

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and
Mr Fouad Mohammed Thunyan Alghanim v Hashemite Kingdom of Jordan
(ICSID Case No. ARB/13/38)**

**PROCEDURAL ORDER NO 7
ON CLAIMANTS' APPLICATION FOR DOCUMENT PRODUCTION**

22 March 2016

The Tribunal

The Honourable L. Yves Fortier, PC CC OQ QC
Professor Marcelo G. Kohen
Professor Campbell McLachlan, QC (President)

Secretary to the Tribunal

Ms. Aïssatou Diop

Assistant to the Tribunal

Mr. Jack Wass

Whereas:

Paragraph 15.2 of Procedural Order No. 1 provides that “Documents may only be requested after the deadline prescribed in Annex A with the leave of the Tribunal or the written consent of the other party”;

By letter of 10 March 2016 and accompanying Redfern Schedule, the Claimants apply pursuant to Article 3(9) of the IBA Rules on the Taking Evidence in International Arbitration 2010 (**IBA Rules**) for the production of a document, namely the “due diligence report prepared by KPMG (Bahrain and/or Jordan), as detailed in §7 of the Second Witness Statement of Ibrahim Khateeb” dated 15 February 2016 (**the Application**);

Claimants affirm that that “have independently confirmed the existence of the due diligence report with KPMG and Batelco, who have confirmed that the document exists on their systems and should they be ordered by the Tribunal to provide it, they will do so.”

By letter of 17 March 2016 and accompanying Redfern Schedule, the Respondent responded to the Application, submitting that leave should be refused and, if leave was granted, that the Application should be refused on its merits;

By updated Redfern Schedule submitted on 20 March 2016, the Claimants provided their comments in rebuttal to the Respondent’s objections to the Application;

The Tribunal now orders as follows:

1. The Tribunal notes that:
 - (a) Khateeb 1, [22] stated that “As far as I am aware, KPMG Bahrain conducted the financial due diligence” for Batelco in relation to its purchase of the shares in UMC from UTT, but did not elaborate;
 - (b) Claimants’ Reply, [74] criticized Mr Khateeb’s evidence, *inter alia* on the basis that he had failed to produce a document in support of his testimony;
 - (c) In Khateeb 2, [7], Mr Khateeb notes that he is criticized in part because “I have not provided a copy of the report.” In response, he confirms that he is sure that “KPMG Bahrain conducted the financial due diligence on the transaction. While our office destroyed all documents and papers prior to 2008 in 2015”.
2. Khateeb 1 refers only in general terms to KPMG’s conduct of the process of financial due diligence. However, the Tribunal considers that a fair reading of the testimony now given in Khateeb 2 is that Mr Khateeb’s evidence is that KPMG Bahrain did report to Batelco on its due diligence, but that no such report is any longer in the possession of KPMG’s Jordan office, since all documents prior to 2008 have been destroyed.
3. The present Application therefore falls to be considered on the distinct basis that a witness called by one of the parties refers to and relies upon a particular document in his witness statement and the other party applies for an opportunity to see the document referred to. This circumstance places the present Application in a different category to

other applications for production of documents where the time for exchange of document production requests has long passed.

4. Since the existence of the document was only confirmed in Khateeb 2; the request is confined to a single document; and the Claimants affirm that the third parties who remain in possession of the document have indicated their willingness to provide it on receipt of a request, the Tribunal considers that it is appropriate to grant leave to the Claimants to make the Application.
5. It is common ground that the Tribunal has the power to request the production of a relevant document such as this from third parties in terms of Article 3(9) of the IBA Rules.¹ It has already exercised this power in PO No 4.
6. The Respondent submits that the Application should be declined because (a) the Claimants have not explained why the document is relevant to the case and material to its outcome in accordance with Articles 3(3)(b) and 9(2)(a); and (b) the Claimants have not explained how the prerequisites in Article 3(3) are satisfied and the discretionary considerations in Article 3(9) favour granting the Application.
7. As a preliminary point, the Tribunal does not accept the Respondent's contention that the result of this Application must stand or fall with the result of the corresponding requests for leave to produce rebuttal evidence addressed in PO No. 6. The applications arise in different contexts and must be addressed on their own terms.
8. With respect to the first objection, the Tribunal notes that Mr Khateeb has put the KPMG report in issue, and has testified that he no longer possesses a copy. Respondent would have been obliged to submit a copy of the report with Khateeb 2, were such a report still in Mr Khateeb's possession, because Article 4(5)(b) provides (inter alia) that, with any Witness Statement "*Documents on which the witness relies that have not already been submitted shall be provided*".
9. In these circumstances, the Tribunal does not need to make its determination as to relevance and materiality in the abstract. The witness has himself referred to the document in the course of explaining his evidence as to KPMG's role in the financial aspects of the transaction that is at issue in the present proceedings.
10. With respect to the second objection, the Tribunal (i) notes that it has already concluded on the basis of the witness's testimony that the document is sufficiently relevant and material; (ii) finds that the Claimants have provided enough detail to satisfy the requirements of Article 3(3); and (iii) notes the Respondent has not suggested that any reason for objection in Article 9(2) applies (other than Article 9(2)(a) addressed above). In those circumstances, the Tribunal is satisfied that a request to produce the document is appropriate.
11. However, the Tribunal considers that in circumstances where the KPMG report was deployed by a witness called by the Respondent, it is appropriate that the Respondent be directed to seek production of the document. Accordingly, the Tribunal orders as follows:
 - (a) No later than 3 working days after the date of this Order, the Respondent shall write to KPMG Bahrain and Batelco jointly, enclosing a copy of the present Order;

¹ The Claimants' original request sought that the Tribunal "order" the third parties to produce the document, but their rebuttal to the Respondent's objections speaks in terms of a request.

- (b) That letter shall request that the recipients provide a copy of the report to the Respondent and the Claimants (by their counsel) as soon as possible, but no later than 5 working days after the date of the Respondent's letter; and
- (c) The parties are not to submit the document to the Tribunal immediately, but shall liaise between themselves to produce an agreed translation of the document, to be submitted to the Tribunal (with the original exhibit) no later than Monday 11 April 2016.

For and on behalf of the Arbitral Tribunal

SIGNED

Professor Campbell McLachlan QC
President of the Tribunal
Date: 22 March 2016