

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
**WASHINGTON, D.C.**

IN THE PROCEEDING BETWEEN

**LIBANANCO HOLDINGS CO. LIMITED**  
(CLAIMANT)

AND

**REPUBLIC OF TURKEY**  
(RESPONDENT)

**(ICSID CASE NO. ARB/06/8)**

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**AWARD**

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*Members of the Tribunal:*

Mr Michael Hwang S.C., *President*  
Mr Henri C. Alvarez Q.C., *Arbitrator*  
Sir Franklin Berman Q.C., *Arbitrator*

*Secretary of the Tribunal:*

Ms Martina Polasek

*Date of Dispatch to the Parties: 2 September 2011*

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## GLOSSARY AND TABLE OF ABBREVIATIONS

The following terms and abbreviations are used in the Award.

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Ayşegül Uzan	Ayşegül Akay Uzan
C.CM	Claimant's Counter-Memorial on the Preliminary Jurisdictional Objections of 3 May 2009
ÇEAŞ	Cukurova Elektrik Anonim Sirketi
Cem Uzan	Cem Cengiz Uzan
Claimant / Libananco	Libananco Holdings Co. Limited
C.M	The Claimant's Memorial on Jurisdiction and Merits of 12 October 2007
Concession Agreements	Concession Agreements signed by ÇEAŞ and Kepez with the Turkish Government in 1998
Continued Hearing	The second tranche of the hearing on Preliminary Jurisdictional Objections which took place in Paris over the period 23 March to 25 March 2010
C.PHM	Claimant's Post-Hearing Memorial of 1 July 2010
C.Rej.	Claimant's Rejoinder on the Preliminary Jurisdictional Objections of 3 August 2009
Cyprus	Republic of Cyprus
Danistay	Turkey's highest administrative body, also known as the Council of State
Depository Bank	İstanbul Stock Exchange Settlement and Custody Bank, Inc.
Depository Bank Report	Report prepared by the İstanbul Stock Exchange Settlement and Custody Bank, Inc. and filed on 3 March 2009 by the Respondent
ECL	Cypriot Exchange Control Law, Chapter 199 of the Laws of the Republic of Cyprus, 1952
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
Electricity Market Law	Law No. 4628, Official Gazette No. 24335, 3 March 2001

Jordan	Hashemite Kingdom of Jordan
Hakan Uzan	Murat Hakan Uzan
IBC	International Business Company
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Immediate Family	The following members of the Cem Uzan's immediate family: Hakan Uzan, Kemal Uzan and Ayşegül Uzan
Kepez	Kepez Elektrik Turk Anonim Sirketi
Latimer	Latimer (Management Services) Ltd
Ministry	Turkish Ministry of Energy and Natural Resources
Preliminary Jurisdictional Objections	Certain issues selected by the Tribunal to be heard as preliminary questions pursuant to Rule 41(4) of the Arbitration Rules
Preliminary Objections Hearing	The first tranche of the hearing on the Preliminary Jurisdictional Objections which was held in Washington, D.C. over the period 4 November to 7 November 2009
Prontoservus	Prontoservus Ltd
Respondent / Turkey	Republic of Turkey
R.CM	Respondent's Counter-Memorial on the Merits of 26 September 2008
R.PHM	Respondent's Post-Hearing Memorial of 1 July 2010
R.PO / Preliminary Objections	Respondent's Preliminary Objections of 23 June 2008
R.Rep.Supp	Respondent's Reply on Issues Contained in the Republic's 3 March Supplement to the Counter-Memorial of 14 August 2009
R.Supp	Respondent's Supplement to Counter-Memorial of 3 March 2009
Rumeli Elektrik	Rumeli Elektrik Yatirim A.S.
RWL	Riley Welch LaPorte & Associates
SDIF	Savings Deposit Insurance Fund

STA(s)	Share Transfer Agreement(s)
Tr	Transcript – references to the transcript are made in the following manner “page number: line number”
Utilities	ÇEAŞ and Kepez
VCLT	Vienna Convention on the Law of Treaties

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## **I. INTRODUCTION**

1. This arbitration concerns a claim brought by the Claimant, Libananco Holdings Co. Limited (“Claimant” or “Libananco”), a Cypriot company, against the Republic of Turkey (“Respondent” or “Turkey”), in respect of a number of alleged breaches of the Energy Charter Treaty (“ECT”), to which both the Republic of Cyprus (“Cyprus”) and Turkey are Contracting Parties. The dispute concerns the seizure of two Turkish utility companies, Cukurova Elektrik Anonim Sirketi (“ÇEAŞ”) and Kepez Elektrik Turk Anonim Sirketi (“Kepez”), in respect of which Libananco holds shares and the cancellation of concession agreements between the latter two entities and the Respondent on 12 June 2003. The Claimant invoked the dispute resolution provisions contained in Article 26 of the ECT and submitted the dispute to the International Centre for Settlement of Investment Disputes (“ICSID”), pursuant to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).
2. This Award deals with certain preliminary objections to jurisdiction raised by the Respondent. The jurisdictional phase has involved extensive submissions by the Parties accompanied by a significant number of exhibits and legal authorities. While the Tribunal does not discuss all exhibits and legal authorities, it has carefully considered all the evidence and legal authorities in this case.

## **II. THE PARTIES**

3. The Claimant in this arbitration is Libananco Holdings Co. Limited, a limited liability company domiciled and organised under the laws of Cyprus.
4. The Claimant is represented in this arbitration by its duly authorised attorneys, Crowell & Moring LLP and Mr Achilleas L Demetriades.
5. The names of the Claimant’s attorneys and their office addresses are listed on the inside cover of the present Award.
6. The Respondent in this arbitration is Turkey.
7. The Respondent is represented in this arbitration by its duly authorised attorneys, Freshfields Bruckhaus Deringer LLP and Coşar Avukatlık Bürosu.
8. The names of the Respondent’s attorneys and their office addresses are listed on the inside cover of the present Award.

## **III. THE ARBITRATION PROCEEDINGS**

9. On 23 February 2006, ICSID received a Request for the institution of arbitration proceedings under the ICSID Convention filed by the Claimant against the Respondent (“Request for Arbitration”). The Request for

Arbitration was registered by the Secretary-General of ICSID on 19 March 2006, pursuant to Article 36(3) of the ICSID Convention.

10. The notice of registration invited the Parties to communicate to ICSID any provisions agreed by them regarding the number of arbitrators and the method of their appointment. By letter of 30 May 2006, the Parties informed ICSID that they had reached agreement on the method, according to which the Tribunal was to consist of three arbitrators, one appointed by each party within a certain time limit and the presiding arbitrator (the President of the Tribunal) to be appointed by agreement of the Parties by 17 August 2006, failing which the appointment would be made by the Chairman of the Administrative Council of ICSID.
11. Within the agreed time limits, the Claimant appointed Mr Henri Alvarez (later Mr Henri Alvarez Q.C.), a national of Canada, and the Respondent appointed Sir Franklin Berman Q.C., a national of the United Kingdom. The Parties having failed to reach agreement on the presiding arbitrator, the Claimant, by letter dated 21 August 2006, requested that the Chairman of the Administrative Council of ICSID appoint the presiding arbitrator. On 11 December 2006, after consulting the Parties, the Chairman appointed Mr Michael Hwang S.C., a national of the Republic of Singapore, as the presiding arbitrator and hence the President of the Tribunal. The Tribunal was thus constituted and the proceedings began on 18 December 2006, pursuant to Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”). Mr Ucheora Onwuamaegbu, Senior Counsel, ICSID, was designated as the Tribunal’s Secretary. He was later replaced by Ms Martina Polasek, Senior Counsel, ICSID.
12. Pursuant to Rule 13(1) of the Arbitration Rules, the Tribunal held its first session with the Parties in New York on 12 February 2007 at the offices of the Respondent’s Counsel. Among other things, it was agreed that the Arbitration Rules in effect as of 1 January 2003 would govern the proceedings; that the place of proceedings would be Washington, D.C.; and that the procedural language would be English. As the Parties did not agree on the procedural calendar, the Tribunal decided that the Claimant would file a Memorial on jurisdiction and merits, but not on quantum, by 13 August 2007, and that the Respondent would file a Counter-Memorial on jurisdiction and the merits within six months of receipt of the Claimant’s Memorial. Upon receipt of both submissions, the Tribunal would decide whether to bifurcate jurisdiction from the merits.
13. On 1 August 2007, the Claimant filed a request for extension of time to file its Memorial. By agreement of the Parties, the Tribunal granted the request and allowed the Respondent the same amount of additional time to file its Counter-Memorial.
14. Concurrently with its request for extension, the Claimant’s First Request for Production of Documents, concerning an alleged surveillance by the Respondent of the Claimant’s potential witnesses and counsel, was filed. On 17 September 2007, at the invitation of the Tribunal, the Respondent filed a

response to the Claimant's latter request, advising that enquiries had been made with the relevant government departments and that they had affirmed that no surveillance of the Claimant's Counsel had been or was being carried out; consequently there were no documents to produce.

15. The Claimant filed a reply on 19 November 2007, questioning the Respondent's affirmation that no surveillance was being carried out and reserving its right to reinstate its First Request for Production of Documents. By letter of 3 December 2007, the Tribunal acknowledged that the Claimant had withdrawn its request for the production of documents.
16. The Claimant filed its Memorial on Jurisdiction and Merits on 12 October 2007 ("C.M"). The C.M was accompanied by exhibits and legal authorities, as well as four Witness Statements of Mr Cem Cengiz Uzan, Mr Reha Ferhun Gulu, Ms Emel Ersen Gunaydin and Ms Hulya Ozveren, and three expert reports of Dr Michael B Rosenzweig, Prof Dr Christian Rumpf and Prof Dr Rudolf Dolzer.
17. On 18 December 2007, the Respondent's First Request for Production of Documents, relating to the Claimant's business activities and its acquisition and ownership of ÇEAŞ and Kepez shares, was filed. Concurrently, the Respondent applied for provisional measures concerning security for costs ("Application for Security for Costs"), requesting an order that the Claimant post security adequate to guarantee payment of any award of legal fees and other costs in the Respondent's favour, namely the amount of US\$5 million, or such other amount as the Tribunal might deem appropriate.
18. After comments by the Parties on the Respondent's two requests, filed respectively on 11 February 2008 (the Claimant's objections to the requests) and 25 February 2008 (the Respondent's further arguments in support of its Application for Security for Costs), the Claimant submitted an application requesting for summary relief ("Claimant's Application for Summary Relief") on 29 February 2008. The application was based on information indicating that the Respondent had conducted intercepts of emails and MSN messages sent by and to the Claimant, persons associated with the Claimant and the Claimant's Counsel in this case.
19. By its submission of 19 March 2008, the Respondent requested that the Tribunal deny the Claimant's Application for Summary Relief. In addition, it applied for an order that the Claimant deposit the original share certificates in ÇEAŞ and Kepez for safekeeping, as a safeguard against an illegitimate course of action that the Respondent alleged could be undertaken by the Claimant. On 25 March 2008, the Claimant filed its comments on the Respondent's observations of 19 March 2008, including new evidence concerning the alleged surveillance, and objected to the request for physical deposit of the relevant share certificates. The Respondent filed a rejoinder on 7 April 2008.
20. The Tribunal suspended the time limit for the filing of the Respondent's Counter-Memorial and fixed a hearing on the Parties' respective applications.

It also requested and received, on 11 April 2008, the Parties' summaries of their respective positions concerning the various requests.

21. The hearing on the Parties' applications was held on 28 April and 29 April 2008 at the World Bank in Washington, D.C. The Tribunal deliberated immediately following the hearing and, on 1 May 2008, issued orders on each of the applications, pending the issuance of a more detailed decision containing the reasoning. That decision was issued on 23 June 2008 (the "Decision on Preliminary Issues").
22. The Tribunal dismissed the Claimant's Application for Summary Relief and addressed the Claimant's concerns concerning intercepts and surveillance through certain protective orders made pursuant to Article 22 of the ICSID Convention, while recognising the Respondent's sovereign powers to conduct criminal investigations. With respect to the Respondent's First Request for Production of Documents, the Tribunal ordered, among other things, that the Claimant deliver originals of share certificates in ÇEAŞ and Kepez to an escrow agent, who would hold the certificates to the order of the Tribunal and would take instructions only from the Tribunal. During the escrow agent's custody of the share certificates, the certificates would be subject to forensic examination by the Parties' respective experts. The Tribunal declined to recommend any measures in respect of the Respondent's Application for Security for Costs. Finally, the Tribunal instructed the Respondent to file its Counter-Memorial on the merits and jurisdiction by 1 July 2008.
23. On 23 June 2008, the Respondent filed Preliminary Objections on Jurisdiction and Admissibility ("Preliminary Objections" or "R.PO"). The Respondent referred to Rule 41(1) and 41(3) of the Arbitration Rules and requested for the Tribunal to suspend the proceedings on the merits to deal with the Preliminary Objections as a preliminary question.
24. On 1 July 2008, the Claimant informed the Tribunal that it had, pursuant to the Tribunal's orders, deposited all the bearer share certificates in ÇEAŞ and Kepez that it owned and that were in its physical possession to a proposed escrow agent in Vienna, Austria. The Claimant subsequently submitted the details of the proposed escrow agent to the Tribunal. The Parties consulted with a view to reaching an agreement on the issues relating to the deposit of the share certificates and other original documents, their inspection, the proposed agent and bifurcation of jurisdiction from the merits. As they were unable to reach agreement, by letters of 17 July and 23 July 2008 respectively, the Parties sought orders from the Tribunal. The Claimant opposed a bifurcation of jurisdiction from the merits on liability and requested the Tribunal to direct the Respondent to submit its Counter-Memorial on the merits forthwith.
25. In its Procedural Order of 11 August 2008, the Tribunal recalled its previous orders and directions. It stated that its decisions recorded in the Minutes of the first session remained in effect, and that the Respondent must accordingly file its arguments on the merits, after which the Tribunal would consider the

question of bifurcation. The Tribunal granted the Respondent until 21 September 2008 to complete its Counter-Memorial on the merits.

26. Also in its Order of 11 August 2008, the Tribunal recalled its order on document production of 1 May 2008 and directed the Claimant to comply with that order. It set out a procedure and fixed time limits in respect of the appointment of an escrow agent, the determination of the place of custody of the share certificates and the Parties' agreement on the terms of a protocol of inspection. The Tribunal also repeated its protective orders concerning persons on the Claimant's team of agents and representatives made pursuant to Article 22 of the ICSID Convention.
27. On 19 August 2008, the Claimant informed the Tribunal that it nominated Mr Stephan Meusburger of the law firm of Benesch & Meusburger in Vienna, Austria, as the escrow agent, and requested for the Tribunal's approval of that appointment. The Respondent did not object to the appointment, but reserved its position as to certain arrangements concerning the proposed place of custody, a facility called "Das Safe" in Vienna, Austria.
28. By order of 16 September 2008, the Tribunal approved Mr Meusburger as the escrow agent and directed him to provide further details concerning the place of custody for the Parties' consideration. Consequently, the escrow agent and the Claimant concluded an Escrow Agent Agreement. Following several letters from the escrow agent and the Respondent concerning Das Safe, the Respondent agreed to that facility as the place of custody.
29. On 26 September 2008, the Respondent submitted its Counter-Memorial on the Merits ("R.CM"). The R.CM was accompanied by two witness statements of Mr Mustafa Cetin and Mr Adem Ektirir, a legal opinion of Prof Dr Zehreddin Aslan and an expert report of Messrs Manuel A Abdala and Pablo T Spiller of LECG. It also contained four volumes of exhibits and four volumes of legal authorities.
30. By letter of 9 October 2008, referring to the Tribunal's Order of 11 August 2008, the Respondent requested that the Tribunal order bifurcation of jurisdiction from the merits. It also renewed its request for production of documents under its First Request for the Production of Documents, namely in respect of certain original documents other than the share certificates. By letter of 14 October 2008, the Claimant objected to the request for bifurcation of the proceedings, but agreed to the production of the requested documents. On 20 October 2008, the Respondent agreed to the inspection of the new documents at Das Safe. However, it maintained its request for bifurcation and proposed a briefing schedule on jurisdiction. The Claimant submitted further observations on bifurcation on 21 October 2008 and the Respondent did likewise on 24 October 2008.
31. On 3 November 2008, the Tribunal issued a Procedural Order approving Das Safe as the place of custody and directing that the inspection of the share certificates be completed within three months of the latter Procedural Order. It further directed the Claimant to produce a copy of the rental agreement for

Das Safe and to produce, within three weeks, the documents requested in the Respondent's letter of 9 October 2008, for an inspection of those documents to take place in Washington, D.C.

32. Pursuant to the Tribunal's Procedural Order, the Claimant provided the Tribunal and the Respondent with a copy of the rental agreement for Das Safe. The Parties then consulted with a view to reaching an agreement on an inspection protocol. On 10 November and 11 November 2008, they submitted, for the Tribunal's consideration, their respective draft protocols concerning the inspection at Das Safe, with points of disagreement highlighted. On 19 November 2008, the Parties submitted an agreed protocol concerning the documents to be inspected in Washington, D.C. at the offices of Crowell & Moring LLP over the period 24 November to 19 December 2008. Having considered the Parties' proposals concerning Das Safe, on 21 November 2008, the Tribunal issued a final inspection protocol for immediate use.
33. On 17 December 2008, the Tribunal issued an Order concerning the bifurcation of jurisdiction from the merits. It selected certain issues to be heard as preliminary questions pursuant to Rule 41(4) of the Arbitration Rules ("Preliminary Jurisdictional Objections"). The Order stated in relevant part that:

*"2. The issues which have been selected by the Tribunal for preliminary hearing ... from the Respondent's Preliminary Objections (R.PO) are:*

- a. Issue V.B (Libananco is not an Investor within the meaning of the ICSID Convention and the ECT);*
- b. Issue V.E (Libananco's Claims do not satisfy express conditions on Turkey's Consent to Arbitration);*
- c. Issue VI.A (Libananco is not entitled to the benefits under Art. 17 of the ECT).*

*3. These issues have been selected on the basis that they are:*

- a. genuinely preliminary;*
- b. discrete; and*
- c. capable of bringing the proceedings to an end;*

*and can be properly disposed of in summary proceedings without causing undue delay to the substantive disposal of the case if none of the objections was upheld".*

34. Also in its Order of 17 December 2008, the Tribunal instructed the Respondent to finalise an amended or supplemented Counter-Memorial after the inspection of documents, by 3 March 2009, and fixed time limits for the Parties' submissions on the Preliminary Jurisdictional Objections. Following consultations with the Parties, the Tribunal reserved dates for a hearing on the Preliminary Jurisdictional Objections ("Preliminary Objections Hearing"), to be held in Washington, D.C. over the period 2 November to 4 November 2009.

35. On 20 February 2009, the escrow agent reported that the Respondent had completed its inspection at Das Safe. Following an invitation from the Tribunal, the Parties commented on whether or not documents should be released from the place of custody. The Respondent's position was that the bearer share certificates should remain at Das Safe, subject to the control and direction of the Tribunal for the remainder of the proceeding. The Claimant did not oppose the Respondent's request that the bearer share certificates continue to be held at the place of custody. The Tribunal therefore directed the escrow agent to continue to hold the share certificates to the order of the Tribunal and take instructions only from the Tribunal until further notice.
36. On 25 February 2009, the Claimant submitted its Second Request for the Production of Documents, which concerned categories of documents relating to the Preliminary Jurisdictional Objections, including certain seized shares. The Parties filed several rounds of comments on the Claimant's Second Request for the Production of Documents in a Redfern Schedule (the Respondent on 9 March and 21 April 2009, and the Claimant on 20 March and 16 April and 29 April 2009).
37. On 3 March 2009, the Respondent submitted a Supplement to its Counter-Memorial ("R.Supp"), including a forensic expert report of Riley, Welch, LaPorte & Associates ("RWL") and an expert report of the Istanbul Stock Exchange Settlement & Custody Bank. The Supplement was also accompanied by seven volumes of supporting materials and an external hard drive containing photomicrographs.
38. In addition, on 3 March 2009, the Respondent filed a Request for Modification of the Tribunal's Procedural Order of 17 December 2008 ("Request for Modification"), accompanied by a legal opinion of Sir Elihu Lauterpacht. The Respondent alleged that it had, as a result of the inspection process in Washington, D.C. and Vienna, discovered evidence that the Claimant had relied on fraudulently manufactured documents to support its jurisdictional case. Accordingly, the Respondent requested that the Tribunal add to the Preliminary Jurisdictional Objections the further objection that Libananco had failed to prove timely ownership of an investment.
39. On 6 March 2009, the Claimant submitted its comments on the Respondent's Request for Modification proposing that, by 3 July 2009, the Claimant file a response to the "timing" allegations of the Respondent, including the submissions made in the Supplement. The Respondent filed further comments by letter of 13 March 2009. On 17 March 2009, the Tribunal directed the Claimant to provide further justification as to the time it sought for the preparation of a response, which it did by letter of 20 March 2009. The Respondent was granted the opportunity to reply (by 27 March 2009) and the Claimant to file a rejoinder (by 3 April 2009).
40. On 27 March 2009, the Claimant filed its Third Request for the Production of Documents, supported by affidavits of three forensic experts: Messrs Peter Tytell, Lloyd Cunningham and Valery Aginsky. The Parties filed comments



on the Claimant's Third Request in a Redfern Schedule (the Respondent on 3 April and 16 April 2009, and the Claimant on 10 April 2009).

