasryia has since applied to annul the award.

This story has been amended since it was first published to make clear that Conseil Economique withdrew its claim and that the tribunal made no determination on the parties' allegations.

Conseil Economique Des Pays Musulmans v The State of Kuwait (PCA Case No. 2018-35)

Tribunal

- **Jean Kalicki** (US) (chair)
- **Kewal Singh Ahuja** (India) (appointed by Conseil Economique Des Pays Musulmans)
- **Attila Tanzi** (Italy) (appointed by Kuwait)

Counsel to Conseil Economique Des Pays Musulmans

- Dechert (after September 2019)

Partner **Arif Ali** and associate **Amir Farhadi** in Washington, DC

- DMDB Law (from 2018 until September 2019)

Partners **Dirk De Meulemeester** and **Eric De Brabandere** in Brussels

- **Manal Ben Heyder** (until 2018)

Counsel to Kuwait

- Curtis Mallet-Prevost Colt & Mosle

Partner **Charles Buder** and **Luciana Ricart** and associate **William Hampson** in London and partner **Justin Jacinto** in Washington, DC and London

- Kuwait's department of legal affairs and legislation of the council of ministers

Lawyers **Salah AlMassad**, **Fuad Al Majed**, **Saud AlQemlas**, **Fatima Al Rubaian** and **Dhuha Alyaseen** in Kuwait City

Alcosa Shareholding and Lucidos De Yeso Proyectado v Kuwait

Tribunal

- **Melanie van Leeuwen** (Netherlands) (appointed by the claimants)
- **Toby Landau QC** (UK) (appointed by Kuwait)

Counsel to Alcosa and Lucidos

- DMDB Law (dropped off the claim)

Partners **Dirk De Meulemeester** and **Eric De Brabandere** in Brussels

Counsel to Kuwait

- Lalive

Partners **Michael Schneider**, **Noradèle Radjai** and **Jaime Gallego** in Geneva