41. On 23 April 2009, the Tribunal directed the Claimant to file a response to the Respondent's Request for Modification and to the Respondent's Supplement by 3 June 2009. The Tribunal further directed the Respondent to file a response by 3 August 2009 and the Claimant to file a rejoinder by 5 October 2009.
42. On 27 April 2009, the Tribunal ruled on the Claimant's Third Request for the Production of Documents, directing the Parties' forensic experts to meet with a view to producing a list of supporting materials used by each party's experts.
43. On 3 May 2009, the Claimant submitted its Counter-Memorial on the Preliminary Jurisdictional Objections ("C.CM"), including six witness statements of Mr Cem Cengiz Uzan, Mr Ali Cenk Türkkkan, Mr Saylan Çiğgin, Mr Antonis Partellas, Mr Polakis K Sarris and Ms Ayşegül Akay Uzan, an expert report of Mr Christos Mavrellis, one volume of fact exhibits and a hard drive containing images of the approximately 49,000 bearer shares held in Das Safe.
44. On 12 May 2009, the Tribunal issued a Procedural Order concerning the Claimant's Second Request for the Production of Documents, granting some requests and denying others.
45. By letter of 12 May 2009, as a result of a meeting between the forensic experts, the Claimant filed a request for the production of certain supporting materials used by the Respondent's experts, to which the Respondent replied on 14 May 2009. On 18 May 2009, the Tribunal issued directions concerning the type of materials that should be exchanged between the Parties' forensic experts.
46. By letter of 21 May 2009, the Respondent requested a four-week extension until 1 July 2009 to file its Reply on the Preliminary Jurisdictional Objections. After giving the Claimant an opportunity to comment, the Tribunal, by its Order of 26 May 2009, granted the extension until 19 June 2009.
47. On 3 June 2009, Claimant filed its Response to the Respondent's Request for Modification and Supplement ("C.Res.Supp"). The C.Res.Supp was accompanied by five expert reports of (i) Stroz Friedberg; (ii) Mr Peter Tytell; (iii) Dr Valery Aginsky; (iv) Mr Lloyd Cunningham; and (v) Messrs Brian Lindblom and Marc Gaudreau, a declaration of Mr Howard Rile, and one binder of exhibits.
48. On 19 June 2009, the Respondent filed its Reply Memorial on the Preliminary Objections to Jurisdiction, which was accompanied by eight volumes of exhibits and two volumes of legal authorities.
49. On 8 July 2009, the Tribunal issued a Procedural Order on the Respondent's Request for Modification. It amended its Order of 17 December 2008 to include the following issue to be argued at the Preliminary Objections Hearing:

*“15.4 Issue IV of the R.PO (Libananco has failed to prove that it owned ÇEAŞ and Kepez shares on or before June 2003)”.*

50. The Order of 8 July 2009 also dealt with certain case management issues, including directions concerning the procedural timetable and the Preliminary Objections Hearing. Among other things, the Tribunal directed the Parties that it intended to implement witness conferencing and hear the Parties’ forensic and computer experts in appropriate “conferencing groups” according to their respective discipline, and that each “conferencing group” prepare a joint report for the Tribunal by 16 October 2009.
51. On 10 July 2009, the Respondent submitted its Second Request for the Production of Documents, concerning the Claimant’s latest submissions of 3 May and 3 June 2009. The Parties filed several rounds of comments on the Respondent’s Second Request for the Production of Documents in a Redfern Schedule (the Claimant on 15 July, 23 July, 31 August and 25 September 2009, and the Respondent on 27 July, 6 August and 1 October 2009).
52. On 13 July 2009, the Tribunal issued a Procedural Order addressing a request from the Respondent that the Tribunal write to a criminal court in Turkey to gain access to a recording which had previously been produced in the form of a transcript (Exhibit R-113), the authenticity of which was disputed by the Claimant. The Tribunal stated that it was prepared to write to the Turkish court upon the Claimant’s confirmation that it wished to have access to the recording. Having subsequently received that confirmation and the Parties’ comments on a draft letter, the Tribunal wrote to the Turkish court accordingly on 29 July 2009.
53. By letter of 17 July 2009, the Claimant requested a two-week extension until 4 August 2009 to file its Rejoinder on the Preliminary Objections. The Respondent did not oppose the extension and also requested an extension until 14 August 2009 to file its Reply to the Claimant’s Response. The Tribunal approved the new time limits.
54. On 3 August 2009, the Claimant submitted its Rejoinder on the Preliminary Jurisdictional Objections (“C.Rej”), accompanied by two Witness Statements of Messrs Craig Bamberger and Faruk Ulusoy, as well as one binder of fact exhibits, one binder of annexes and electronic copies of legal authorities.
55. On the same date, the Claimant filed a Request for Modification of the Tribunal’s Procedural Orders of 6 April 2007 and 17 December 2008 (“Claimant’s Request for Modification”). It requested that the issue of quantum, which had previously been bifurcated by the Tribunal in 2007, be added to the remaining Preliminary Objections and the merits to be briefed in the event the Tribunal dismissed the Preliminary Jurisdictional Objections. The Tribunal subsequently invited the Parties to make submissions on the Claimant’s Request for Modification after the Preliminary Objections Hearing in November 2009.

56. Also on 3 August 2009, the Claimant submitted a Request to Examine Witnesses Under the Control of Respondent (“Request to Examine Witnesses”), seeking to cross-examine certain present and former Turkish Government officials and employees whom the Respondent had not put forward as witnesses. The Respondent objected to the Request to Examine Witnesses by letter of 14 August 2009, and sought leave to file responsive evidence to the Witness Statement of Mr Faruk Ulusoy. The Tribunal granted the latter request on 19 August 2009.
57. On 14 August 2009, the Respondent submitted its Reply Memorial on Issues Contained in its Supplement to the Counter-Memorial (“R.Rep.Supp”), accompanied by three expert reports of (i) Riley Welch LaPorte & Associates Forensic Laboratories; (ii) Curtis W. Rose & Associates and Mandiant Corporation; and (iii) Dr. Durand R. Begault; and a Witness Statement of Mr Serkan Gerçel. The R.Rep.Supp was also accompanied by four volumes of exhibits.
58. On 25 August 2009, pursuant to the Tribunal’s directions of 19 August 2009, the Respondent filed three Witness Statements of Mr Enis Güçlü Şirin, Mr Orhan Seyfi Güner and Mr Deniz Bozkurt and nine exhibits, as a response to certain allegations made in the C.Rej. The Claimant responded that it wished to cross-examine the three new witnesses at the Preliminary Objections Hearing and, as a result, withdrew two of the proposed witnesses from its Request to Examine Witnesses.
59. On 31 August 2009, the Tribunal issued a Procedural Order concerning the remainder of the persons in the Claimant’s Request to Examine Witnesses, denying the request. The Tribunal noted that the Preliminary Objections Hearing would be devoted to the issues previously identified by the Tribunal and that the examination of the proposed witnesses was not relevant to these issues.
60. On 2 September 2009, representatives of the Parties listened to the audio recordings underlying Exhibit R-113 (a transcript of those recordings) at a court in İstanbul.
61. On 28 September 2009, the Respondent submitted new evidence (Exhibits R-851 to R-855) in support of its R.PM and to refute the testimony of one of the Claimant’s witnesses, Mr Ali Cenk Türkkan.
62. On 7 October 2009, the Claimant filed a Motion to Strike Evidence from the Record (“Motion to Strike”). The motion concerned certain CD recordings and transcripts made of the recordings, as well as allegations and statements concerning alleged fraud and criminality directed at the Claimant, its shareholders and advisors. The Motion to Strike was accompanied by an expert report of BekTek LLC. The Respondent filed a response on 16 October 2009.
63. Having been granted a short extension, the Claimant filed its Rejoinder to the R.Supp on 12 October 2009. The Claimant had previously, on 9 October 2009,

filed the supporting documents for the Rejoinder to the R.Supp, consisting of four Witness Statements of Mr Ali Cenk Türkkkan, Mr Antonis Partellas, Mr Murat Hakan Uzan and Mr Bret A Padres; three expert reports of (i) Stroz Friedberg; (ii) Mr Eoghan Casey (cmdLabs); and (iii) combined report of Messrs Tytell, Aginsky, Cunningham, Rile, Lindblom and Gaudreau; and a volume of exhibits.

64. On 12 October 2009, the Claimant informed the Tribunal that its owner, Mr Cem Cengiz Uzan (“Cem Uzan”), had applied for, and received, political asylum from France, where he was currently residing. The Claimant stated that Cem Uzan was available to testify at the World Bank’s premises in Paris or by video-conference from Paris. On the same date, the Respondent submitted a list of witnesses that it wished to cross-examine at the Preliminary Objections Hearing. However, it noted that a serious issue arose as to the legality and propriety of testimony by one of the witnesses that it had provisionally called, Mr Murat Hakan Uzan (“Hakan Uzan”), owing to an Interpol Red Notice and an arrest warrant issued by a US Federal Court in New York.
65. In a letter of 13 October 2009, the Respondent submitted its views on the issue of hearing four of the Claimant’s witnesses; namely Hakan Uzan, Mr Ali Cenk Türkkkan, Cem Uzan and Ms Ayşegül Akay Uzan (“Ayşegül Uzan”). It stated that: (i) Mr Türkkkan’s situation was similar to that of Hakan Uzan in that he was also subject to an Interpol Red Notice; (ii) Cem Uzan had absconded from Turkey because of a conviction of embezzlement which was currently pending appeal in Turkey; and (iii) Ms Ayşegül Uzan might also have absconded from Turkey in violation of judicial and administrative orders. The Respondent submitted that, in these circumstances, it would be wrong as a matter of law and judicial propriety to permit the four witnesses to testify, and requested that their statements be stricken or disregarded. It reserved its position on the question of cross-examination should the witnesses be allowed to testify.
66. On 14 October 2009, the President of the Tribunal held a pre-hearing conference with the Parties by telephone conference. Among other things, the Claimant requested that the Tribunal allow Cem Uzan, Hakan Uzan and Mr Türkkkan to testify by video-conference from the World Bank offices in Paris, Amman and a third undisclosed location. The Claimant also informed the Tribunal that Ms Ayşegül Uzan would be unable to testify due to illness. The Claimant subsequently filed a medical certificate to that effect.
67. On 16 October 2009, the Claimant submitted its comments concerning the testimony of the four witnesses and observations on proposals concerning the order of witnesses and experts at the Preliminary Objections Hearing. On the same day, the Respondent submitted its comments on the Claimant’s Motion to Strike. The Claimant filed a reply on 20 October 2009.
68. On 21 October 2009, the Claimant informed the Tribunal that it had received from the Respondent a new expert report of RWL, which dealt with an entirely new set of documents. The Claimant requested for the Tribunal decide that the report was inadmissible if the Respondent sought to introduce it into the

record. The Respondent replied on the same day, arguing, among other things, that the report was short and related to two discrete forensic issues. The Respondent further requested that the Tribunal order the production of a first generation photocopy of an exhibit previously produced by the Claimant for forensic testing, after which the Respondent would decide on its position whether or not to seek leave to introduce the report into the record. The Claimant submitted further comments on the latter report by letter of 23 October 2009.

69. On 22 October 2009, the Tribunal issued its decision on the Respondent's Amended Second Request for the Production of Documents. It also issued a Procedural Order on the Claimant's Motion to Strike and the Respondent's request to exclude witness testimony. The Tribunal declined to strike any evidence from the record for the time being, and stated that it would rule on the Claimant's Motion to Strike during the Preliminary Objections Hearing. The Tribunal further declined to strike the written statements of Cem Uzan, Hakan Uzan, Ms Ayşegül Uzan and Mr Türkkhan from the record, but stated that their testimony would not be heard during the November 2009 hearing because of concerns raised by ICSID concerning certain legal implications arising from the latter. By letter of 23 October 2009, ICSID clarified its concerns.
70. By letter of 26 October 2009, the Tribunal instructed the Respondent to file the supplementary report of RWL by 27 October 2009, without prejudice to the Tribunal's decision on its admissibility. Pursuant to the Tribunal's directions, the Respondent filed the supplementary report, dated 20 October 2009 on 27 October 2009 ("RWL Supplementary Report").
71. Also on 26 October 2009, pursuant to the Parties' agreement during the pre-hearing conference, the Parties filed rebuttal exhibits.
72. On 28 October 2009, the Parties filed two joint reports of the audio forensics experts and the computer forensics experts. An additional joint report by the document forensics experts was filed on 31 October 2009.
73. Also on 28 October 2009, following the Claimant's notification that Mr Ulusoy would not testify at the hearing, the Respondent requested an urgent decision by the Tribunal to disqualify Mr Ulusoy's Witness Statement and excuse the Respondent's three rebuttal witnesses from appearing for cross-examination. By its Order of 30 October 2009, the Tribunal declined to strike Mr Ulusoy's Witness Statement for the time being, and stated that it wished to hear the oral testimony of the Respondent's three rebuttal witnesses, Messrs Şirin, Güner and Bozkurt.
74. The Preliminary Objections Hearing was held in Washington, D.C. over the period 4 November to 7 November 2009. In addition to Freshfields Bruckhaus Deringer LLP and Coşar Avukatlık Bürosu, the Respondent was represented by Mr Mark Howard, Q.C. The Claimant was represented by Crowell & Moring LLP. The Parties made opening presentations followed by the examination of fact witnesses – Messrs Güner, Şirin, Bozkurt, Çiğgin, Sarris

and Partellas, followed by the conferencing of the Parties' forensic experts, and then subsequently by closing statements.

75. At the Preliminary Objections Hearing, the Tribunal informed the Parties that it would not rule on the Parties' requests to exclude evidence, but decide what weight, if any it would give to the disputed evidence. It also indicated that it was premature to decide on the Claimant's Request for Modification of the Tribunal's Procedural Orders of 6 April 2007 and 17 December 2008. In addition, the Tribunal and the Parties discussed the possibility of hearing the oral testimony of Cem Uzan, Hakan Uzan and Mr Türkkan. The Tribunal requested for the Parties to revert with their views. The Respondent and the Claimant did so by letters of 25 November and 30 November 2009 respectively.
76. On 30 November 2009, the Tribunal informed the Parties that its intention was to hold a three-day hearing in Paris for the examination of Cem Uzan, Hakan Uzan and Mr Türkkan, subject to the Parties' definitive position on the calling and cross-examination of the witnesses. The Tribunal attached a letter from ICSID outlining a procedure to follow for ICSID to facilitate a hearing of the witnesses, to the effect that relevant authorities be notified of the details of a video-conference or in-person hearing. The Parties subsequently confirmed that they wished to examine the witnesses and that they were prepared to accept the procedure proposed by ICSID. The Claimant requested that the Respondent take certain measures to confirm the immunity of the witnesses. The Respondent objected to this request.
77. In a Procedural Order of 18 December 2009, the Tribunal confirmed that it would hear Cem Uzan and Hakan Uzan in person in Paris and Mr Türkkan by video-conference from Amman, in a hearing during the period 23 March to 25 March 2010 ("Continued Hearing"). It rejected the Claimant's request concerning the immunity of the three witnesses, noting that the provisions of the ICSID Convention were sufficient in this regard, and directed the Parties to follow the procedure as outlined by ICSID. The Tribunal decided to disregard Ms Ayşegül Uzan's witness statement, taking into account Article 4.8 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration. Finally, it decided to maintain Mr Ulusoy's Witness Statement on the record, indicating that it would decide in due course what weight (if any) to attach to it.
78. On 22 December 2009, the Claimant submitted further comments on the admissibility of the RWL Supplementary Report, arguing that it should be stricken from the record. The Respondent replied on 6 January 2010. By its Procedural Order of 7 January 2010, the Tribunal admitted the RWL Supplementary Report and allowed a responsive report by the Claimant's experts by 8 February 2010. The Claimant proceeded accordingly, filing a responsive report signed by Dr Aginsky and Mr Tytell dated 8 February 2010.
79. On 27 January 2010, owing to a disagreement between the Parties, the Tribunal issued a Procedural Order concerning the conduct of the cross-examination of Mr Türkkan by video-conference. The Tribunal confirmed its

previous Order of 22 December 2009, and gave directions as to possible logistical solutions to certain technical difficulties.

80. Following a request made by the Claimant, on 12 February 2010, the Tribunal issued a Procedural Order confirming that the ICSID Convention's provisions on immunity (i.e. Articles 21 and 22) applied to Hakan Uzan's travel, over the period 22 March to 26 March 2010, to attend the hearing in Paris.
81. On 20 January and 24 February 2010, respectively, the Claimant submitted a second and third Witness Statement of Mr Faruk Ulusoy, requesting that the Tribunal take the latter into account when determining the weight to be given to Mr Ulusoy's first Witness Statement.
82. On 10 March 2010, the Respondent proposed that it file a short reply report to the Claimant's response of 8 February 2010 to the RWL Supplementary Report, and stated that it would in any event address these issues in its post-hearing brief. The Respondent also attached certain new documents. The Claimant objected to the additional reply and the accompanying exhibits.
83. The Continued Hearing (with Cem Uzan and Hakan Uzan attending in person in Paris, and Mr Türkkan attending by way of video-conference from Amman) was held over the period 23 March to 25 March 2010 as stated above. The Parties had teams of legal counsel both in Paris and in Amman, with the main team, the Tribunal and the Secretary sitting in Paris. Counsel for the Respondent, Mr Mark Howard Q.C., cross-examined the three witnesses. Telepresence, an advanced video-conference system, was used for the purposes of Mr Türkkan's examination.
84. Following the hearing, as the Parties were unable to agree on a time limit for the filing of their respective Post-Hearing Briefs, the Tribunal fixed the date for those briefs to be exchanged on 1 July 2010. It directed the Parties to include in their Post-Hearing Briefs a list of issues to be addressed, a list of principal cases relied upon, as well as a submission on costs.
85. On 20 May 2010, the Respondent submitted 16 new rebuttal exhibits concerning assertions made by Hakan Uzan and Mr Türkkan at the Continued Hearing.
86. Pursuant to the Tribunal's directions, the Parties filed their Post-Hearing Briefs, including their respective petitions for costs, on 1 July 2010 ("R.PHM" and "C.PHM"). The R.PHM was accompanied by additional legal authorities and one exhibit (R-1035). The C.PHM was accompanied by its Fourth Request for Production of Documents, relating to the merits and quantum.
87. On 24 August 2010, the Respondent filed further new exhibits concerning Mr Türkkan's testimony. The Claimant filed a response on 2 September 2010, requesting that the Tribunal disregard those exhibits. On 20 September 2010, the Tribunal, having regard to all the other evidence available on the record and also to the belated arrival of the new exhibits (i.e. after the completion of

the evidentiary hearing and final submissions), issued a Procedural Order declining to admit the new exhibits.

#### **IV. THE FACTUAL BACKGROUND**

88. The Uzan family has been portrayed by the Claimant as coming from humble beginnings as emigrant farmers from Bosnia to Turkey in 1910. By 2001, they were recognised as among the wealthiest families in the world. According to the Claimant, the Uzans' net worth has been estimated at US\$ 1.6 billion. Cem Uzan and his father Kemal Uzan, mother Melahat Uzan, brother Hakan Uzan and sister Ayşegül Uzan owned some 130 business operations, spanning the globe and in a broad range of industries, including construction, media and telecommunications, sports and entertainment, and banking and finance.
89. In the early 1990s, having already purchased a prominent Turkish daily newspaper (Yeni İstanbul, 1964), and having established a strong foothold in the construction (Yapı ve Ticaret AS, 1965), banking (İmar Bank, 1984; Ababank, 1985), and telecommunication sectors (Interstar, 1990), the Uzan family decided to invest in the Turkish electricity sector. The Uzan family's opportunity to enter the energy sector presented itself in 1993, when the Turkish Government decided to divest itself of its share ownerships in ÇEAŞ and Kepez.
90. By way of background, ÇEAŞ and Kepez were founded in 1952 and 1955 respectively, both as vertically integrated (i.e. performing production, transmission, distribution and marketing functions) electrical utilities companies. From the 1950s to the 1990s, the Turkish Government progressively divested itself of a significant percentage of its equity in both ÇEAŞ and Kepez. Over that period, they operated as privately owned entities, and were among the most successful electric utility companies in Turkey, carrying out the generation, distribution, transmission and marketing of electricity across four regions in the southern part of Turkey.
91. In 1992, the Turkish Government announced the block sale offering of its remaining shares in ÇEAŞ and Kepez in separate public tenders. The privatisation tenders for the block sale of the Government's remaining holdings in ÇEAŞ and Kepez took place in early 1993. The winner of both tenders was Rumeli Elektrik Yatırım A.S. ("Rumeli Elektrik"), a company owned by Cem Uzan and his family. Following Rumeli Elektrik's purchase of the Turkish Government's shares, the Uzan family continued to increase their equity stake in the ÇEAŞ and Kepez, eventually coming to own a majority of the shares in each company by the mid-1990s. Their ownership of a majority interest in ÇEAŞ and Kepez was at all material times publicly known.
92. In 1998, as a result of a law requiring them to replace their existing concession contracts with new ones, ÇEAŞ and Kepez signed new concession agreements with the Turkish Government ("Concession Agreements"). These Concession Agreements gave ÇEAŞ and Kepez the right to continue to operate the utilities for another 60 years, until 2058.



93. The Respondent has alleged the following breaches of the Concession Agreements. Among other things, ÇEAŞ and Kepez: (i) used a construction project known as the Berke Dam as a vehicle for improper fund transfers, by replacing the incumbent foreign contractor with one controlled by the Uzan family; (ii) improperly financed other companies outside of the electricity sector, which were controlled by the Uzan family; (iii) refused to take the necessary steps to provide full distribution services (low voltage lines) and non-discriminatory transmission services (high voltage lines) in their concession areas; (iv) violated the competition laws by frustrating the connection to the network of “autoproducer” companies that were legally generating their own electricity; (v) realised only a small fraction of the infrastructure investments the companies themselves included in the investment plans submitted to the Turkish Ministry of Energy and Natural Resources (“Ministry”); (vi) failed to provide reliable and uninterrupted electricity supply to their customers, including electricity-critical facilities such as schools and factories and so risked public safety and welfare; and (vii) refused to comply with the key provisions of Law No. 4628, Official Gazette No. 24335, 3 March 2001 (“Electricity Market Law”), notwithstanding their legal and contractual obligation to do so, thereby frustrating key elements of Turkey’s regulatory reform of its electricity sector.
94. The Claimant alleges that, in April 2002, Libananco was acquired by Ali Cenk Türkkan, a close business associate of the Uzan family, on behalf of members of that family. The Claimant’s case is that Libananco subsequently acquired shares in ÇEAŞ and Kepez owned by members of the Uzan family, and that this process was completed by May 2003 (see paragraphs 136 to 139 below).
95. On 12 June 2003, five years after the Concession Agreements had been entered into, representatives from the Ministry assembled armed members of the Turkish military and police outside the headquarters of ÇEAŞ. A similar force gathered outside Kepez the same day. These forces raided ÇEAŞ’ and Kepez’s facilities. Company personnel were removed from the respective premises, and movable and immovable properties were seized. At the same time, the Ministry served notices of cancellation of the Concession Agreements on ÇEAŞ and Kepez.
96. On 8 September 2003, ÇEAŞ and Kepez filed lawsuits in the Danistay (Turkey’s highest administrative body, also known as the Council of State), challenging the cancellation of the Concession Agreements. On 31 May 2005, the 13<sup>th</sup> Panel of the Danistay issued a decision affirming the Ministry’s grounds for cancellation of the Concession Agreements. It held that “[n]o illegality has been established in deciding to terminate under Article 19 setting out the termination of the Agreement due to the fault of the compan[ies]”. ÇEAŞ and Kepez appealed the decision to the appellate body of the Danistay, which dismissed the appeal.
97. On 23 February 2006, some three years after the seizure of the assets of ÇEAŞ and Kepez by the Turkish Government, the Claimant filed its Request for Arbitration against Turkey in the present proceedings.

## V. THE ISSUES

98. The Claimant's case is that, owing to the instability of the Turkish economy in 2000 and 2001 and Cem Uzan's decision to enter Turkish politics (which, according to Cem Uzan, left his and his family's business holdings potentially vulnerable to politically-motivated reprisals), the Uzans decided to acquire or establish an international holding company in a stable and reputable jurisdiction known for providing advantages to international investment companies.
99. Libananco was thus acquired for and on behalf of Cem Uzan and his immediate family members, excluding his mother Melahat Uzan (i.e. his father Kemal Uzan, his brother Hakan Uzan and his sister Ayşegül Uzan) ("Immediate Family") in April 2002.
100. The Claimant's case in relation to its acquisition of ÇEAŞ and Kepez shares has, however, not remained constant.
- 100.1 In its Request for Arbitration filed in February 2006 and the C.M filed in October 2007, the Claimant submitted that it acquired its first shares in Kepez in October 2002 and its first shares in ÇEAŞ in November 2002. It then continued to acquire shares in ÇEAŞ and Kepez over the following months, with its last acquisitions taking place in May 2003, one month before the Concession Agreements held by ÇEAŞ and Kepez were cancelled by the Turkish Government. The Claimant submitted that this process was carried out by way of 32 separate transactions, each documented by a share transfer agreement ("STA"). The Claimant supported its case with additional documentary evidence in the form of, among other things: (i) a Share Acquisition Report allegedly dated 20 May 2003 (Exhibit H-61), which showed a number of transactions as having occurred between 30 October 2002 and 15 May 2003; (ii) Libananco's board minutes allegedly dating from 2002 and 2003, recording the alleged transactions in the same range of dates.
- 100.2 In the C.CM in May 2009, the Claimant advanced a different position. It argued instead that the 32 STAs were merely expressions of intent to transfer and that the actual acquisition of the ÇEAŞ and Kepez shares by Libananco was achieved by two acts of delivery or *teslim* (a legal concept under Turkish law) in April 2003 and on 15 May 2003 respectively. Many of the documents tendered by the Claimant (see paragraph 100.1 above) were therefore no longer helpful (or relevant) to its case.
101. In any case, the Claimant claims that it was the owner of a majority of shares in each company by the end of May 2003, specifically owning 65.2 per cent of ÇEAŞ' issued shares and 60 per cent of Kepez's issued shares.
102. The Claimant alleges that ÇEAŞ' and Kepez's Concession Agreements have been cancelled outright and that its facilities have been seized and permanently taken over by the Respondent. Consequently, and based on these

alleged facts, the Claimant has sought determinations from the Tribunal as follows.

- (a) The Respondent has expropriated the Claimant's investment in violation of Article 13 of the ECT.
- (b) The Respondent has treated the Claimant's investment unfairly and inequitably in violation of Article 10(1) of the ECT.
- (c) The Respondent has failed to meet the obligations it entered into with regard to the Claimant's investment in violation of Article 10(1) of the ECT.
- (d) The Respondent has failed to provide the Claimant's investment with the most constant protection and security in violation of Article 10(1) of the ECT.
- (e) The Respondent has impaired the Claimant's investment by unreasonable measures in violation of Article 10(1) of the ECT.

103. The thrust of the Respondent's case on the merits, which is not set out in any great detail (since, as explained below, this Award decides only certain Preliminary Jurisdictional Objections raised by the Respondent) is as follows.

103.1 Although ÇEAŞ and Kepez had indeed been successful electricity concessionaires for several decades, their performance deteriorated sharply once the Uzan family acquired majority shareholding and control. In particular, ÇEAŞ and Kepez breached their obligations under the respective Concession Agreements on many occasions and refused to cooperate with the Turkish authorities.

103.2 ÇEAŞ and Kepez did not comply with the Electricity Market Law and its implementing regulations – including, in particular, the requirement that ÇEAŞ and Kepez and other entities transfer State-owned transmission facilities in their territories to a new independent entity that would ensure non-discriminatory access to an integrated single Turkish transmission network. This refusal to comply on the part of ÇEAŞ and Kepez undermined a pillar of Turkey's reform of its electricity sector.

103.3 In the face of this refusal to comply, and other longstanding breaches of ÇEAŞ' and Kepez's obligations under the Concession Agreements, the Respondent had ample reason to terminate the respective Concession Agreements, which it validly did in June 2003.

104. The Respondent has raised certain jurisdictional objections to the Claimant's claim, and has submitted that, for the reasons set out below, the Claimant's action should be dismissed for want of jurisdiction. These are as follows.

- (a) Libananco has failed to prove that it owned ÇEAŞ and Kepez shares before 12 June 2003, the date of the alleged expropriation.

- (b) Libananco was not an “Investor” within the meaning of the ICSID Convention and the ECT because it is the *alter ego* of various Turkish nationals. The facts in the present case accordingly call for the corporate veil to be pierced.
- (c) There was no “Investment” under Article 25 of the ICSID Convention because Libananco’s alleged ownership of ÇEAŞ and Kepez fails each branch of the five-factor jurisdictional test under the ICSID Convention as established by case law and commentary (i.e. the “Investment” must: (i) have a certain duration; (ii) provide regular profit and return; (iii) entail risk; (iv) entail a substantial commitment by the investor; and (v) contribute significantly to the host State’s development).
- (d) Libananco’s alleged acquisition of ÇEAŞ and Kepez shares was invalid and/or illegal under Turkish and Cypriot law, and is therefore not an “Investment” protected by the ECT or the ICSID Convention. The illegality of the alleged transactions deprives the Tribunal of jurisdiction.
- (e) Libananco’s claims do not satisfy express conditions of the Respondent’s consent to arbitration because: (i) pursuant to ECT Annex ID, Turkey has withheld consent to arbitrate issues that have already been litigated before its national courts; and (ii) pursuant to Article 25(4) of the ICSID Convention, Turkey filed a notification upon acceding to the ICSID Convention to the effect that only disputes arising directly out of investment activities which have obtained necessary permission in accordance with Turkish laws on foreign capital would be subject to the jurisdiction of ICSID.
- (f) The Tribunal has no jurisdiction over claims arising before 4 July 2001, the date the ECT entered into force with respect to Turkey, e.g. claims brought by Libananco in relation to the Electricity Market Law.
- (g) Additionally, the Claimant’s claim is inadmissible for the following reasons: (i) Libananco is not entitled to the benefits of the ECT pursuant to Article 17(1) of the ECT because it is owned by non-Cypriots and conducts no business in Cyprus; (ii) Turkey is entitled to deny the benefits of the ECT to Libananco pursuant to Article 17(2) of the ECT because Libananco is a national of a state with which it has no diplomatic relations; (iii) all of the Claimant’s claims other than for expropriation are inadmissible pursuant to Article 24(3)(c) of the ECT because Turkey considered the measures in question “*necessary... for the maintenance of public order*”; and (iv) the present proceedings are an abuse of process.

105. The present Award addresses the Preliminary Jurisdictional Objections (i.e. certain of the Respondent’s jurisdictional objections which the Tribunal

determined were appropriate for preliminary determination). These are set out below.

105.1 First, whether Libananco in fact owned ÇEAŞ and Kepez shares before 12 June 2003 (the date of the alleged expropriation). This is the key issue in the present case. It is common ground between the Parties that Libananco would have no standing to prosecute the present arbitration if it did not own shares in ÇEAŞ and Kepez on or before 12 June 2003. The Claimant's position is that Libananco owned the shares in question before 12 June 2003. The Respondent's position is that Libananco did not acquire the shares in question on or before 12 June 2003, and that the Claimant has failed to prove the facts which it asserts to be true.

105.2 Second, whether Libananco is an "Investor" within the meaning of the ICSID Convention and the ECT. The difference between the Parties here is whether Libananco has any real corporate existence of its own, or if it is merely an *alter ego* of the Uzan family, and therefore does not qualify as a foreign investor entitled to maintain claims under the ICSID Convention and the ECT. The Respondent submits that Libananco's corporate veil should be pierced for the reason given above. The Claimant's position, on the other hand, is that Libananco is plainly an "Investor" within the meaning of the ECT and the ICSID Convention by virtue of its place of incorporation and hence its nationality. The Claimant argues, among other things, that the Respondent has not shown the existence of any rule of corporate nationality that would override the plain definition of "Investor" for the purposes of the ECT and ICSID Convention, or that there is any international law doctrine of "veil-piercing" that would take precedence in the present circumstances.

105.3 Third, whether Libananco's claims satisfy express conditions of Turkey's consent to arbitration. Here, the Respondent relies principally on Article 26(3)(b)(i) of the ECT which states that:

*"Contracting Parties listed in Annex ID do not give ... unconditional consent [to international arbitration] where the Investor has previously submitted the dispute [to the courts or administrative tribunals of the Contracting Party to the dispute]"*.

Turkey is a Contracting Party listed in Annex ID to the ECT. The Respondent's position is that the subject matter of the present dispute has already been submitted to the Turkish courts by the Uzan family and related entities, and that the latter were unsuccessful in their litigation. For that reason, the Respondent has not consented to arbitrate the present dispute. The Claimant's response is that Libananco itself has never submitted itself to the jurisdiction of the Turkish courts, and therefore has never been a party in any Turkish litigation; further, the disputes before the Turkish courts referred to by the Respondent are not the same as the present dispute before this Tribunal.

105.4 Fourth, whether Libananco is entitled to the benefits of the ECT under its Article 17. The Respondent relies on Articles 17(1) and 17(2) of the ECT to argue that Libananco is not entitled to the benefits of the ECT. In broad terms, these provisions deny the benefits of the ECT to: (i) a legal entity which has “no substantial business activities” in the country in which it is organised, and is owned by citizens or nationals of a “third state” (Article 17(1) of the ECT); and (ii) an investment which is one belonging to an “Investor of a third state” in respect of which the denying Contracting Party does not maintain a diplomatic relationship (Article 17(2)(a) of the ECT). The Respondent has accordingly submitted that: (i) Libananco has never had any substantial business activities in Cyprus; (ii) Libananco is owned or controlled by citizens or nationals of a “third state”; and (iii) that Turkey and Cyprus do not maintain diplomatic relations. The crux of the Claimant’s position is simply that both Cyprus and Turkey are Contracting Parties to the ECT, and consequently neither is a “third state”.

## **VI. RELIEFS REQUESTED BY THE PARTIES**

106. On the Preliminary Jurisdictional Objections set out above, the Claimant has sought the following orders from the Tribunal:

- (a) a denial of the Respondent’s jurisdictional objection based on the timing of the Claimant’s acquisition of ÇEAŞ and Kepez bearer share certificates;
- (b) a declaration that the Respondent’s allegations of fraud and forgery regarding this dispute are unsubstantiated, and that the Claimant did in fact acquire a substantial and controlling interest in ÇEAŞ and Kepez prior to 12 June 2003;
- (c) a dismissal of the Respondent’s other Preliminary Jurisdictional Objections;
- (d) the advancement of this arbitration forward as expeditiously as possible to the remaining jurisdictional objections, and the merits and quantum phase; and
- (e) an order for the Respondent to bear all the Claimant’s costs and expenses relating to the present phase of the arbitration (i.e. the determination of the Preliminary Jurisdictional Objections).

107. The Claimant has additionally requested for the following reliefs:

- (a) damages in an amount to be quantified in the damages phase of the arbitration;
- (b) all costs associated with this arbitration;
- (c) all attorney’s fees and expenses;

- (d) pre-award and post-award interest, as appropriate in light of the other items of relief requested, at the highest rate; and
  - (e) such other relief as the Tribunal may deem appropriate.
108. The Respondent, on the other hand, requests that the Tribunal issue an Award:
- (a) dismissing the Claimant's claims in their entirety;
  - (b) declaring that Libananco has asserted its claims in bad faith and on the basis of fraudulent documents; and
  - (c) awarding the Respondent all the expenses and costs associated with these proceedings, including interest.

## VII. THE APPLICABLE LAW

109. As agreed by the Parties, the Tribunal must analyse its jurisdiction under Article 26 of the ECT and Article 25(1) of the ICSID Convention.
110. The relevant provisions of Article 26 of the ECT state:
- “(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*
  - (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
    - (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;*
    - (b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
    - (c) in accordance with the following paragraphs of this Article.*
  - (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.*

(b) (i) *The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2) (a) or (b).*

(ii) *For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.*

...

(4) *In the event that an Investor chooses to submit the dispute for resolution under subparagraph 2(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:*

(a)(i) *The International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or*

...

5(a) *The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:*

(i) *written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules.*

(ii) *an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”) ...*

(6) *A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law”.*

111. Article 25(1) of the ICSID Convention states:



*“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally”.*

112. Additionally, it is common ground between the Parties that Turkish law applies to the issue of whether (and when) Libananco acquired the shares in question and thus had an “Investment” under Article 26(1) of the ECT and Article 25(1) of the ICSID Convention. In interpreting the provisions of the ECT and the ICSID Convention, the Tribunal has considered previous ICSID decisions and awards relied on by the Parties.
113. Accordingly, in this Award, the Tribunal will apply the provisions of the ECT and the ICSID Convention. The Tribunal will also apply Turkish law (evidence of which has been given by both Parties) to determine whether there has been a valid transfer of the shares in question to Libananco as this is a question of domestic law.

## **VIII. BURDEN AND STANDARD OF PROOF**

114. The Tribunal now turns to consider the issue of which Party bears the burden of proof in relation to the facts and assertions advanced by each of them. It is necessary to set the stage at the outset since the Parties differ fundamentally as to the issue of burden of proof.

### ***A. The Claimant’s position***

115. The Claimant, in the C.M, made the argument initially that the Tribunal should, at the jurisdictional phase, accept *pro tem* the facts alleged by the Claimant as substantiation for its claims of breach. In support of this proposition, the Claimant cited the case of *Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18 (Decision on Jurisdiction of 6 July 2007) (quoting *Siemens v Argentina*, ICSID Case No. ARB/02/8, (Decision on Jurisdiction, 4 August 2004, at paragraph 180), at paragraph 103:

*“At this stage of the proceedings, the Tribunal is not required to consider whether the claims under the Treaty made by [Claimant] are correct. This is a matter for the merits. The Tribunal simply has to be satisfied that, if Claimant’s allegations would be proven correct, then the Tribunal has jurisdiction to consider them”.*

However, in the C.Rej, the Claimant recognised and admitted that the latter submission had been made at a time when the Respondent had not yet raised any objections to the Tribunal’s jurisdiction. The Claimant has since expressly recognised that it bears the burden of demonstrating its timely ownership of the bearer share certificates in question, and has indeed put forward substantial

documentary, testimonial and forensic evidence in that regard in the course of these proceedings.

116. However, in relation to the remaining three Preliminary Jurisdictional Objections, the Claimant has pleaded the principle of *actori incumbit probatio* (i.e. he who asserts must prove). Specifically, the Claimant has submitted that the Respondent bears the burden of proving the legal theories on which it relies and that the latter are applicable to the facts in the present case. The Claimant's argument is this.

116.1 With respect to the Respondent's assertion that Libananco's legal personality has been "misused" for purposes of perpetrating a "fraud" (i.e. the second Preliminary Jurisdictional Objection set out in paragraph 105.2 above), it is a general principle of law that "*good faith is to be presumed, whilst an abuse of right is not*".<sup>1</sup> Thus, "*It rests with the party who states that there has been such a misuse to prove his statement*".<sup>2</sup>

116.2 With respect to the Respondent's contention that it has limited its consent to arbitration of the present dispute (i.e. the third Preliminary Jurisdictional Objection set out in paragraph 105.3 above), general principles of law dictate that:

*"whoever will derive to himself any advantage by the exception to a general rule, or by interference with the generally acknowledged rights of another, is bound to prove that his case is completely within the exception"*.<sup>3</sup>

Accordingly, it is for the Respondent to prove that it has limited its consent to arbitration.

116.3 In relation to the Respondent's argument that it is entitled to invoke Article 17 of the ECT to deny Libananco the benefits of Part III of the treaty (i.e. the fourth Preliminary Jurisdictional Objection set out in paragraph 105.4 above), this constitutes an affirmative defence on the merits. In *Generation Ukraine v Ukraine*, ICSID Case No. ARB/00/9 (Award dated 16 September 2003), it was held by the tribunal that (at paragraph 15.7):

*"In the absence of any competing considerations advanced by the Respondent, the Tribunal is satisfied that "third country control" over Generation Ukraine is a prerequisite for any purported invocation of Article I(2) by the Respondent. Furthermore, **the burden of proof** to establish the factual basis of the "third country control", together with*

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<sup>1</sup> Citing Bin Cheng, *General Principles of Law as Applies by International Courts and Tribunals* (Cambridge 2006) at 305.

<sup>2</sup> Citing Bin Cheng, *General Principles of Law as Applies by International Courts and Tribunals* (Cambridge 2006) at 305 (quoting *Certain German Interests in Polish Upper Silesia* (F.R.G. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 30 (1926)).

<sup>3</sup> Citing Bin Cheng, *General Principles of Law as Applies by International Courts and Tribunals* (Cambridge 2006) at 306 (quoting *Jay Treaty (Art. VII) Arb* (1794) 4 INT. ADJ. M.S. 372 at 407).

*the other conditions, falls upon the State as the party invoking the “right to deny” conferred by Article 1(2)”.*

(emphasis added by Claimant)

The Claimant also cited the case of *AMTO LLC v Ukraine*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 080/2005, Final Award (2008), which it argued reached a similar conclusion (at paragraphs 64 to 65):

*“[W]hen a respondent alleges that the claimant is of the class of Investors only entitled to defeasible protection, so that the respondent can exercise its power to deny, then the burden passes to the respondent to prove the factual prerequisites of Article 17 on which it relies”.*

117. Further, with respect to the Respondent’s submission that the equitable doctrine of veil-piercing applies in the present case such that Libananco does not qualify as an “Investor” for the purposes of the ICSID Convention and the ECT (i.e. the second Preliminary Jurisdictional Objection set out in 105.2 above), the Claimant has contended that since the Respondent’s arguments here are premised upon the existence of “fraud or other serious wrongdoing”, a heightened standard of proof should apply. The Claimant has cited, among other things, the following authorities in support of this proposition:

- (a) the *Case Concerning Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. Rep. 856, (Separate Opinion of Judge Rosalyn Higgins) (“*Oil Platforms case*”) where it was observed that: “*the graver the charge, the more confidence there must be in the evidence relied on*”; and
- (b) the decision in *Siag and Vecchi v. Egypt*, ICSID Case No. ARB/05/15 (Award dated 11 May 2009), where the tribunal reasoned as follows (at paragraphs 325 to 326):

*“For reasons summarised above, the Claimants have submitted that Egypt must prove its Lebanese nationality objection to a heightened standard of proof. Chief among the reasons cited by Claimants is that Egypt’s Lebanese nationality application rests upon allegations of fraud, and that claims of such nature are typically held to a heavy standard of proof. The standard suggested by the Claimants was the American standard of “clear and convincing evidence,” that being somewhere between the traditional civil standard of “preponderance of the evidence” (otherwise known as the “balance of probabilities”), and the criminal standard of “beyond reasonable doubt.”*

*The Tribunal accepts the Claimants’ submission. It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof. The same is the case in international proceedings, as can be seen in the cases cited by*

*Claimants, among them the Award of the ICSID Tribunal in Wena Hotels. Egypt's principal submission was that the burden of proof was on Mr Siag, a submission which the Tribunal has rejected so far as the proof of fraud or other serious misconduct is concerned. Egypt did not submit that, if it were required to prove fraud, it should be held to a lesser standard than that argued by the Claimants. **The Tribunal accepts that the applicable standard of proof is greater than the balance of probabilities but less than beyond reasonable doubt. The term favoured by Claimants is "clear and convincing evidence."** The Tribunal agrees with that test".*

(emphasis added by Claimant, citations omitted)

### **B. The Respondent's position**

118. The Respondent's position is simply that the Claimant bears the burden of proof with respect to all elements required to establish the jurisdiction of the Tribunal (including, among other things, that Libananco was an "Investor" under the ECT and the ICSID Convention and that it owned a qualifying "Investment" under those instruments at all material times).
119. The Respondent has taken the position that, during an initial jurisdictional phase, a *prima facie* case on the merits may suffice to overcome an objection that a claimant has failed to state a cognisable claim, since a tribunal will wish to avoid pre-judging disputed factual issues on the merits in adjudicating such an objection. However, with respect to jurisdictional facts (such as the existence or lawful ownership of an investment), mere allegations are insufficient. These facts must be proven, and the burden to do so rests squarely on a claimant. In support of this proposition, the Respondent has cited, among other things, the *Oil Platforms case* (Separate Opinion of Judge Higgins, at paragraphs 32 to 34):

*"The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausible based upon the 1955 Treaty is to accept pro tem the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes – that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.*

*... The Court should thus see if, on the facts as alleged by Iran, the United States actions complained of might violate the Treaty articles.*

*Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases....What is for the merits...is to determine what exactly the facts are, whether as finally determined they do sustain a violation of, for example, Article X; and if so, whether there is a defence to that violation, lying in Article XX or elsewhere. In short, it is at the merits that one sees "whether there really has been a breach.""*

(citations omitted)

120. In response to the Claimant's argument that the standard of proof with respect to the determination of the second Preliminary Jurisdictional Objection (set out in paragraph 105.2 above) should be heightened, the Respondent has submitted, among other things, that the Claimant's contention that a heightened standard "*is common practice in municipal legal systems*" is not correct. In civil law systems, there is no special standard of proof applicable in cases involving fraud. The Respondent has submitted that, under English law, the standard of proof does not change simply because fraud has been alleged. It says the decision of the English House of Lords in *In re Doherty* [2008] UKHL 33 is instructive (at paragraphs 25 and 28):

*"Fraud is usually less likely than negligence ... [T]his does not mean that where a serious allegation is in issue the standard of proof required is higher ...*

*[I]n some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place ..., the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact".*

(citations omitted, underline added by Claimant)

### **C. Analysis**

121. The Tribunal notes that, in relation to the issue of whether Libananco acquired timely ownership of the share certificates in question (i.e. the first Preliminary Jurisdictional Objection set out in paragraph 105.1 above), it is now common ground between the Parties that the Claimant has the burden of proof. However, for the avoidance of doubt, the Tribunal confirms its view that it is not required to make a *pro tem* assumption of the truth of a fact if the evidence of that fact has been fully presented, and sufficient evidence exists for the Tribunal to make an informed and dispositive finding at this stage.
122. The Tribunal is assisted by the following remarks of the tribunal in *Phoenix Action, Ltd. v Czech Republic*, ICSID Case No. ARB/06/5 (Award dated 15 April 2009) ("*Phoenix Action*") (at paragraphs 60 to 61):

*"In the Tribunal's view, it cannot take all the facts alleged by the Claimant as granted facts ... but must look into the role these facts play either at the jurisdictional level or at the merits level.*

*If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such*

*at the jurisdictional stage, until their existence is ascertained or not at the merits level. **On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.** For example, in the present case, all findings of the Tribunal to the effect that there exists a protected investment must be proven, unless the question could not be ascertained at that stage, in which case it should be joined to the merits”.*

(emphasis added)

123. In *PSEG Global Inc and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No. ARB/02/5 (Decision on Jurisdiction of 4 June 2004) (“*PSEG*”), the parties made similar arguments concerning the *prima facie* test for jurisdictional challenges. The tribunal stated that (at paragraph 64):

*“The Tribunal is aware that the prima facie test has been applied in a number of cases, including ICSID cases...and that as a general approach to jurisdictional decisions it is a reasonable one. However, **this is a test that is always case-specific. If, as in the present case, the parties have views which are so different about the facts and the meaning of the dispute, it would not be appropriate for the Tribunal to rely on the assumption that the facts as presented by the Claimants are correct.**”*

(emphasis added)

124. The Tribunal agrees with the tribunal in *PSEG* that whether or not the *prima facie* test should be applied when deciding a jurisdictional challenge is case-specific. In this case, the Tribunal made the decision for a bifurcation of proceedings to hear the Preliminary Jurisdictional Objections first, on the basis that any of these objections, if successful, would be dispositive of the case. Full evidence and argument on all factual and legal issues relating to the Preliminary Jurisdictional Objections has been received and heard by the Tribunal. It would wholly defeat the purpose of bifurcation if the Tribunal were to now assess only whether the Claimant has provided *prima facie* evidence of ownership of the share certificates, and allow the proceedings to move to the merits on that basis, leaving the question of the substantive ownership of the shares still to be determined.
125. In relation to the Claimant’s contention that there should be a heightened standard of proof for allegations of “fraud or other serious wrongdoing”, the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that “*the graver the charge, the more confidence there must be in the evidence relied on*” (see paragraph 117(a) above), this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged.

126. In any event, the question of the applicable standard of proof for allegations of “fraud or other serious wrongdoing” and the other disputed issues set out in paragraph 116 above (as to which Party should bear the burden of proof in relation to the second, third and fourth Preliminary Jurisdictional Objections) are of academic interest only. As will be apparent from the Tribunal’s observations and findings below, the second, third and fourth Preliminary Objections (set out in paragraphs 105.2, 105.3 and 105.4 above respectively) are not dispositive in these proceedings. Accordingly, the question of burden of proof and/or the applicable standard of proof in respect of these Preliminary Jurisdictional Objections does not arise for consideration. Although the Parties have raised interesting and novel points, the Tribunal does not consider that it is necessary to say more than it already has at this stage. For the avoidance of doubt, the respective submissions of the Parties not analysed by the Tribunal here are neither accepted nor rejected in the circumstances.

### **IX. HAS THE CLAIMANT PROVED THAT IT OWNED ÇEAŞ AND KEPEZ SHARES BEFORE 12 JUNE 2003?**

127. It is common ground between the Parties that the Tribunal’s jurisdiction over the merits depends on whether Libananco owned ÇEAŞ and Kepez shares at the time of the alleged expropriation (i.e. 12 June 2003).
128. In order to establish jurisdiction, the Claimant must prove that it owned ÇEAŞ and Kepez shares during the time at which it claims the acts constituting a violation of the ECT were committed by the Respondent. In *Aram Sabet et al v. Islamic Republic of Iran – Bonyad-E-Mostazafan*, Iran-US Claims Tribunal Case No. 815-816-817, Award No. 593-815/816/817-2, 29 June 1999, the tribunal held (at paragraph 55 of the award) that: “*In order to succeed in their claims, the Claimants must prove, as a preliminary matter, that, during the relevant period, they owned the shares that they claim the Respondents expropriated*”.
129. The point is further underscored by the award in *Saluka Investment BV (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, where the tribunal similarly held that its jurisdiction would be limited to claims arising after Saluka acquired the shares from its parent, Nomura. It was accordingly held that the tribunal did not have jurisdiction in respect of damage suffered by Nomura before October 1998 when the bulk of the shares became vested in the claimant, Saluka.
130. A similar conclusion follows from the jurisdictional provisions of investment treaties, including the ECT and the ICSID Convention. Article 1(6) of the ECT defines “Investment” as “*every kind of asset, owned or controlled directly or indirectly by an Investor*”. Although, the ECT speaks of ownership and control (both direct and indirect), this case has been argued by the Parties on the sole basis of ownership (i.e. it is not part of the Claimant’s case that it had control but not ownership of the share certificates in question). Accordingly, unless Libananco “owned” ÇEAŞ and Kepez share certificates at the time of the events giving rise to the present dispute, there can be no jurisdiction under

Article 26 of the ECT, which provides for arbitration of “[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former”.

131. In short, in order to establish the Tribunal’s jurisdiction, the Claimant must show that it owned the shares in question on or before 12 June 2003 (i.e. the date of the Respondent’s alleged expropriation of the Claimant’s ownership interests in ÇEAŞ and Kepez).
132. As this issue turns largely on the facts, this section will be organized differently from the rest of the Award. The Tribunal will first set out the Parties’ respective positions before discussing the factual evidence (i.e. the Witness Statements and oral testimony), followed by an analysis of and/or observations on the expert evidence (i.e. forensic analysis of the documentary, computer and audio evidence). The Tribunal will then discuss the law on the transfer of bearer shares, setting out the Parties’ positions where relevant. As the factual and expert evidence is voluminous, the Tribunal will only set out the salient parts of the various witnesses’ (both factual and expert) evidence.

#### *A. The Claimant’s case*

##### **1. Background to Libananco’s creation**

133. The Claimant’s case is that the instability of the Turkish economy during the economic crisis of 2000 and 2001 prompted the Uzan family to refocus their business strategies by reducing their domestic operations and concentrating on foreign expansion. It was said that the Uzan family was deeply concerned that the business environment in Turkey would continue to deteriorate, and therefore made a decision to internationalise their business holdings.
134. The Tribunal was also told that, around the same time, Cem Uzan had decided to enter Turkish politics. Cem Uzan was the founder and leader of the Genç Parti, a national political party in Turkey that sought to challenge the ruling party. It was said that, owing to the “rough and tumble” nature of the Turkish political arena, Cem Uzan’s and his family’s business holdings were potentially vulnerable to politically-motivated reprisals.
135. For those main reasons, the Uzan family established Libananco as an investment vehicle. On 1 April 2002, Libananco, a limited liability company domiciled in Nicosia and organised in accordance with applicable Cypriot laws, was acquired by Ali Cenk Türkkan, a close business associate of the Uzan family on behalf of members of the Uzan family. On that same date, Libananco’s current Board of Directors was also established, comprising two directors in addition to Mr Türkkan himself: Antonia Kyriakou and Andreas Partellas, both of whom were Cypriot citizens residing in Nicosia. The Claimant’s case is that Mr Türkkan purchased Libananco in April 2002 and that this supports its case that Libananco went on to acquire a majority of the shares in ÇEAŞ and Kepez before June 2003.



## 2. Libananco's alleged investment in ÇEAŞ and Kepez

136. At that time of its acquisition by Mr Türkkan in April 2002, Libananco did not have substantial capitalisation or assets. It was therefore intended that Libananco would be capitalised through its acquisition of ÇEAŞ and Kepez shares owned by members of the Uzan family.
137. The current version of the Claimant's case is that Libananco acquired legal ownership of those shares in April and May 2003. Its last acquisitions took place in May 2003, one month before the companies' respective concession rights were cancelled by the Turkish Government.
138. According to the Claimant, the events leading up to Libananco's acquisitions were as follows.
- 138.1 In October 2002, Hakan Uzan and Mr Türkkan began executing written STAs to evidence the transfer of Hakan Uzan's shares to Libananco.
- 138.2 In or around January 2003, the Uzan family agreed to sever their ownership interests in each other's businesses – essentially to enter into a family business “divorce”. Accordingly, it was decided, among other things, that Kemal Uzan, Hakan Uzan and Ayşegül Uzan would transfer their respective ownership interests in ÇEAŞ and Kepez to Cem Uzan.
- 138.3 It was further agreed that the severance of the ownership interests would be accomplished by capitalising Libananco with ÇEAŞ and Kepez shares, with members of the Uzan family signing STAs to memorialise their intent to make those transfers to Libananco. In addition, the Claimant explained that, as part of the family “divorce”, certain intra-family agreements were entered into pursuant to which (among other things):
- (a) Kemal Uzan transferred shares in both ÇEAŞ and Kepez to Hakan Uzan;
  - (b) Cem Uzan transferred shares in Kepez to Hakan Uzan; and
  - (c) Cem Uzan transferred shares in ÇEAŞ to Aysegul Uzan
- these transfers “*provided the predicate for moving forward with the share transfers to Libananco*” (C.PHM, paragraph 43).
- 138.4 Although the STAs were not necessary for a legally effective transfer under Turkish law (under Turkish law, a transfer of ownership of bearer share certificates is evidenced by, among other things, a transfer of possession to the buyer, i.e. *teslim*), Cem Uzan insisted on the STAs being executed as he believed that, since Libananco was no longer collectively owned by the family, it would be best for his father and siblings to create a record of the transfer to prevent potential disputes within the family in the future.

138.5 Consequently, from February 2003 onwards, Kemal Uzan, Hakan Uzan and Ayşegül Uzan (along with Mr Türkkan, on behalf of Libananco), commenced the process of executing various STAs, thereby evidencing their intent to transfer their shares in ÇEAŞ and Kepez to Libananco, which was by then beneficially owned by Cem Uzan. In total, 32 STAs were signed. All 32 STAs were exhibited by the Claimant.

139. The Claimant's ultimate position is therefore that Libananco was the owner of a majority of the shares in each company by 15 May 2003, specifically owning 65.2 per cent of ÇEAŞ's issued shares and 60 per cent of Kepez's issued shares.

**3. The ÇEAŞ and Kepez share certificates were delivered to Libananco no later than 15 May 2003**

140. Throughout the time the STAs were being executed, the share certificates that were to be acquired by Libananco were located in the Rumeli and Doğuş buildings (both of which were leased to Uzan group companies) in Mecidiyeköy, İstanbul and in the Uzan family's holiday home in Switzerland.

141. The Claimant accepted that a legal transfer of possession to Libananco or *teslim* in respect of the share certificates is a prerequisite to Libananco's ownership of the latter (see paragraph 392 below). The Claimant submitted that *teslim* was accomplished in relation to all the share certificates that it presently claims to own.

142. The Claimant's arguments on *teslim* were as follows.

142.1 With respect to the bearer shares located in Switzerland that were to be transferred to Libananco, these particular shares were owned by Hakan Uzan and Ayşegül Uzan, and held in custody by Hakan Uzan. The Claimant's case was that, in April 2003, Hakan Uzan called Mr Türkkan in Jordan to inform him that ownership of those shares was being transferred to Libananco, and that he would maintain custody of those shares in Switzerland until such time as they could be delivered to Libananco. It was alleged that Mr Türkkan accepted the shares on behalf of Libananco, and agreed with Hakan Uzan that they would remain in Switzerland until alternative arrangements could be made.

142.2 With respect to the bearer share certificates located in İstanbul, it is alleged that they were wrapped in brown paper and labelled with the name "Libananco", and that this was sufficient to signify the transferors' intent to have those shares transferred to Libananco. In this connection, the Claimant alleges that, on 15 May 2003, Saylan Çiğgin (then the head of Cem Uzan's Star Media Group's legal department) went to the Rumeli and Doğuş buildings in İstanbul and inspected the shares, thereby accepting them on behalf of Libananco (and thus fulfilling the element of transfer of possession or *teslim* required under Turkish law).

142.3 Additionally, Hakan Uzan's evidence was that Kemal Uzan telephoned him and told him to go to the garage in an office building in İkitelli, İstanbul to receive delivery of the large denomination ÇEAŞ and Kepez share certificates on 15 May 2003.

143. The Claimant's position is therefore that, by no later than 15 May 2003, Libananco had become the owner of all of Hakan Uzan's and Ayşegül Uzan's share certificates in Switzerland and all of Hakan Uzan's, Ayşegül Uzan's and Kemal Uzan's share certificates in the Rumeli and Doğu Buildings.

**4. Libananco's production of the ÇEAŞ and Kepez share certificates in Vienna in 2009 confirmed that it was most likely in possession of those shares before 12 June 2003**

144. Although the Claimant accepted that *teslim* is required for the transfer of ownership under Turkish law, its position (notwithstanding that its witnesses have given substantial evidence in relation to the issue of whether *teslim* was accomplished in respect of the share certificates it claims to have owned before 12 June 2003) was that there is no requirement at this stage (i.e. the jurisdictional stage) to demonstrate the occurrence of *teslim*. It submitted that it was required only to show that Libananco acquired possession of the shares in question before 12 June 2003, and not *how* such acquisition occurred.
145. In that regard, the Claimant, in response to the Respondent's request for production of documents, delivered to the Das Safe facility in Vienna approximately 50,000 original share certificates of ÇEAŞ and Kepez for forensic examination by the Parties' respective experts. On 20 February 2009, the Respondent completed its inspection of the share certificates at Das Safe. The Respondent did not dispute the authenticity of those share certificates, although it questioned, at an earlier stage, whether Libananco had possession of them in the first place, and, if so, whether such share certificates were authentic (see the Respondent's First Request for the Production of Documents filed on 18 December 2007).
146. The Claimant argued that the fact that it was able to produce the share certificates for inspection made it likely that it was in possession of those share certificates before 12 June 2003 for the reasons set out below.

146.1 Historically, shares belonging to the Uzan family were kept in the Rumeli and Doğu Buildings.

146.2 As early as 3 July 2003, when the Savings Deposit Insurance Fund ("SDIF")<sup>4</sup> seized İmar Bank and began attachment proceedings against Uzan family companies, access to the Rumeli and Doğu Buildings was under very tight security given the presence of İmar Group Companies in those buildings.

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<sup>4</sup> According to the Respondent, the SDIF was authorised to locate and attach assets belonging to members of the Uzan family to satisfy the Uzan family's multi-billion-dollar debt to Turkey stemming from a fraud allegedly perpetrated through İmar Bank (a large Turkish financial institution), which was said to have been owned and controlled by the Uzan family from 1984 onwards.

146.3 The SDIF took complete control over the entire Rumeli and Doğu Buildings on 14 February 2004, including the posting of security at the entrance and exit of the buildings and on each floor.

146.4 Accordingly, no property, especially a large quantity of bearer share certificates worth millions of dollars, could have been removed from the Rumeli and Doğu Buildings after 14 February 2004 without the express authority of the SDIF.

146.5 While low value and bulky share certificates were discovered in the Rumeli and Doğu Buildings and confiscated, the high denomination share certificates that were produced for inspection in Vienna were not (since they were not in the Rumeli and Doğu Buildings from the time the SDIF assumed control over the Rumeli and Doğu Buildings).

146.6 It could therefore be concluded from the facts set out above that the high denomination share certificates which were produced in Vienna were most likely to have been removed from the Rumeli and Doğu Buildings before July 2003. This (together with the other evidence on the record) in turn supports the conclusion that Libananco took possession (and hence acquired ownership) of those share certificates before 12 June 2003.

***B. The Respondent's case***

147. The Respondent's case is essentially that the Claimant has failed to show that Libananco owned the share certificates in question before 12 June 2003. Its main arguments are set out below under their respective headings.

**1. The Claimant's changing and conflicting stories**

148. The Respondent submitted that the Claimant's changing and conflicting stories, the shifting testimony of its witnesses and the documents that it has produced (which contradict certain portions of the Claimant's own case) suggest that the case brought by the Claimant is fraudulent. According to the Respondent, the Claimant has presented four different (and sometimes contradictory) versions of its case. The key elements of each of these are set out in brief below.

148.1 In the first version (as set out in the Claimant's Request for Arbitration filed in February 2006), the Claimant portrayed itself as an independent and innocent Cypriot investor that had been caught in a domestic Turkish political crossfire. However, the Claimant subsequently abandoned that position, and now acknowledged that the real party in interest in the present dispute was Cem Uzan himself. In relation to the issue of Libananco's acquisition of ÇEAŞ and Kepez share certificates, it was argued that these were progressively completed between October 2002 and May 2003.

148.2 In the second version (as first set out in the C.M filed in October 2007), the Claimant dropped its earlier argument that it was an innocent investor unrelated to the Uzan family. Instead, it admitted that Libananco had been beneficially owned by Cem Uzan and his Immediate Family since 2002. Libananco was set up to be a conduit for the Uzan family's overseas investments. The Claimant also, at that stage, produced certain documents which were alleged to be contemporaneous, including the 32 STAs allegedly reflecting Libananco's purchase of ÇEAŞ and Kepez share certificates from Kemal Uzan, Hakan Uzan and Ayşegül Uzan in the form of 32 separate transactions occurring between 30 October 2002 and 15 May 2003.

148.3 In the third version (as set out in the C.CM filed in May 2009), the Claimant sought to introduce a new fact, i.e. pursuant to an alleged "family divorce" which was consummated in January 2003, the Uzan family divided its assets among Kemal Uzan, Hakan Uzan and Cem Uzan, and agreed, in particular, that Cem Uzan would receive the family's stake in ÇEAŞ and Kepez and therefore would become the sole beneficial owner of Libananco, thus contradicting its earlier submission that Libananco was acquired by Mr Türkkkan for Cem Uzan and his Immediate Family. The Claimant also abandoned its earlier case where it argued that it acquired its interests in ÇEAŞ and Kepez pursuant to 32 separate transactions as represented by the STAs previously produced. Instead, it argued that it only actually acquired the share certificates much later, in April and May 2003. The Claimant explained that the STAs were no more than mere "expressions of intent" to transfer; the actual acquisitions having taken place through two acts of *teslim*: (i) a telephone call in April 2003 with respect to share certificates in Switzerland and (ii) Mr Çiğgin's inspection of share certificates in İstanbul. This third version of the Claimant's case contradicted the STAs themselves as well as the other documents produced by the Claimant.

148.4 The fourth version (which was introduced in the Claimant's oral arguments in November 2009 and fleshed out by witness testimony in March 2010) was that the Uzan family had consummated a series of intra-family transfers of ÇEAŞ and Kepez share certificates on 3 April and 4 April 2003 pursuant to the alleged "family divorce". The Claimant introduced these intra-family transfers to explain why the percentage of ÇEAŞ' and Kepez's share capital that Libananco allegedly received from Hakan Uzan and Ayşegül Uzan exceeded (and therefore did not match) the amounts owned by those individuals (according to records of dividends received by them). It was said that, pursuant to these intra-family transfers, Cem Uzan transferred shares to his siblings, who then transferred them to Libananco. The Respondent submitted that these intra-family transfers appeared late in the day, only some three years after the Claimant filed its Request for Arbitration; and further, that they were circular and roundabout in nature since Cem Uzan was by then the sole beneficial owner of Libananco. The Respondent also noted that the Claimant's witness Hakan Uzan introduced a third (undocumented and previously unmentioned) act of *teslim* – Hakan Uzan claimed that his father Kemal

Uzan telephoned him on 15 May 2003 and instructed him to go to the garage in an office building in İkitelli (that same day) to receive delivery of ÇEAŞ and Kepez share certificates.

149. The Respondent submitted that the changing stories were a clear sign of falsehoods on the part of the Claimant. In particular, the Respondent submitted that the changes in the Claimant's case were telling in relation to the manner in which the shares were allegedly transferred to Libananco.

## **2. The Claimant's key jurisdictional documents were backdated**

150. The Respondent submitted that the key jurisdictional documents relied on by the Claimant were backdated and created no earlier than 2005. It is argued by the Respondent that key documents represented by the Claimant to be "originals" dating from 2002 to 2003 were actually backdated reproductions created only after November 2005. In that regard, the Respondent advanced, among others, the following arguments.

150.1 The 32 STAs which bore various dates between 30 October 2002 and 15 May 2003 that were relied on by the Claimant could not, based on the evidence given by its forensic experts, have been signed in the sequence that their dates implied.

150.2 The forensic evidence showed, among other things, that the signatures of Kemal Uzan and Ayşegül Uzan on the STA were forgeries, and that at least seven of the STAs had been stamped no earlier than 2005.

150.3 In any event, all the STAs that were produced were not original documents (although the Claimant initially represented them as such) as they were printed and signed by Mr Türkkan in 2005.

150.4 Board minutes tendered by the Claimant purporting to record Libananco's acquisition of shares in ÇEAŞ and Kepez had been printed with ink that was not commercially available before August 2005.

150.5 In any event, Mr Türkkan admitted that many of the minutes were printed in 2005, so the documents tendered were not in fact original (although the Claimant initially represented them as such).

150.6 In relation to the Instrument of Transfer allegedly dated 1 April 2002 tendered by the Claimant (which documents the transfer of ownership of Libananco to Mr Türkkan), the Respondent's forensic experts detected an anti-counterfeiting code on one of the pages, proving that it could not have been printed before 2007.

150.7 Mr Türkkan likewise admitted that the Instrument of Transfer was only printed and signed in 2007, so the version tendered was not an original document (although the Claimant initially represented it as such).

### **3. Mr Türkkan's account of acquiring Libananco in April 2002 was flawed and contradicted by other evidence on the record**

151. The Respondent submitted that Mr Türkkan's account of acquiring Libananco in April 2002 was contradicted by other available evidence. Mr Türkkan's evidence was that, on 1 April 2002, Prontoservus Ltd ("Prontoservus"), a company associated with the law firm Polakis Sarris & Co (of which the Claimant's witness Polakis Sarris is a partner), transferred 100 per cent of Libananco's shares to him. This transfer was memorialised in an Instrument of Transfer dated 1 April 2002 and resignation letters from the directors of Prontoservus. It was submitted that, if Mr Türkkan did not in fact purchase Libananco on 1 April 2002 as alleged by the Claimant, then the Claimant's entire case would collapse. This is because the alleged purchase of Libananco was central to its account of how, when and why it came to acquire shares in ÇEAŞ and Kepez. The Respondent submitted that parts of Mr Türkkan's Witness Statements explaining his acquisition of Libananco were false, including the following assertions made by him.

151.1 Mr Türkkan deposed in his First Witness Statement that he was looking for a Cypriot firm to help him acquire an investment vehicle, and he chose Partellas & Kiliaris "*after identifying [the] firm based on its website*". The Respondent submitted that this was not possible since the firm did not have a website in March 2002.

151.2 On the day that Libananco was allegedly purchased by Mr Türkkan (i.e. 1 April 2002), Mr Türkkan "*participated, by telephone*" in a meeting of the new Board of Directors. The Respondent submitted, based on the evidence given by the Claimant's witnesses, that no Board meeting was in fact held on 1 April 2002, and that the minutes of that meeting were created for tactical purposes.

151.3 Shortly after the alleged telephone conference, Mr Türkkan travelled to Nicosia, Cyprus "*on a non-stop Royal Jordanian flight from Amman and stayed two nights at the Nicosia Hilton*", where he allegedly met Mr Antonis Partellas (a Cypriot accountant) for the first time. The Respondent pointed out that the Nicosia Hilton had no record of Mr Türkkan's alleged stay in April 2002 and that Royal Jordanian did not operate a non-stop flight from Amman, Jordan to Larnaca, Cyprus on 1 April 2002.

### **4. The May 2003 dividend records for ÇEAŞ and Kepez showed that members of the Uzan family and not Libananco owned the shares**

152. The Respondent argued that records of the ÇEAŞ and Kepez dividend payments in May 2003 showed that the Uzans owned the shares that are alleged to have been owned by Libananco at that time.

153. Specifically, the Respondent contended that the evidence demonstrated that Libananco received none of the dividends of ÇEAŞ and Kepez which were paid beginning on 20 May 2003. Instead, all of the dividends that were

supposed to have been received by Libananco went to members of the Uzan family or to Turkish companies which they controlled.

153.1 The İstanbul Stock Exchange Settlement and Custody Bank, Inc. (“Depository Bank”) prepared a report (“Depository Bank Report”), submitted by the Respondent together with its Supplement to Counter-Memorial (filed on 3 March 2009), which confirmed that Libananco did not collect any dividends from either ÇEAŞ or Kepez on 20 May 2003 (or thereafter) even though approximately 99 per cent of ÇEAŞ’ and Kepez’s shareholders collected those dividends. Instead, the dividends were collected by members of the Uzan family.

153.2 The Depository Bank Report showed that members of the Uzan family collected the dividends on all of the ÇEAŞ and Kepez share certificates that Libananco produced in Vienna.

153.3 The owners of the shares in ÇEAŞ and Kepez were the members of the Uzan family who collected the May 2003 dividends and not Libananco.

154. Accordingly, the Respondent submitted that Libananco owned no shares in ÇEAŞ and Kepez as at 20 May 2003.

**5. The Claimant failed to prove *teslim* (i.e. the legal transfer of possession) in relation to the share certificates allegedly acquired by Libananco**

155. The Respondent emphasised that the Claimant failed to demonstrate a legal transfer of possession in favour of Libananco in relation to the share certificates in question. This concept is known as *teslim*, and is one of the requirements for a legally effective transfer of ownership.

155.1 The alleged delivery of share certificates in Switzerland in April 2003 was put forward based only on the testimony of Hakan Uzan and Mr Türkkan, who claimed to have effected delivery over the telephone, with Hakan Uzan in İstanbul and Mr Türkkan in Jordan. None of this was recorded in writing. Notably, at the hearing, Mr Türkkan conceded that no *teslim* actually occurred with respect to the share certificates located in Switzerland.

155.2 The only witness who allegedly had personal knowledge of the 15 May 2003 delivery-by-inspection at the Rumeli and Doğu Buildings in İstanbul was Şaylan Çiğgin, who supposedly carried out the inspection. Mr Çiğgin testified that he deliberately destroyed the only document that he ever claimed to possess in relation to the supposed inspection at the Rumeli and Doğu Buildings, i.e. the share inventory list that Mr Türkkan had allegedly sent him.

155.3 The *teslim* that was alleged to have taken place in a garage in İkitelli was attested to only by Hakan Uzan, who was unable to recall any



inventory or other document identifying the share certificates that were supposedly delivered.

156. The Respondent further submitted that the documents produced by the Claimant contradicted the evidence of the occurrence of *teslim* given by its witnesses.

156.1 Mr Çiğgin testified that the text of the STAs (in particular the range of dates indicated on the STAs representing the dates on which the individual transactions were supposed to have been executed) contradicted his evidence that *teslim* in relation to the share certificates in İstanbul only took place on one day in May 2003 (i.e. 15 May 2003).

156.2 There was no language in the STAs stating that *teslim* took place, or even that it was to occur in the future.

156.3 Libananco's board and management minutes failed to mention any of the three acts of *teslim* alleged by the Claimant.

156.4 Libananco's Share Acquisition Report dated 20 May 2003 (Exhibit H-61) did not mention any of the alleged deliveries or acts of *teslim*, and in any event also reflected acquisition dates earlier than April and May 2003.

156.5 Libananco's audited 2002 and 2003 financial statements contradicted the evidence of the Claimant's witnesses that *teslim* took place in April and May 2003 since both statements showed that Libananco already owned millions of dollars' worth of ÇEAŞ and Kepez share certificates on 31 December 2002 (well before the alleged occurrence of the first act of *teslim* in April 2003).

**6. The Claimant failed to produce documents that would have existed if its story was true**

157. The Respondent further submitted that the Claimant failed to produce documents that would exist if its version of events were true. The Respondent's case here was that, if the events alleged by the Claimant had in fact happened in 2002 and 2003, they would have generated a substantial paper trail, not only in Turkey, but also in Cyprus, Jordan, Switzerland, Lebanon and elsewhere. The Respondent submitted that the Claimant failed to produce any such record.

158. These documents would have included the following:

- (a) records of communications between Mr Türkkan and Cem Uzan or Hakan Uzan regarding the supposed acquisition of Libananco in 2002;
- (b) documents relating to the operation of a company (i.e. Libananco) such as tax returns, bank account statements, registration of

corporate formalities, records of routine administrative costs, and so on;

- (c) documents evidencing the alleged Uzan “family divorce” in January 2003, e.g. written advice from professional advisors when dividing up their business empire;
- (d) documents that would have been created in connection with (or otherwise evidencing) the alleged deliveries (i.e. legal transfers of possession) of share certificates to Libananco in April and May 2003; and
- (e) regulatory filings and approvals required by both Turkish and Cypriot law.

### **7. The Claimant’s witnesses are not credible**

159. Finally, the Respondent submitted that the testimony and conduct of the Claimant’s witnesses showed that they were not credible and could not be relied upon. According to the Respondent, the credibility of the Claimant’s case rests on its witnesses since the Claimant has not produced any paper trail or other independent corroboration of its case.

#### ***C. The factual witness evidence***

##### **1. First Witness Statement of Cem Cengiz Uzan dated 20 September 2007**

160. Cem Uzan’s First Witness Statement deals with the following areas of evidence:
- (a) the reasons that Cem Uzan’s family decided to establish an international holding company (i.e. Libananco) in Cyprus;
  - (b) the reasons Mr Türkkan was chosen to begin the process of establishing this international holding company; and
  - (c) the time frame in which Libananco allegedly acquired ownership of ÇEAS and Kepez share certificates.

##### ***(a) Why Cem Uzan’s family decided to establish Libananco in Cyprus***

161. In early 2002, Cem Uzan’s Immediate Family decided to consider their future investment strategy with the aim of hedging against risks then prevalent in the Turkish economy. They had concerns that the business environment within Turkey could further deteriorate after the twin economic crises and thus negatively affect any new investments they might make domestically. They decided that they would “*diversify*” their business interests by making most of their future investments in business and operations outside of the country.

162. They decided to establish a new international holding company to facilitate their *“diversification strategy”*, and *“to capitalize the company with some of [their] most valuable and highest income-generating businesses. The latter was critical in order to facilitate the company’s access to investment capital and debt and thereby support our international diversification plans”*.
163. Around the same time (i.e. early 2002), Cem Uzan also made the decision to enter Turkish politics. For that reason, *“protecting against politically-motivated actions against these business interests which might arise before or after the elections also became an important component of the business planning”*. At paragraph 21 of his First Witness Statement, Cem Uzan deposed that he entered Turkish politics *“in the summer of 2002”* by assuming leadership of a party called the Genç Parti. He also deposed that the elections were scheduled for November that year.
164. In implementing this diversification plan, Cem Uzan and his Immediate Family were advised to set up a new company outside of Turkey and in a country within the European Union in order for them to benefit from: (i) political stability; (ii) a transparent legal and judicial system; (iii) ease of corporate administration; (iv) comprehensive rules on business confidentiality; and (v) favourable tax treatment. Cyprus was chosen because it was not politically recognised by Turkey and accordingly, the Uzans’ *“advisors believed that it would provide an extra layer of protection to these business interests that was not offered by any of the other jurisdictions that were under consideration”*.

*(b) Why Mr Türkkan was chosen to begin the process of establishing Libananco*

165. Cem Uzan deposed that he instructed Mr Türkkan, whom he described as a *“trusted business associate”* to begin the process of setting up a new company in Cyprus.
166. He deposed that he had instructed Mr Türkkan to set up the new company in Cyprus firstly because he was a permanent resident of Amman, Jordan who had long served as an officer and employee in several of his businesses, especially those located outside of Turkey. Second, Mr Türkkan was *“a sophisticated, multi-lingual businessman”*, who held a university degree in economics and was familiar with their businesses. Third, because he lived permanently in Jordan, he was able to travel easily to Cyprus to conduct the company’s business and otherwise handle the business, legal and administrative affairs of the Cypriot company.
167. Thus, *“after consultation with Turkish and Cypriot legal/accounting advisors, in 2002 Mr Türkkan purchased 100% of the outstanding shares of a Cypriot company called Libananco”*.

(c) The time frame in which Libananco allegedly acquired ownership of ÇEAS and Kepez share certificates

168. Cem Uzan deposed that:

*“When Libananco was purchased by Mr Türkkkan, it was a shell company without assets. To serve our business purposes, it needed a sufficient capital base for two primary reasons. First, such a base would enable it to access capital markets to facilitate its future investments. Second, a strongly capitalized company would be attractive to future business partners, and was usually a pre-requisite for participation in various asset and project tenders around the world.*

...

*It was decided that in order to capitalize the company, Libananco would purchase my Immediate Family’s shares in the Utilities”.*

...

*The acquisition of shares in the Utilities made sense for Libananco as its very first investment. The Utilities had benefited from several years of major investment and growth and by 2002 were providing excellent returns. Accordingly, the acquisition of substantial ownership interests in those Utilities, it was felt, would establish Libananco’s commercial credibility and facilitate its expansion into international markets...*

...

*I was not involved in the administrative details of the acquisition of shares in the Utilities by Libananco, although I was generally kept informed of its progress. **From approximately October 2002 until May 2003, Libananco acquired most of my Immediate Family’s ownership interests in the Utilities***

...

*At all times, Mr Türkkkan was the managing director and owner of Libananco as described in its public filings. At the same time, it was understood and agreed between Mr Türkkkan and me that he would own Libananco on our behalf ... it would have been politically improvident under these circumstances to have disclosed my business relationship with Libananco on account of the sensitivities of the Turkey/Cyprus issue...*

***By May 2003, nearly 18 months after the decision was made to establish an international investment company, Libananco had completed its acquisition of a substantial number of shares in the Utilities from my Immediate Family, with more to be purchased.”***

(emphasis added)

**2. Second Witness Statement of Cem Cengiz Uzan dated 24 April 2009**

169. Cem Uzan's Second Witness Statement covers the following areas of evidence:

- (a) the circumstances surrounding the alleged "family divorce" that took place from the middle of 2002 to early 2003;
- (b) the significance of the STAs allegedly entered into between individual members of the Uzan family (except for Cem Uzan) and Libananco;
- (c) the physical process by which the ÇEAŞ and Kepez share certificates were allegedly delivered to Libananco;
- (d) why Libananco did not attend the General Assemblies of ÇEAŞ and Kepez held on 31 March 2003;
- (e) why he and members of his Immediate Family (and not Libananco) redeemed the dividends payable to shareholders of ÇEAŞ and Kepez on 20 May 2003 (even though Libananco was alleged to have acquired their shares in ÇEAŞ and Kepez by that time); and
- (f) why there was no public disclosure of the transfer of shares in ÇEAŞ and Kepez to Libananco even though, under Turkish law, Libananco would have been required to make various legal and regulatory filings if it had actually acquired majority interests in ÇEAŞ and Kepez in 2002 and 2003.

(a) The circumstances surrounding the alleged "family divorce"

170. Cem Uzan began by explaining the manner in which the various businesses were organised within his family.

170.1 He deposed that:

*"my father was responsible for running banking, cement and construction businesses, as well as heavy industries such as steel and aluminium manufacturing. On the other hand, my brother, Hakan, took responsibility for telecommunication operations (e.g. Telsim) and I was responsible for managing the media group (e.g. Star Media) and electricity enterprises (i.e. the Utilities). While there was some overlap here and there (such as ... my father's advisory involvement in the Utilities), the primary responsibility for running these major businesses was divided between us fairly clearly".*

170.2 He elaborated as follows:

*“while for many years, I personally had primary control over the management and direction of the Utilities, as well as physical control of many of the bearer shares, as a practical matter my family collectively owned most of the shares in the Utilities until 2003”.*

171. He explained that part of the rationale for the alleged “family divorce” was as follows:

*“my efforts to lead the Genç Party in 2002 and 2003, including running a national campaign in 2002, essentially consumed my life. At the same time, my father was entirely focused on running his own businesses, and I frankly did not know much about them or what was happening in those companies, including İmar Bank (which my father managed with his brother, Yavuz Uzan). With Hakan being engaged with the various telecom matters and lawsuits, and my father consumed with his own affairs, it was becoming more and more difficult to continue our collective ownership of certain businesses. Moreover, it also interfered with my ability to focus on running those businesses that were my responsibility – namely, the Star Media Group and the Utilities. To be honest, I also viewed our failure to clearly divide our ownership interests as presenting a significant hindrance to my political career because of the potential for me to be associated publicly with companies I did not manage or control”.*

172. He explained that, by January 2003, his father, brother and he had decided to accomplish a full division in ownership of their various businesses:

*“along the lines of how we had managed them in the past. As part of this decision, it was thus agreed that my father, brother and sister would transfer to me their ownership interests in Star Media and the Utilities; that my father would be the sole owner of the family’s remaining banking, manufacturing and construction companies; and my brother would be the sole owner of Telsim”.*

173. Cem Uzan deposed that the beneficial ownership of Libananco consequently changed in January 2003. At that time, the trust arrangement between Mr Türkkkan (who was at the time holding Libananco on trust for the benefit of Cem Uzan and his Immediate Family) and Cem Uzan’s Immediate Family ended. As a result, from that point on, Cem Uzan remained the sole beneficial owner of Libananco, with Mr Türkkkan as his trustee.

*(b) The significance of the STAs in the context of the alleged “family divorce”*

174. According to Cem Uzan’s Second Witness Statement:

*“[i]n October and November 2002, Hakan and Cenk Türkkkan (for Libananco) had used Mr Çiğgin’s draft to begin preparing share*

*transfer agreements recording Hakan's intent to transfer his shares in the Utilities to Libananco".*

175. However, after preparing three such agreements (two for Kepez and one for ÇEAŞ) *"we did not take any more action on the matter"*. Cem Uzan deposed that *"recording such a transfer did not seem to ... be of any great importance"* since his Immediate Family would still own Libananco beneficially. However, in January 2003, the STAs *"took on a whole new importance"*. Cem Uzan explained: *"Therefore, at my request, my Immediate Family, along with Mr Türkkkan, once again commenced the process of executing various share transfer agreements in February 2003"*.
176. Relations by that time between Kemal Uzan, Hakan Uzan and Cem Uzan had become increasingly strained and Cem Uzan *"very much believed that it was important that [his] Immediate Family memorialize their intention to irrevocably surrender their ownership interests in the Utilities to Libananco, in order to prevent this from becoming an issue in any potential future disputes within the family"*.
177. He explained:

*"Since Libananco (a) was already in existence in Cyprus; (b) was owned by Mr Türkkkan in trust for my family and (c) was already in the process of acquiring our bearer shares in the Utilities, we decided that the severance of the Utilities' ownership to me alone could be best and most efficiently accomplished by (a) continuing to capitalize Libananco with the Utilities' bearer shares, as and for the reason previously agreed; but also (b) agreeing that Libananco would be held by Mr Türkkkan in trust for me alone ... it made no sense to stop a process that was still relevant and already underway.*

...

*Thus at my instruction, my brother informed Mr Türkkkan that my Immediate Family would continue to transfer our bearer shares in the Utilities to Libananco but that thereafter, Mr Türkkkan would hold Libananco in trust for me alone. Mr Türkkkan agreed to this. Thus, from that time [i.e. April 2003, according to Mr Türkkkan's First Witness Statement], Libananco was owned by me, through my trustee, Mr Türkkkan and would itself later acquire the bearer shares in the Utilities"*.

178. Cem Uzan also described the legal advice he had received in connection with the share transfer process:

*"... we were advised by our Turkish legal counsel that transfer of the bearer shares to Libananco – just like our prior ownership of the shares – did not have to be in writing at all. Rather, the share agreements were executed simply to memorialize my Immediate Family's intent to transfer shares in the Utilities to Libananco"*.

179. Cem Uzan explained that he did not personally sign any of the STAs as seller. He deposed that:

*“[a]s I was to be the sole owner of Libananco, there was no reason for me to demonstrate my intent to transfer my interest in the Utilities to a company which I beneficially owned. Moreover, as the General Manager of the company, it was naturally Mr Türkkan who signed each of the transfer agreements on behalf of Libananco”.*

*(c) The process by which the ÇEAŞ and Kepez share certificates were allegedly delivered to Libananco*

180. Cem Uzan deposed that “[t]hroughout the early months of 2003, the majority of the physical bearer shares in the Utilities were being held in” the Rumeli and Doğu buildings and in his “family’s holiday home in Switzerland.” He stated that:

*“Obviously, for Libananco to take possession of these shares and transport them to a secure location was going to be a major undertaking and one which I did not want to accomplish without serious safeguards being put into place”.*

181. Cem Uzan described the share delivery process as follows.

*“Therefore, with regard to the shares in Turkey, in April 2003, I instructed my brother to have the shares repackaged in the name of “Libananco”. Then, on 15 May 2003 Libananco sent Mr. Çiğgin, who had been appointed as the company’s legal representative, to go to the secure storage areas where the shares were being held in İstanbul, to inspect them on behalf of Libananco; and to ensure that they were being held for Libananco’s benefit. After Mr. Çiğgin’s inspection, I arranged to have the largest denomination (i.e. most valuable) shares removed and taken to a secure location for Libananco. The remainder of the shares, all smaller denominations (and hence bulky) remained mostly in the Rumeli building pursuant to written share custody agreements between Libananco, and ÇEAŞ and Kepez. The originals of these share custody agreements were delivered to my offices in İkitelli, İstanbul where I placed them in one of my safes. Those offices were subsequently raided on 14 February 2004 by the SDIF and all papers including those agreements, were seized.*

...

*With regard to the shares in Switzerland, my brother Hakan, informed me in April 2003 that he had spoken to Mr Türkkan a few days earlier and had informed him that he was transferring those shares to Libananco. **He also agreed with Mr Türkkan that those shares would continue to be kept by him in Switzerland, although now in custody for Libananco”.***



(emphasis added)

(d) Why Libananco did not attend the General Assemblies of ÇEAŞ and Kepez held on 31 March 2003

182. Cem Uzan deposed that Libananco, “in view of how and when the ownership of the bearer shares was actually transferred ... was not actually the legal owner of any shares in the Utilities on 31 March 2003, the date of the General Assemblies”. It therefore did not attend the General Assemblies. He further deposed:

*“Although at that time my Immediate Family had undoubtedly undertaken to transfer their shares in the Utilities to Libananco, that company did not actually become the legal owner of any shares **until April 2003** with regard to the bearer shares in Switzerland and **May 2003** with regard to the bearer shares in İstanbul”.*

(emphasis added)

(e) Why Libananco did not redeem the dividends payable to shareholders of ÇEAŞ and Kepez on 20 May 2003 even though it had allegedly acquired a majority of the shares in ÇEAŞ and Kepez by that time

183. Cem Uzan deposed that the share certificates and dividend coupons were separate bearer instruments and that:

*“most of the coupons for the Utilities’ 2002 dividends had already been removed from the share certificates being transferred to Libananco (i.e. those in the Rumeli and Doğuş buildings in İstanbul and those in our family home in Switzerland) by the time of the General Assemblies of 31 March 2003. In other words, **when Libananco took ownership of the share certificates in April and May 2003 respectively, it did not take ownership of virtually any of the coupons for the Utilities’ 2002 dividends. This remained with me and my family and we therefore redeemed the dividends on 20 May 2003”.***

(emphasis added)

(f) Why there was no public disclosure of Libananco’s alleged acquisition of shares in ÇEAŞ and Kepez even though this was required under Turkish law

184. Cem Uzan deposed that: “It is true that there was no public disclosure of the transfer of the Utilities’ bearer shares to Libananco to Turkish or Cypriot authorities until 2005”. This significant transaction was “undertaken confidentially” and:

*“Although it was generally and publicly known we held a large interest in the two companies, it was not disclosed to the Turkish regulatory authorities how we allocated ownership of the bearer shares among*

*ourselves (and among other entities we owned or controlled) at any given time”.*

185. Cem Uzan stated that the confidentiality “*continued before during and after the 2002-2003 process of transferring ownership of bearer shares in the two Utilities to Libananco*” and “[*at*] the same time, [*he*] obtained legal advice from his Turkish counsel, Mr. Saylan Çiğgin, to ensure that not making these disclosures did not negatively impact the legitimacy of the share transfers”.
186. Cem Uzan believed at that time “*that public disclosures of the transfer to a Cypriot company ... might attract negative political attention*”.
187. As a result:

*“Until 2005, Libananco, through Mr Türkkkan, also maintained this same confidentiality. Indeed, public disclosure even of Mr Türkkkan’s ownership of Libananco would have revealed, at the very least, a connection between Libananco and my [i.e. Cem Uzan’s] family”.*

### **3. Cross-examination of Cem Uzan**

188. Cem Uzan was cross-examined on the following matters:
- (a) the time frame in which Libananco allegedly acquired ownership of the ÇEAŞ and Kepez share certificates; and
  - (b) why he did not file financial disclosures in respect of material changes in his assets which were mandatory under Turkish law for leaders of political parties, even though he allegedly transferred significant interests in ÇEAŞ and Kepez to Aysegul Uzan and Hakan Uzan respectively pursuant to the “family divorce” (see paragraph 138.3 above).

*(a) The time frame in which Libananco allegedly acquired ownership of the ÇEAŞ and Kepez share certificates*

189. On this topic, Cem Uzan gave the following evidence.
- 189.1 In his First Witness Statement, he deposed that Libananco acquired ownership interests in ÇEAŞ and Kepez from October 2002 until May 2003. It was put to Cem Uzan that his evidence (as appears from paragraph 33 of his Second Witness Statement) was to the contrary, i.e. that no acquisitions took place until April and May 2003, when *teslim* in relation to the share certificates in Switzerland and İstanbul respectively were alleged to have been accomplished.
- 189.2 He admitted that until *teslim* takes place, it is the seller of the share certificates that owns the latter (Tr 2780:21-2781:1) – in his own words, “*the acquisition is not complete until you have teslim*” (Tr 2784:11-2784:12).

189.3 He agreed that *teslim* (with regard to the share certificates in İstanbul) only took place on 15 May 2003. When pressed as to whether Libananco could have acquired those share certificates (i.e. the share certificates that were allegedly delivered on 15 May 2003 in İstanbul) before 15 May 2003, Cem Uzan was evasive and did not give a direct or helpful answer. He likened the acquisition to:

*“an ongoing process... It is like buying a car. You go into a car dealership. You sign a contract... But until you have taken over the car, you’re in the car and drive away, you haven’t bought the car. You have a contract to buy the car, and the same thing with bearer shares, okay? Until teslim takes place, the acquisition is not completed”* (Tr 2780:6-2780:19).

189.4 Although there are apparent inconsistencies in the evidence summarised above, the Tribunal considers that the totality of Cem Uzan’s evidence here appears to be that Libananco only acquired ownership of the bearer share certificates in Switzerland and İstanbul in April 2003 and on 15 May 2003 respectively.

*(b) Cem Uzan’s failure to file financial disclosures required under Turkish law for a leader of a political party*

190. Cem Uzan was also cross-examined on the requirements under Turkish law for him (as a leader of a political party) to file mandatory financial disclosures in respect of material changes in his assets. The underlying premise of this line of cross-examination was that if the alleged transfers of his shares in ÇEAŞ and Kepez to Ayşegül Uzan and Hakan Uzan respectively (pursuant to the alleged “family divorce”) in fact occurred, this would have required disclosure. Accordingly, the Tribunal considers that this portion of the cross-examination impacts upon the credibility of the “family divorce” theory which is now central to the Claimant’s case.

190.1 Cem Uzan was referred to his Financial Disclosure of 17 April 2003 (Exhibit H-169), and was asked why there was no reference to his alleged divestment of his shares in ÇEAŞ and Kepez pursuant to the alleged “family divorce”. His response was: *“because the teslim had not taken place”* (Tr 2813:21-2813:22). It is noteworthy that he did not elaborate as to when *teslim* in relation to the alleged intra-family transfers did occur.

190.2 Cem Uzan was referred to his Financial Disclosure of 12 June 2003 (Exhibit H-186), where it was disclosed that Kepez and ÇEAŞ had paid its shareholder (i.e. Cem Uzan himself) the dividends set out. Annexed to Cem Uzan’s Financial Disclosure of 12 June 2003 were two letters from ÇEAŞ and Kepez (both dated 29 May 2003) stating that dividends had been paid to Cem Uzan. The letter from Kepez was specifically addressed: *“To our Company’s Shareholder Mr Cem Cengiz Uzan”*. Cem Uzan was asked whether he declared, in his Financial Disclosure of 12 June 2003, that he received the dividends as a shareholder of ÇEAŞ and Kepez

respectively. His reply was that the dividends were paid to him “*as the coupon holder of the dividends. Dividends are paid to coupons, sir*” (Tr 2816:18-2816:19).

190.3 When probed further as to why there was no disclosure (pursuant to the alleged “family divorce”) of his alleged divestment of shares in ÇEAŞ and Kepez, Cem Uzan did not give a relevant answer (Tr 2817:8-2817:14).

190.4 Cem Uzan admitted that it would warrant disclosure under Turkish law if he had disposed of his shareholding (Tr 2820:2-2820:5). He then explained: “*What the lawyers and accountants advised me I filed [sic] up*” (Tr 2820:10-2820:11).

190.5 He was referred to his Financial Disclosure of 31 July 2003 (Exhibit H-201), and was asked why there was no disclosure of his alleged 100 per cent beneficial ownership of Libananco, which had by that time allegedly acquired substantial interests in ÇEAŞ and Kepez. Cem Uzan was unable to give any explanation other than that: “*you have to ask Mrs. Rakrimra (ph.), I guess, that, because she was one of the lawyers who advised me on that filing*” (Tr 2808:5-2808:7).

#### **4. Witness Statement of Murat Hakan Uzan dated 9 October 2009**

191. Hakan Uzan’s Witness Statement takes the form of questions and answers (i.e. not in the form of a conventional witness deposition), with him giving his answers to questions posed to him by the Claimant’s Counsel. Hakan Uzan’s Witness Statement covered the following areas:

- (a) the setting up of Libananco and its acquisition of shares in ÇEAŞ and Kepez;
- (b) the circumstances surrounding the alleged “family divorce” – in particular, how he came to acquire a large quantity of ÇEAŞ and Kepez share certificates as a result of a number of intra-family transfers;
- (c) why no cash actually changed hands even though the STAs entered into between him and other individual members of his family on the one hand and Libananco on the other hand indicate that “*cash*” was given as consideration for the share certificates;
- (d) the ownership structure in ÇEAŞ and Kepez amongst his family members; and
- (e) how delivery (to Libananco) or *teslim* took place with respect to the share certificates located in Switzerland;

(a) The setting up of Libananco and its acquisition of shares in ÇEAŞ and Kepez

192. Hakan Uzan deposed that, at the beginning of 2002, he and his brother Cem Uzan decided that their family should acquire an international investment company outside of Turkey. They decided that the company would be owned by someone other than themselves, for and on behalf of Cem Uzan, Hakan Uzan, his father Kemal Uzan and his sister Ayşegül Uzan.
193. He deposed that: *“Given my brother’s [i.e. Cem Uzan’s] decision in early 2002 to devote his time to a campaign for public office, it fell to me to oversee purchase of the foreign investment company”*.
194. In or around March 2002, he asked Mr Türkkan, *“a trusted senior executive in Jordan who had worked for [him] personally for around five years”*, to research various jurisdictions around the world where such a company could either easily be founded or purchased.
195. A few days later, Mr Türkkan emailed him a Strength-Weaknesses-Opportunities-Threats (“SWOT”) analysis of various jurisdictions, recommending the Cyprus as the most suitable choice.
196. Hakan Uzan deposed that he settled on Cyprus, which had the added benefit of being a location where the Turkish Government would be cautious to tread. Given Cem Uzan’s political aspirations, all of *“us”* (i.e. the Uzan family) had begun to think of potential retaliation from the Turkish Government as a factor to be taken into account in business planning.
197. According to Hakan Uzan, after *“we”* had reached *“our”* decision (i.e. the Uzan brothers or the Uzan family), Hakan Uzan told Mr Türkkan that he should proceed to establish or purchase a company in Cyprus in his name to be held on behalf of Kemal Uzan, Cem Uzan, Ayşegül Uzan and himself.
198. In April 2002, Mr Türkkan informed him that he had purchased a Cypriot company by the name of Libananco and Hakan Uzan *“told him to await further instructions”*.
199. In the early fall of 2002, Hakan Uzan called Mr Türkkan again and informed him that Libananco was to acquire a majority of the shares in ÇEAŞ and Kepez. Hakan Uzan deposed as follows:
- “I did not tell him [i.e. Mr Türkkan] the purpose of this transaction; only that it was a family decision and that he would receive (i) a template share transfer agreement that he could employ for recording the transaction, and (ii) information from Shareholder Services Department in İstanbul, which would provide him with the information he would require for inputting information into the template”*.
200. Hakan Uzan deposed that, from late October 2002 to early June 2003, Kemal Uzan, Ayşegül Uzan and Hakan Uzan executed a total of 32 STAs (with

Libananco as the counterparty). By agreement among family members, the STAs transferred 100 per cent of Hakan Uzan's shares, 100 per cent of Ayşegül Uzan's shares and the majority of Kemal Uzan's shares in ÇEAŞ and Kepez to Libananco.

201. It was Hakan Uzan who decided what quantity of ÇEAŞ and Kepez shares would be transferred to Libananco at any particular time and by whom, in order to ultimately reach a particular threshold (approximately 67 per cent) ownership by Libananco, which had specific significance in relation to the control of ÇEAŞ and Kepez.<sup>5</sup>
202. He provided the information to a trusted employee of his (*"probably Sadrettin Balaban"*), who would convert the percentages into numbers and forward that information to Mr Türkkan. The Shareholder Services Department at ÇEAŞ and Kepez would closely monitor and track each transaction for their records.
203. There was no particular legal or business reason why he requested the transfers to be done in tranches over a period of time; this was simply a business practice that the Uzan companies routinely followed for decades in Turkey.
204. He also confirmed that he would receive two versions of the STAs (one signed by Mr Türkkan and one unsigned) which would arrive on his desk *"via the Legal Department"*.
205. He would sign them or arrange for the relevant seller to sign them. He confirmed that he personally signed each of the STAs on which his signature appears, and provided the exact pen used for those signatures to the Claimant's Counsel.
206. He confirmed that Ayşegül Uzan signed each of the STAs on which her signature appears in his presence.
207. In relation to his father Kemal Uzan, he deposed that:

*"although my father did not usually sign his Agreements [i.e. the STAs] in my presence, and many of his business documents and letters had been signed by his two brothers (my two uncles) on his behalf for a number of years, I can confirm that (i) he told me, at that time, that he had personally signed the Agreements, (ii) at that time, I recognized his signature, and (iii) I still do so now upon being shown again the Agreements in question"*.
208. He stated that *"it is virtually certain that I provided many of the Agreements for signature in a group or stack after I had collected a sufficient number for it to be worth my time to seek a signature or execute my own"*.

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<sup>5</sup> cf. Exhibit C-155, Libananco Minutes of Directors Meeting dated 15 November 2002: *"It is agreed to continue to purchase shares until a threshold of 45% in both companies"*.

(b) The circumstances surrounding the alleged “family divorce” and how Hakan Uzan came to acquire a large quantity of shares in ÇEAŞ and Kepez

209. Hakan Uzan elaborated on the alleged “family divorce” as follows:

*“As background, I would note that (i) my brother Cem became the sole beneficial owner of Libananco on account of this split (ii) we relinquished certain shares in various companies to each other to concretize – or more accurately, begin to concretize – the split (e.g. my brother’s shares in Telsim to me or my shares in my father’s various industrial companies to him, etc); (iii) **as part of the consideration for my father relinquishing his interest in companies to be owned by my brother and me, my father received the largest Utilities’ dividends in 2003**”.*

(emphasis added)

210. He deposed that the “family divorce” occurred “*between October 2002 (when [his] family commenced the process of transferring some of the shares [they] did then own personally) to May and June 2003 (when [he] transferred the remaining shares [he] had come to own in the interim to Libananco)*”. However, he said during direct examination that the “family divorce” took place in “*March, April, May 2003*” (Tr 1842:3-1842:4) instead.

211. He deposed that the 16 intra-family agreements (recovered as deleted electronic files on Mr Türkkan’s floppy disks) reflected a *quid pro quo* as between family members for the respective transfers. He subsequently agreed during direct examination that these intra-family agreements were signed “*in approximately early April, April 3 or 4, 2003*” (Tr 1845:18-1845:20).

212. He was asked by the Claimant’s Counsel in direct examination to elaborate on these agreements. He said that they were signed in circumstances where:

*“the General Assembly [of ÇEAŞ and Kepez that was held in 2003] had taken place [on] the 31<sup>st</sup> of March, and it was an ongoing discussion before and after between my father, my brother, and I, and my brother was pushing me to get these signed. I had asked to pass by my father’s house where he worked several times, and I passed by his office there. I visited him. I discussed the things again, and he signed them in front of me there”* (Tr 1848:7-1848:15).

He confirmed that he saw Kemal Uzan and Ayşegül Uzan sign these agreements (Tr 1848:16-1849:1).

213. At the time “*Shareholder Services*” undertook their calculations for Hakan Uzan in 2002 and 2003, he “*was not the majority shareholder in ÇEAŞ and Kepez*”. This was qualified by his evidence that:

*“By May 2003, however, I was [the majority shareholder in ÇEAŞ and Kepez], thus explaining how I ended up as a seller of the largest*

*amount of Utilities' shares to Libananco. The reason for this "intermediate" movement of shares between October 2002 (when my family commenced the process of transferring some of the shares we did then own personally) to **May and June 2003** (when I transferred the remaining shares he had come to own in the interim to Libananco), lies in the decision made around that time by my brother, father and myself to go our separate ways in business".*

(emphasis added)

214. He stated:

*"There would always be claims and counterclaims in what is inevitably a messy process. But that is precisely the reason my brother insisted on my family documenting our intent in the share transfer agreements: while there might be room for bickering, there would ultimately be no doubt about the actual ownership".*

*(c) Why no "cash" changed hands as a result of the STAs entered into with Libananco*

215. He also confirmed that no cash changed hands as a result of the individual STAs entered into between him and other members of his family on the one hand and Libananco on the other hand. He deposed:

*"The reason why there is "cash" shown as paid on the face of the Agreements when, in fact, no "cash" changed hands is because this was a template agreement used by the Uzan Companies for all its intra-group transactions... Even though there was no "cash" changing hands per se, there was no reason not to use this same template again because Libananco was in fact taking a debt on its books equivalent to the cash considered paid and received by each of the three sellers. Had Turkey not cancelled ÇEAŞ' and Kepez's concession agreements in June 2003, our Legal and Tax Departments would have worked with Mr. Türkkan and Libananco's Board to ensure that Libananco's debt would eventually have been repaid in the most tax-efficient manner through the income it would have received from ÇEAŞ and Kepez in future years and any further investment it planned to make".*

(underlined portions emphasised as italics in original text)

*(d) The arrangement as to ownership of ÇEAŞ and Kepez within the Uzan family and the relationship between dividends and shareholding*

216. In relation to the issue of why the dividends paid out by ÇEAŞ and Kepez in 2003 were not collected by Libananco, but rather by members of the Uzan family, Hakan Uzan deposed that the:

*"actual ownership [of shares in ÇEAŞ and Kepez] is in no way related to who claimed dividends in 2003. The dividend collection was agreed*



*by and between my brother, father and I as part of the initial stages of concretizing our asset and business separation (what my brother has referred to as a “family divorce,”...). **Ownership and dividend collections are, therefore, completely distinct**”.*

(emphasis added, underlined text italicised in original text)

217. Hakan Uzan further deposed that:

*“Actual ownership in ÇEAŞ and Kepez amongst my family was, in fact, very complicated ... which Uzan family member owned (directly or through another company) the entity which owned the Utilities’ shares also changed over time, again for tax or other reasons. In other words, individual ownership in ÇEAŞ and Kepez between my father, brother, sister and I (and other family-owned companies) fluctuated over time. We knew, of course, that as a family, we owned the majority of the shares. We also used a certain percentage of the shares to hold General Assemblies of the Utilities. **But none of that required an accurate tally of each individual owner’s share percentage, whether direct or indirect.** The only way such an individual tally could have been calculated would have been as I described above: to first receive accurate shareholder information from the Shareholders Services at ÇEAŞ and Kepez and then to take that information to the Shareholders Services Departments at other Uzan companies to see which entity was held by which other entity and eventually up the chain, which individual family member held how many shares”.*

(emphasis added)

218. He deposed that Exhibit R-821, allegedly an e-mail message from his secretary “attaching a fax with [his] entire family’s holdings in each and every company” was not legitimate. He deposed:

*“I can state without hesitation that this document cannot be legitimate for various reasons. First, my secretary sat across from me. There is simply no reason for her to be emailing me a fax rather than just giving it to me. Second, she has not written anything in the text of the email. Again, this was not standard practice for my secretary... Third there is no fax header to the document... Finally ... the actual information contained in the attachment (i) was very difficult to obtain, requiring access to shareholder service departments of all the various companies and all levels across Turkey, requiring the permission of each family member listed in the document (ii) was information that we purposely kept highly confidential... (iii) would never have been collated by anyone in a single document that would have been faxed or scanned or emailed loosely around the group and (iv) contains information that I know is false. Specifically, the amounts of ÇEAŞ and Kepez shares listed as being “owned” by my family appear to correlate to the dividend pay out in 2003. As I stated, this was never indicative of ownership. **Rather, ownership was evolving between***

***2002 and 2003 ... and culminated in the transfer of the majority of the Utilities' bearer shares to Libananco in 2003. The fact that R-821 attempts to match ownership to dividend payment, when they are unrelated, tells me one thing: this is a fraudulently manufactured document***".

(emphasis added)

*(e) Delivery to Libananco or teslim in respect of the share certificates located in Switzerland*

219. He also deposed that he sold the ÇEAŞ and Kepez share certificates which were located and Switzerland and owned by him. This transaction was recorded on paper (i.e. in the STAs). He deposed that:

*"Adding up the number of shares transferred to Libananco as recorded in the Agreements [i.e. the STAs], and comparing that number to the number of shares I understand are currently in Vienna, Austria and those that were seized in Turkey, it is clear that I did sell all my shares, including those in Switzerland. Otherwise, the numbers would not make sense"*.

220. In respect of the sale of the share certificates in Switzerland, he deposed that:

*"What is not recorded is the actual delivery of shares to Libananco, which was undertaken by a phone call I made to Mr. Türkkan in April 2002, in which I informed him that I was holding bearer shares in Switzerland, which I had transferred (or was going to transfer) in the Agreements [i.e. the STAs], on behalf of Libananco"*.

#### **5. Cross-Examination of Hakan Uzan**

221. The cross-examination of Hakan Uzan covered the following areas:

- (a) his involvement in the formation of Libananco and the circumstances surrounding how he came to choose Mr Türkkan to set up Libananco and manage its affairs;
- (b) the terms (and other details) of the alleged trust arrangement pursuant to which Mr Türkkan allegedly held his shares in Libananco on trust for the benefit of members of the Uzan family;
- (c) why "cash" was declared on the face of the STAs (suggesting that cash was paid to the seller of the shares as consideration for the transfer to Libananco), even though no cash in fact changed hands as a result of the execution of the STAs;
- (d) the circumstances surrounding the alleged "family divorce", in particular the subsequent events and the intra-family transactions;

- (e) the alleged third act of *teslim* in relation to share certificates located in İstanbul, which had not been mentioned anywhere previously; and
- (f) the particulars surrounding the *teslim* that allegedly took place in relation to the share certificates which were kept in Switzerland.

(a) Hakan Uzan's involvement in the formation of Libananco and his choice of Mr Türkkan to manage Libananco's affairs

- 222. Hakan Uzan began by confirming that he “*played a central role in matters relating to the formation of Libananco and the acquisition by Libananco of the shares in ÇEAŞ and Kepez*” (Tr 1860:9-1860:15).
- 223. His evidence was that he had a prior working relationship with Mr Türkkan, and that, as between him and his brother Cem Uzan, he was the one who had dealings with Mr Türkkan (Tr 2048:19-2049:9).
  - 223.1 He confirmed that he asked Mr Türkkan to set up Libananco and to hold it on trust – initially for all members of his immediate family (including him), and then later only for Cem Uzan (presumably once the alleged “family divorce” had taken place) (Tr 2049:10-2049:18).
  - 223.2 In relation to this alleged trust arrangement, his evidence is that Cem Uzan had complete trust in Mr Türkkan (as his trustee), even though nothing was recorded in writing in relation to the trust arrangement (Tr 2050:20-2051:4).
- 224. In relation to Mr Türkkan himself, Hakan Uzan gave the following evidence.
  - 224.1 Mr Türkkan was the “*Turkish representative in the Jordanian [Uzan] companies*” (Tr 1989:18-1989:19) – “*there was JPP, Alpha, there were a couple of other ones, but I wouldn't know if he was registered as an employee in all of them*” (Tr 1990:3-1990:5).
  - 224.2 Hakan Uzan said that, within those companies, Mr Türkkan “*was responsible for finance and financial matters, shareholder matters and such for companies that operated in Jordan and were established in Jordan*” (Tr 1990:8-1990:11).
  - 224.3 Hakan Uzan was referred to Exhibit H-152, which contained an e-mail message from one Haciahmet Bas (who appeared to be Mr Türkkan's supervisor at Rumeli Telekom) to him. In that e-mail message, Mr Bas was very critical of Mr Türkkan's abilities and proposed that Mr Türkkan's salary be reduced if Hakan Uzan wished to keep him as an employee. Hakan Uzan agreed that Mr Bas had a critical view of Mr Türkkan (Tr 1993:16-1993:18).

224.4 Hakan Uzan also confirmed that he “[m]ost possibly” decided to cut Mr Türkkan’s salary by half at the time the e-mail messages in Exhibit H-152 were sent (i.e. February 2003) (Tr 1996:6-1996:9).

224.5 When asked why Mr Türkkan was nevertheless still chosen to conduct a SWOT analysis, Hakan Uzan replied as follows:

*“First, Cenk [i.e. Mr Türkkan] was not the only person whose salary was cut in half. Over the 2000 year period, at least hundreds of people in İstanbul and in other countries as well as all the other employees in Jordan had their salaries cut because it was a serious economic crisis and the companies were facing challenges, so it wasn’t unique to Cenk. I had met Cenk on many occasions, and I knew him personally, and I knew his preparation of reports, and his diligence to the work I assigned to him. That was sufficient for me to decide on him” (Tr 1998:17-1999:5).*

(emphasis added)

(b) The terms of the alleged trust arrangement between Mr Türkkan and members of the Uzan family in relation to Libananco

225. As to the terms of this unwritten trust arrangement, Hakan Uzan testified that Mr Türkkan: “holds it for us, and whenever I or we tell him to transfer it to whoever we designate, he transfers it” (Tr 2042:8-2042:10).

225.1 When asked who the beneficiaries of the trust were, Hakan Uzan answered that, when Libananco was first acquired: “My understanding would be me and my brother” (Tr 2042:16-2042:17). He then elaborated that there was:

*“always this question in my mind, you know, my sister was there, my father was there, but I was trying—at one point, everything I established I would start making just me and my brother, but I think at this stage I would say that at that time it was still probably for everybody” (Tr 2042:19-2043:2).*

225.2 When asked to clarify whether Libananco was initially being held on trust for just Hakan Uzan and his brother Cem Uzan, or all four members of Cem Uzan’s Immediate Family, Hakan was unable to give a clear answer:

*“As I said, there was always discussion of divorce, always. And at the time when this [i.e. Libananco] was being bought, and generally with all the other companies, it was always this question, are we together, are we not, shall I start with the things that I’m doing now being separate, being divorced or not? So, I may have told him like that, **but it’s difficult for me to know because always there was the issue of divorce**” (Tr 2046:7-2046:15).*

(emphasis added)

225.3 He was then asked how Mr Türkkan could be sure who the beneficiaries were, if even he was not certain at the time. His response was that: *“He [i.e. Mr Türkkan] doesn’t need to know that... He’s holding it under my instructions”* (Tr 2043:5-2043:7). When probed further, he agreed with Counsel for the Respondent that: *“He’s [i.e. Mr Türkkan] holding it on your instructions for members of your family, but he doesn’t know which members”*. Accordingly: *“He [i.e. Mr Türkkan] would need to ask me or get instructions from me in that regard”* (Tr 2043:9-2043:16). He elaborated that: *“the terms were that when I told him, he would do what I tell him”* (Tr 2054:2-2054:3). Specifically, Hakan Uzan agreed that *“the terms of the unwritten trusts [were] never, in fact, expressly communicated to [Mr Türkkan]”* (Tr 2054:13-2054:17).

225.4 Hakan Uzan was asked whether Mr Türkkan was, for a period of three months, *“proceeding under a completely false apprehension as to who [was] actually interested in Libananco”*, since the change in the arrangement pertaining to the holding of Libananco occurred between Cem Uzan and Hakan Uzan in January 2003, but that information was not communicated to Mr Türkkan until April 2003 (Tr 2055:6-2055:15). Hakan Uzan responded as follows: *“I guess maybe that wasn’t a top priority in those months, so it took me a little longer, yes”* (Tr 2055:16-2055:18). Interestingly, Hakan Uzan’s evidence was that, even after April 2003 (when Mr Türkkan was informed by Hakan Uzan that Cem Uzan would henceforth be the sole beneficial owner of Libananco), he continued to communicate with Mr Türkkan in relation to *“the day-to-day daily work and day-to-day management and operation of the companies, including the liaison [sic] with Mr. Türkkan”* (Tr 2056:11-2056:21). Hakan Uzan’s explanation for this was that his brother Cem Uzan *“was in politics”* (Tr 2056:16).

225.5 Hakan Uzan was asked how he communicated the change in beneficial ownership of Libananco to Mr Türkkan. His response was this was done *“[b]y telephone”*, but that he had no record of that telephone call:

*“I never kept separate notes of or, like you said, remarks of making phone calls to anybody, any executive or outside party, and unless it was required, I never did a follow-up e-mail. But I’m sure the telephone company should have all the records of all the telephone calls”* (Tr 2051:14-2052:7).

225.6 The Respondent’s Counsel put to Hakan Uzan the scenario where Mr Türkkan met with an unfortunate accident, and asked whether there would be any proof to show that Libananco was not owned by Mr Türkkan for himself, but rather it was being held for members of the Uzan family, and later Cem Uzan himself (Tr 2208:9-2208-14). Hakan Uzan first replied that *“that was the case for a multitude of shareholdings that were placed on other people in Turkish companies, or outside of Turkey”* (Tr 2208:15-2208:17), but later agreed that it was *“[t]rue”* that here was absolutely

nothing that he or Cem Uzan could do to establish that, in fact, the shares in Libananco were not owned by Mr Türkkan beneficially for himself (Tr 2209:10-2209:16).

(c) Why “cash” was declared on the face of the STAs even though no cash in fact changed hands as a result of the execution of the STAs

226. Hakan Uzan was referred to paragraph 17 of his Witness Statement where he deposed that “cash” was declared on the face of the STAs even though no cash changed hands, and that these were meant to represent a book debt in favour of the sellers which would eventually have been repaid if the Concession Agreements held by ÇEAŞ and Kepez had not been cancelled in June 2003.

226.1 He confirmed in cross-examination that “*the Share Transfer Agreements, on their face, purport to show money being paid*” (Tr 2083:12-2083:15).

226.2 He also confirmed that no money was in fact paid to the sellers pursuant to the STAs (Tr 2083:21-2084:1), but that Libananco’s debt (i.e. what is referred to as “cash” on the STAs) would have been repaid to the sellers of the shares if the Concession Agreements had not been cancelled (Tr 2085:13-2085:20).

226.3 When confronted by the Respondent’s Counsel that: “*in fact, there was no arrangement at all, as far as you were concerned, in place for any future payment, although you say there must have been some*”, Hakan Uzan initially did not offer any helpful clarification other than to say that: “*the payments as such were part of the divorce. And, for example, my father got the largest dividends out of the divorce; that was part of the compensation*” (Tr 2088:7-2088:14).

226.4 But when asked whether there was an agreement as to how his father Kemal Uzan would be paid by Libananco, he said that: “*My father would not get paid directly through Libananco. It was part of the family divorce how everything was split up*” (Tr 2086:22-2087:2). When asked to confirm whether, in his father’s case, it was indeed the case that no money was ever going to be paid as set out in the STAs, he explained: “*that’s why he received a very large portion of the dividends*” (Tr 2087:8-2087:9).

226.5 Hakan Uzan explained that the large dividend received by his father Kemal Uzan was given to him as consideration for, among other things, his father’s transfer of his shares in ÇEAŞ and Kepez. He was asked by the Respondent’s Counsel:

*“So, as I understand it, in particular your father, he supposedly got an especially large dividend in 2003, and his, as it were, consideration for transferring shares in ÇEAŞ and Kepez was the especially large dividend and the fact that he was getting other parts of the Uzan empire, the bank and the industrial holdings; correct?”*

to which his response was: “Yes, more or less yes”.

226.6 On this basis, he confirmed that, after his father Kemal Uzan received the large dividend, there would be no further monies due to him from Libananco for the supposed sale of the ÇEAŞ and Kepez shares (Tr 2212:3-2212:6).

226.7 Hakan Uzan was also questioned as to why the 2003 financial statements of Libananco recorded a debt of US\$ 234 million that was owed to Mr Türkkan, notwithstanding the fact that Libananco allegedly acquired a book debt in favour of the sellers of the shares. He said that he was unable to explain why this was the case, and said that: “I have never seen the Libananco balance sheets. I never had the opportunity to go through them or structure them in any way” (Tr 2213:18-2213:20). He even went so far as to say that that “would be incorrect. It would need to be corrected” (Tr 2214:10-2214:11).

(d) The circumstances surrounding the alleged “family divorce” and the series of intra-family transactions which purportedly took place pursuant to the “family divorce”

227. In relation to the alleged “family divorce”, Hakan Uzan gave the following evidence.

227.1 When asked whether he had effected a reconciliation with his father Kemal Uzan, he said that: “To have a reconciliation, you must have a falling out first” (Tr 2214:20-2214:21). When asked whether he in fact had a falling out with his father, Hakan Uzan said: “No. I mean as always, I mean, over the years we always had our disagreements, but—so, no, I didn’t have a fallout with him” (Tr 2215:2-2215:4).

227.2 Hakan Uzan was asked whether it was Kemal Uzan who ran ÇEAŞ and Kepez, even after the alleged “family divorce” where it was agreed that there would be a “full division”<sup>6</sup> of ownership of the various businesses, with ownership of ÇEAŞ and Kepez going to Cem Uzan. His initial response was that this was not so: “I would say for major issues my brother [i.e. Cem Uzan] was responsible” (Tr 2109:11-2109:12). However, he later said that his father Kemal Uzan was in charge of ÇEAŞ “[o]n certain daily issues” (Tr 2111:15). Significantly, he admitted that his father Kemal Uzan was in charge of dealing with the important issue of the cancellation of the Concession Agreements then held by ÇEAŞ and Kepez (Tr 2111:20-2112:2).

227.3 Hakan Uzan was referred to Exhibit H-418, which was an excerpt from the İstanbul Trade Registry Gazette, No 5824, 20 June 2003. This shows that Cem Uzan and his Immediate Family incorporated a new company even after the alleged “family divorce”. It was put to Hakan Uzan that this

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<sup>6</sup> Cem Uzan’s Second Witness Statement, paragraph 17.

was not consistent with a “family divorce” having taken place earlier. His response was that:

*“a divorce, especially family divorce, with—of this magnitude nor of this size never happens in one day. We were pushing for the divorce, and the first steps which was the ÇEAŞ and Kepez separation and the Telsim separation had started. Obviously, it hadn’t gone through all the companies and/or all the systems” (Tr 2136:5-2136:11).*

He went on to say that: *“It [i.e. the alleged “family divorce”] began in 2003. We are actually never able to completely make a divorce. Now if we would have been able to, a lot of other things would not have happened” (Tr 2137:10-2137:13).*

227.4 Hakan Uzan was asked whether it was indeed the case that the alleged “family divorce” happened without the involvement of external lawyers, bankers or accountants. He confirmed that this was true and that there was no documentary evidence other than the intra-family agreements (deleted files recovered from Mr Türkkan’s floppy disks) and the 32 STAs:

*“Yes. There would be no way that my father, me, or my brother would bring in a third party, may be whatever the position, into our negotiations and into our discussions of what was going to happen garage [sic] and how the divorce was going to happen. It was just not the way it was going to be” (Tr 2138:19-2139:15).*

228. In relation to the intra-family transactions carried out pursuant to the alleged “family divorce”, Hakan Uzan gave the following evidence.

228.1 Hakan Uzan was asked how, notwithstanding that the record of dividends showed that he received payouts corresponding to 0.43 per cent of the total shareholding of Kepez, he transferred shares corresponding to a total of 44.08 per cent of the shareholding of Kepez. He disagreed that his total shareholding in Kepez amounted to 0.43 per cent, saying: *“No. It only means that within the family distribution of dividends, I only received that percentage from the dividends” (Tr 2099:1-2099:3).*

228.2 Hakan Uzan was also asked, in relation to ÇEAŞ, how he managed to transfer shares amounting to 35.53 per cent of the shareholding in ÇEAŞ to Libananco, even though, according to the record of dividends paid out, he only received dividends corresponding to 6.04 per cent of the shareholding of ÇEAŞ. The Respondent’s Counsel put to him that the total shareholding in ÇEAŞ allegedly transferred to him via the intra-family transfers was 29.04 per cent, and that when this figure was added to the earlier figure of 6.04 per cent, this gave a total of approximately 35 per cent which he alleged he transferred to Libananco. It was put to him that:

*“the intra-family faxes, which appeared so mysteriously on the Floppy Disks, are intended to fill the gap between the 6.04 percent that you*



*started with and the 35-odd percent that you transferred” (Tr 2100:14-2100:18).*

Hakan Uzan’s reply in that regard was merely that: *“The intra-family transactions and the sale to Libananco are two different things” (Tr 2100:19-2100:20).*

228.3 Hakan Uzan was asked what purpose would be served in having Ayşegül Uzan transfer shares to him, only for him to then transfer them on to Libananco. His reply was that: *“As part of the divorce, my brother wanted all things to be documented, all the intra-family share sales to be documented, so that there is no misunderstanding or dispute later” (Tr 2103:9-2103:12).* When pressed to explain the complex nature of the transactions, he repeated his earlier answer and said: *“Again, my brother wanted to have everything documented; and, as part of the family divorce, this is the way things got structured” (Tr 2106:18-2106:20).*

228.4 Hakan Uzan denied that the purpose of these roundabout transactions was to *“supply the missing shares for [him] to transfer, pursuant to the Share Transfer Agreements, to Libananco” (Tr 2107:7-2107:9).* He explained that:

*“If you look starting in 1992 with the acquisition of the privatization of ÇEAŞ and Kepez shares until including these, 2002 and 2003, you will see hundreds of these sort of transactions between family members, between companies, either done for accounting purposes, either done for dividend purposes, for whatever purposes they may have been at the time. It was a complex structure between family members and between companies, and that’s the way they were done” (Tr 2107:14-2108:1).*

The Tribunal notes that no evidence has been tendered of any such similar transactions.

229. On the related issue of the authenticity of Exhibit R-821, which purported to be a fax document detailing the breakdown of his family’s shareholdings in various companies, including ÇEAŞ and Kepez (see paragraph 218 above), Hakan Uzan gave the following evidence.

229.1 He confirmed that one of the reasons he disputed the authenticity of Exhibit R-821 was the fact that his secretary sat across from him, so there would be no need to send him a document via e-mail (Tr 2156:11-2156:20).

229.2 He was asked whether the contents of Exhibit R-821 (i.e. the table representing shareholding structure within his immediate family) were being looked at closely at the time (i.e. 14 July 2003) because a freezing order had been made by a Turkish court on 4 July 2003 in relation to the assets of Kemal Uzan, Cem Uzan, Hakan Uzan and Ayşegül Uzan and other Uzan group companies. He initially denied that he was looking

closely at the shareholding structure within his immediate family at that time (Tr 2166:1-2166:6). But he gave a different answer upon further questioning and agreed that, in the face of the freezing order, he would have been looking carefully at the shareholding structure within his family: *“Well, if you assumed that these are correct, then that would be right, but it’s not”* (Tr 2166:19-2167:2).

229.3 However, he said that the contents of Exhibit R-821 did indeed correctly represent the factual position in relation to his family’s shareholdings in ÇEAŞ and Kepez at some earlier point in time: *“let’s say, from roughly six months earlier or nine months earlier or one year earlier, then it would be a correct document”* (Tr 2150:19-2150:22).

*(e) The requirement of teslim and the third act of teslim (not previously mentioned) which allegedly took place in İstanbul*

230. Hakan Uzan was then cross-examined on the requirement of delivery or *teslim*, which was necessary to effect a valid transfer of ownership under Turkish law.

230.1 Hakan Uzan’s evidence was that *“as far as I know, then and today, bearer share certificates only need to be—can be agreed in any form and need to be delivered to be valid”* (Tr 2058:21-2059:2). Hakan Uzan therefore agreed that the STAs themselves could not effect a valid transfer of ownership because actual delivery of the share certificates was necessary – *“the Share Transfer Agreements are or were not even necessary”* (Tr 2059:10-2059:21).

230.2 Hakan Uzan was later asked to confirm that *teslim* took place, firstly, over a telephone call to Switzerland in April 2003, and secondly, when Mr Çiğgin inspected the share certificates in İstanbul on 15 May 2003. His response sought to introduce a third act of *teslim* not previously mentioned or referred to in his Witness Statement (or in any of the other witness statements tendered by the Claimant): *“No. I mean, on the Vienna shares, they were sent by my father to our offices, to me. And, as I said, he actually called me and told me to go to the garage, which I did when the large denomination shares arrived at İkitelli offices”* (Tr 2067:4-2067:8). Hakan Uzan testified that, sometime in May 2003, he took delivery of the large denomination “Vienna shares” (i.e. the ÇEAŞ and Kepez share certificates that were produced in Vienna by the Claimant for inspection in these proceedings): *“When they were sent from my father’s offices to the İkitelli offices”* (Tr 2068:11-2068:16).

230.3 When asked why this was not captured in his Witness Statement, Hakan Uzan said:

*“It’s the information I have. I mean, I told the lawyers when we were preparing my Witness Statement a lot of information, a lot of—regarding a lot of different subjects, and this is the draft that came out. Something not being in here doesn’t mean there is something missing in the story or anything like that”* (Tr 2067:22-2068:7).

He was unable to give any other explanation for this significant omission from his witness statement.

231. Hakan Uzan was subsequently cross-examined on the alleged *teslim* that took place in İkitelli (see paragraph 230.2 above).

231.1 He gave evidence as follows:

*“The shares were sent by my father to our İkitelli offices. He telephoned me, and I went downstairs to the garage where the car came into and I guess that’s where it took place... I believe it was the day that Mr Çiğgin went to his part of the transaction”* (Tr 2198:17-2199:1).

231.2 Hakan Uzan thus confirmed that the delivery of share certificates that took place in İkitelli happened on the same day as Mr Çiğgin purported to take delivery of the ÇEAŞ and Kepez share certificates at the Rumeli and Doğuş Buildings (Tr 2199:3-2199:7). He said that he received a telephone call from his father Kemal Uzan in the *“early afternoon”* (Tr 2240:16-2240:19). His evidence was that this phone call was made by his father Kemal Uzan from his (i.e. Kemal Uzan’s) office, which was: *“Either in the Doğuş and the Adabank Building or from the house”* (Tr 2264:7-2264:13).

231.3 Hakan Uzan said that the share certificates in question were moved from a safe in the Rumeli and Doğuş Buildings to the garage in the İkitelli Building, where they were then delivered to him and subsequently moved to the safe of Cem Uzan (Tr 2199:15-2200:6) on the fifth floor of the İketeli Building (Tr 2204:2-2204:10). At that point in time, those share certificates were being held on behalf of Libananco (presumably by Cem Uzan, since those share certificates were kept in his safe) (Tr 2204:11-2204:15).

231.4 He agreed that the sequence of events was that the share certificates were moved from the Rumeli and Doğuş Buildings (after Mr Çiğgin allegedly inspected the share certificates and took delivery of the latter on behalf of Libananco) to the İkitelli Building (Tr 2200:4-2200:22). His evidence was that:

*“My father’s office was on the same floor of the Doğuş Building, so the safes were in the other bank building in İkitelli. So, they were visited there by Mr. Çiğgin and then later put in cars to be sent to me in İkitelli”* (Tr 2242:16-2242:20).

231.5 He said that the share certificates were wrapped in packages at the time he received them in İketli:

*“The corners were ripped. They were some that had like packaging on the side but not on the top... My father sent me ÇEAŞ and Kepez*

*shares. From the ones that I saw on top, that was it. I mean, it wasn't going to be paper wrapped underneath” (Tr 2205:15-2206:11).*

231.6 He was asked whether there was any list that accompanied delivery of those share certificates which would identify the share certificates which were allegedly delivered. His reply was that: *“There may have been [such a list]. I don't recall... I don't recall a document, so I don't know what happened to something that I don't recall” (Tr 2206:12-2207:11).*

231.7 Hakan Uzan was asked to clarify whether the share certificates that were allegedly delivered to him in İkitelli were the same as those that Mr Çiğgin purported to accept (on behalf of Libananco) in the Rumeli and Doğu Buildings. His response was in the affirmative: *“I believe they were all located in the same place, so most likely they would be the same. He [i.e. Mr Çiğgin] would have seen these shares as well” (Tr 2242:7-2242:10).*

*(f) The circumstances surrounding teslim that allegedly occurred in relation to the share certificates located in Switzerland*

232. In relation to the remaining act of delivery or *teslim* alleged by the Claimant, Hakan Uzan was referred to paragraph 26 of his Witness Statement, where he deposed that share certificates located in Switzerland were delivered to Mr Türkkan by means of a phone call in *“April 2002”*. He later clarified that this was an error, and the month should have been April 2003 instead (Tr 2236:21-2236:22). He gave the following evidence in relation to *teslim* that allegedly occurred in relation to the share certificates located in Switzerland.

232.1 The share certificates in Switzerland were located on a property rented by his uncle Yavuz Uzan (Tr 2183:12-2184:1).

232.2 No evidence was given by him as to how the share certificates were moved to that property (Tr 2184:2-2184:5).

232.3 The alleged phone call was made by Hakan Uzan from İstanbul, to Mr Türkkan who was at the time most probably in Jordan (Tr 2189:11-2190:1).

232.4 Hakan Uzan took the share certificates to Switzerland in 1995. At the time, these shares were owned by members of his family (Tr 2190:20-2191:8).

232.5 Hakan Uzan was unable to identify which of the share certificates in Switzerland were the subject of the alleged transfer referred to in paragraph 26 of his Witness Statement.

232.6 When asked whether he knew that there were in fact no Kepez share certificates found in Switzerland, he replied that he did not know (Tr 2192:17-2193:5). When asked: *“So, it's a very uncertain concept, your delivery, that it's delivery of something you don't even know what it is your [sic] delivering; is that right?”*, he replied:

*“Yes. But had the events in June and July [2003] not taken place, sooner or later they would have been relocated, just like the high volume shares were relocated by my father from the safe to me”* (Tr 2194:10-2194:17).

232.7 When asked whether he knew which share certificates or what he was allegedly delivering, Hakan Uzan replied: *“I knew—as far as I knew, it was ÇEAŞ and Kepez shares”* (Tr 2195:8-2195:9). He said, however, that he did not know which shares specifically he purported to deliver (Tr 2195:10-2195:11). He also agreed that he took no steps to evidence which of the share certificates in Switzerland had allegedly been delivered: *“Well, at the time when I talked to Cenk, I didn’t; and, later on, if events hadn’t occurred as they did, I would have”* (Tr 2196:1-2196:3).

232.8 Hakan Uzan agreed that:

*“At the time there was absolutely no way anybody going into this apartment in Switzerland would be able to identify which Share Certificates were supposedly owned by Libananco and which were supposedly owned by other people”* (Tr 2196:16-2196:21).

#### **6. First Witness Statement of Ali Cenk Türkkkan dated 23 April 2009**

233. Mr Türkkkan’s First Witness Statement discussed the instructions he received from Hakan Uzan to establish a company in Cyprus, and the events that followed. Of particular interest and relevance is Mr Türkkkan’s role in the preparation of the STAs and the corporate documents of Libananco (including its board and management minutes) which Mr Türkkkan allegedly prepared. Mr Türkkkan’s First Witness Statement may, in broad terms, be broken down into the following areas or topics:

- (a) the circumstances surrounding his purchase of a holding company in Cyprus at the instruction of Hakan Uzan;
- (b) why it was necessary for him to reprint and re-sign the Instrument of Transfer dated 1 April 2002;
- (c) Libananco’s corporate affairs, including its meetings conducted by Mr Türkkkan and the numerous STAs purportedly recording its acquisition of shares in ÇEAŞ and Kepez;
- (d) the circumstances surrounding the alleged delivery or *teslim* that occurred in relation to the share certificates located in Switzerland and İstanbul; and
- (e) the alleged trust arrangement between Mr Türkkkan and Cem Uzan, which was brought to an end at the end of 2008.

(a) The circumstances surrounding Mr Türkkan's acquisition of Libananco and his travel to Cyprus in April 2002

234. In early 2002, Mr Türkkan was asked by Hakan Uzan to purchase or establish a company in Cyprus on trust for Hakan Uzan's family.
235. Following this request, he researched professional service firms in Cyprus through the Internet to identify a firm that could assist him in this project:

*“After identifying a firm **based on its website**, in March 2002, I telephoned Mr Antonios Partellas of the firm Partellas & Kiliaris, in Nicosia, Republic of Cyprus, and requested that his firm assist me in arranging the acquisition of a Cypriot company”.*

(emphasis added)

236. Mr Türkkan deposed that:

*“After Mr. Partellas had arranged such an acquisition, namely of Libananco, I travelled to Nicosia, Republic of Cyprus in early April 2002. This was my first trip to the Republic of Cyprus, although I had spent time in the northern part of the island previously for business. I flew there on a non-stop Royal Jordanian flight from Amman and stayed two nights at Nicosia Hilton”.*

237. April 2002 was also Mr Türkkan's first meeting in person with Mr Partellas, and he discussed the general rules and organisation of Libananco, including the requirement that a majority of the board of directors had to be Cypriot nationals.

238. Mr Türkkan stated that:

*“My acquisition of Libananco was recorded on an instrument of transfer dated 1 April 2002... I had never met or communicated with Mr. Sarris or anyone at Prontoservus prior to 1 April 2002, when I participated by telephone, in a meeting arranged for the appointment of a new Board of Directors for Libananco”.*

239. On 1 April 2002:

*“the two original directors of the company, as well as the corporate secretary – Mr. Polakis Sarris – resigned their positions and a new Board of Directors and corporate secretary – namely, Latimer Management Services, Ltd. – were appointed”.*

Thereafter, Libananco's Board of Directors consisted of Mr Türkkan, as well as Andreas Partellas and Antonia Kyriakou (both of whom were citizens of and resident in Cyprus).

(b) The Instrument of Transfer dated 1 April 2002 memorialising Mr Türkkan's acquisition of Libananco

240. In relation to the Instrument of Transfer dated 1 April 2002, Mr Türkkan's First Witness Statement was as follows.

240.1 *"When I arrived in Cyprus shortly thereafter, Mr. Antonios Partellas had only some of the relevant paperwork ready for me to sign during my visit. Indeed, it was only after I returned to Amman that I received from Mr. Partellas a copy of the instrument of transfer signed by Mr. Sarris and a witness, along with an unsigned counterpart of the same document. I signed the unsigned counterpart of the instrument of transfer, along with a witness (Mr. Ali Betar, an attorney in Jordan) and returned the signed original to Mr. Partellas for placement in Libananco's files. In other words, in April 2002, the four signatures were not on the same original page, but on two separate and identical counterparts".*

240.2 *"Sometime in 2007, Crowell & Moring ... asked me if I had with me in Jordan the original or a copy of the instrument of transfer which I had signed in April 2002, and which they informed me was missing from the company files in the Republic of Cyprus".*

240.3 Mr Türkkan deposed that he had not kept a copy, and had checked with Mr Partellas and Mr Betar (who had witnessed his signature of the document in April 2002), all of whom said they had not kept a copy. He deposed that Mr Betar, as his business lawyer, asked him why he was concerned with this document as ownership of Libananco had been transferred in 2002 and publicly registered in his name in 2005. According to Mr Türkkan, Mr Betar suggested that he:

*"simply re-sign another copy of the document in order to put Libananco's files in complete and good order and that, in his opinion as a business lawyer, this would have no legal effect on my [i.e. Mr Türkkan's] ownership of the company. I therefore went to his [i.e. Mr Betar's] Amman law office with a printed copy of the April 2002 version signed by Mr. Sarris and his witness. Mr. Betar and I then re-signed that version and I sent it to Mr. Partellas in Nicosia to put Libananco's files in good order".*

240.4 Mr Türkkan deposed that:

*"When I sent the re-signed document back to the company files, it was my intention to simply put them in good order. Had I known at that time that any question would be raised in this case regarding the date of this document, I would have notified Crowell & Moring that I had re-printed and re-signed the document in 2007".*

(c) Libananco's corporate affairs including its meetings conducted by Mr Türkkan and the numerous STAs purportedly recording its acquisition of shares in ÇEAŞ and Kepez

241. On 10 July 2002, Libananco held its first Board of Directors meeting under Mr Türkkan's direction. In that meeting, he was appointed as Libananco's General Manager by the Board of Directors. Mr Türkkan deposed that, although the beneficial and legal ownership of Libananco had undergone changes between 2002 and the present, the same directors (Antonia Kyriakou, Andreas Partellas and Mr Türkkan himself), secretary (Latimer Management Services Ltd. ("Latimer")) and auditor (Alliot Partellas Kilaris Ltd.) remained in their positions up to the date that Mr Türkkan made his First Witness Statement (i.e. 23 April 2009).
242. Mr Türkkan deposed that Libananco's management and board meetings took place in the following manner.
- 242.1 All Management Committee and Board of Directors meetings took place by telephone: *"Board meetings were conducted in Nicosia, Republic of Cyprus (although I always attended the meetings telephonically)"*.
- 242.2 Minutes were then prepared by him on a computer and hard copies were printed and circulated by fax for signature, *"and then replaced by hard-copy originals which were kept in Libananco's corporate files in the Republic of Cyprus"*.
- 242.3 Mr Türkkan stated that: *"I printed out in hard copy and personally signed each and every one of the Management Committee and Board of Directors minutes, within a few days or weeks of the meeting held"*.
- 242.4 Mr Türkkan further stated that:
- "whenever I created a set of minutes on the computer... I also saved these minutes electronically on a floppy disk... to maintain copies of these files, separate from the official and signed hard-copy records in the Republic of Cyprus, so that I could retrieve them and refer to them as needed for purposes of conducting company business as General Manager. I have provided all of these floppy disks to Crowell & Moring"*.
243. Mr Türkkan gave evidence in relation to the process by which Libananco allegedly acquired ownership of shares in ÇEAŞ and Kepez. Contrary to Cem Uzan's testimony in his First Witness Statement that the share transfer process began in October 2002 (see paragraph 168 above), Mr Türkkan testified that:
- "... by the end of Summer or early Fall 2002, Hakan Uzan told me that the company would begin acquiring bearer shares in the two Utilities from members of the Uzan family, so that it would have, in the future, a sufficient capital base to begin investment activities outside of Turkey."*



*In September 2002, therefore, Libananco began the process to acquire these shares”.*

*(emphasis added)*

244. As to the mechanics of the share acquisition process, Mr Türkkan deposed as follows:

*“As recorded in the 23 September 2002 Management Committee minutes, Mr. Saylan Çiğgin (Libananco’s internal legal advisor) prepared the template share transfer agreement text that was later used in the acquisition by Libananco of ÇEAŞ and Kepez shares from Kemal, Hakan and Ayşegiül Uzan.*

*However, the process by which these share transfer documents were completed and signed were as follows: (a) first, I would receive a fax from İstanbul to prepare a share transfer agreement (per Mr. Çiğgin’s template) on a particular date, for a specified amount of shares; (b) I would prepare the document in duplicate, print both copies, and send one with my signature and one without my signature to Turkey; (c) the relevant transferor (either Kemal Hakan or Ayşegiül Uzan would receive and review both of the documents and sign the unsigned version; (d) I would receive their signed version back in Amman, **though often I would receive several of these signed documents at the same time in bundles; (e) sometimes, I would not receive a particular document back at all, and I would then have to create another one and go through the same process again; (f) I would then sign the documents I had received from Turkey (either individually or in stacks or bundles, depending on how I received them; and (g) after all the agreements had been executed, I personally took all of them to Cyprus in a single package and told Mr. Antonios Partellas, the corporate secretary to place them in Libananco’s corporate files”.***

*(emphasis added)*

*(d) The circumstances surrounding the alleged delivery of the share certificates located in Switzerland and İstanbul*

245. Mr Türkkan had the following to say in his First Witness Statement about the alleged delivery or *teslim* in respect of the share certificates located in Switzerland and İstanbul:

*“During this process, sometime in April 2003, I was contacted by Hakan Uzan, who informed me that some of the bearer shares in the Utilities that he intended to transfer to Libananco (and that were contained in the percentage of shares listed in the share transfer agreements) **were being held for the company in custody in Switzerland.** As Libananco’s General Manager, I acknowledged my agreement to this arrangement. Shortly thereafter, Hakan Uzan also*

*told me that from now on I would own Libananco in trust solely for Cem Uzan.*

*On 18 April 2003, the Management Committee decided to instruct Mr. Saylan Çiğgin to visit the offices in İstanbul where the bearer shares located in Turkey were stored and physically **re-check** the storage of the shares and their labelling under Libananco's name. I telephoned Mr. Çiğgin (who was in İstanbul) and told him to inspect those bearer shares and **conduct an inventory at the İstanbul storage facilities to accept delivery on behalf of Libananco. Around the same time, Mr. Cem Uzan made arrangements to transport the most valuable of those shares to a separate secure location for Libananco. Also, Mr. Çiğgin sent me, by fax, two share custody agreements, dated [16]<sup>7</sup> May 2003, according to which the less valuable bearer shares were to continue to be held at the same location for Libananco, under the custody of ÇEAŞ and Kepez respectively**".*

(emphasis added)

*(e) Change in legal ownership of Libananco and transfer of the company to Cem Uzan*

246. Last, Mr Türkkkan deposed that the legal ownership of Libananco changed in January 2009 when he transferred the company to Cem Uzan:

*"At the end of 2008, Cem Uzan informed me that he wanted to bring our trust arrangement to an end and acquire outright legal ownership of Libananco. Thus, on 12 January 2009, I signed an instrument of transfer in which Cem Uzan acquired 100 percent of Libananco's shares directly from me, thereby becoming the sole legal owner of the company".*

**7. Second Witness Statement of Ali Cenk Türkkkan dated 8 October 2009**

247. Mr Türkkkan's Second Witness Statement was given essentially in response to an allegation made by the Respondent in the R.Rep.Supp filed on 14 August 2009 (see paragraph 6 and paragraphs 81 to 85 of the R.Rep.Supp), described in summary below.
248. On 15 July 2009, the Claimant provided for the first time the hand stamp purportedly used to place Libananco's common seal on (at least some of) the STAs bearing dates from the period October 2002 to May 2003. The Respondent submitted in its R.Rep.Supp that it obtained evidence to show that the hand stamp produced was of a "Shiny" brand model, and could not have been purchased in Cyprus before February 2005.

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<sup>7</sup> Mr Türkkkan clarified during direct examination that the date on which he received the two share custody agreements was 16 May 2003 and not 15 May 2003 as printed at paragraph 25 of his First Witness Statement (Tr 2295:7-2295:12).

249. The Respondent accordingly argued that the STAs (or at the very least some of them) were backdated, since the “Shiny” stamp used to apply the Libananco seal was only commercially available long after the STAs were alleged to have been executed.
250. Mr Türkkan’s answer to this allegation was that the hand stamp which was produced (i.e. the “Shiny” brand model) was not in fact the one which was originally used to stamp the STAs executed between October 2002 and May 2003. His evidence was that the stamp machine first used was a different one, and that the second stamp machine (i.e. the “Shiny brand model) was purchased because the first stamp machine broke in 2005 when he was in transit to Cyprus.
251. His evidence in his Second Witness Statement was as follows.
- 251.1 *“Sometime in the late summer or early fall of 2002, I had a Libananco corporate stamp made at a local firm in Amman so that I could use it to stamp company-related documents. This stamp was installed on a small, plastic stamp machine. **I have no clear recollection but believe that the type of stamp machine may have been a Trodat.** The body of the stamp is a small manufactured device. The imprint of the stamp, the medallion, has to be custom made and I had one made that bore the name Libananco”* (emphasis added).
- 251.2 He would use the stamp machine described above (i.e. the first stamp machine) to apply the stamp to the signature page of the agreement after he signed the STA containing the seller’s signature, sometimes individually and sometimes in a group with other agreements.
- 251.3 In early November 2005, he travelled again to Nicosia, Cyprus *“to meet lawyers from the United States who were coming to inspect Libananco corporate documents in order to evaluate a possible legal claim for the company”*.
- 251.4 *“[B]efore meeting with the lawyers, I met with Mr. Antonis Partellas... I brought with me to that meeting all of the original share transfer agreements, which I had kept such originals in my offices in Amman since before the June 2003 seizure of the assets. The purpose of the meeting was to make sure Mr. Partellas could make the corporate file available to the visiting lawyers, and to place the original share transfer agreements in that file”*.
- 251.5 *“I also brought with me the Libananco corporate stamp I had purchased back in 2002 and had used to stamp the agreements. When I arrived in Nicosia, I noticed the stamp machine had a broken plastic leg piece and was no longer functioning. I showed the stamp machine to Mr. Partellas, whose office was able to obtain another stamp machine very similar to the broken one. I do not know if his office bought a new one or had an extra one in their office. I recall taking the Libananco medallion off*

*the old stamp machine and placed it onto the new machine provided by Mr. Partellas' office. I left the stamp machine with Mr. Partellas' office because I did not want to break it again, and because it was my practice to leave all Libananco-related files and paperwork in Cyprus”.*

251.6 *“I believe that I applied the stamp to the share transfer agreements in 2002 and 2003 sometime around the time I signed them for the company as the buyer. I am told that it is possible some of the STAs may have been stamped in Cyprus when I visited in November 2005. Frankly, it is possible that I may have done that on a few of the STAs but I simply do not have any specific memory of doing so”.*

## **8. Cross-examination of Mr Türkkan**

252. The cross-examination of Mr Türkkan covered the following areas:

- (a) the circumstances surrounding the formation of Libananco;
- (b) the alleged trust arrangement between him and members of the Uzan family;
- (c) the minutes of the board and management meetings of Libananco;
- (d) the omission of significant facts or events from Libananco's minutes;
- (e) the circumstances surrounding the alleged “family divorce”, specifically how faxes purportedly evidencing intra-family share transfers came to be found on his floppy disks even though he was not responsible for, and did not assist with, any of these transfers; and
- (f) the circumstances surrounding the alleged delivery or *teslim* in relation to the share certificates located in both Switzerland and İstanbul.

### (a) Mr Türkkan's involvement in the creation of Libananco

253. Mr Türkkan was referred to paragraph 12 of his First Witness Statement:

*“I researched professional service firms in the Republic of Cyprus through the internet to identify a firm that could assist me in this project. After identifying a firm **based on its website**, in March 2002, I telephoned Mr. Partellas...”.*

(emphasis added)

253.1 It was put to Mr Türkkan that Mr Partellas did not have a website until late 2002. Mr Türkkan's response was that it was not actually Mr Partellas' (or that of his firm's) website that he found: *“what I finded [sic] on the internet, it was a Web site containing all the accountant or law*

*firms of the Cypriot. It is like a directory or yellow pages, and I find their information from there” (Tr 2373:21-2374:3).*

253.2 Mr Türkkan agreed that he knew absolutely nothing about Mr Partellas’ firm other than that his firm was on a list of lawyers and accountants in Cyprus that was located as a result of an Internet search (Tr 2374:22-2375:5).

253.3 When asked by the Tribunal why he chose Mr Partellas’ firm over other firms listed on the Internet, his response was:

*“As I remember when I find this list, I start to call, and I believe his name was on the top, maybe because his name is starting with A. And I remember I called several companies, but they were not speaking in English, or I didn’t reach them. This was the first company where I reached them, and they said they can help me” (Tr 2745:10-2745:17).*

254. Mr Türkkan was asked whether he had met Mr Partellas before, and whether he had any prior business dealings with him. His response to both questions was negative (Tr 2381:12-2381:17). He agreed that a fee would be payable to Mr Partellas (or his firm) for the acquisition or incorporation of a company in Cyprus. He said that the fee quoted was 1,500 Cypriot pounds, and that it was paid over to Mr Partellas on 1 April 2002 when he (i.e. Mr Türkkan) was in Cyprus (Tr 2382:6-2382:11).

254.1 Mr Türkkan was asked: *“So, Mr. Partellas and Mr. Sarris, who never met you before, are apparently taking entirely on trust that you will pay them the money; is that right?”*, to which his response was: *“Yes, sir”* (Tr 2381:21-2382:20).

254.2 Mr Türkkan also agreed that Mr Partellas would have given him an invoice for the payment received, and that this invoice could be found in either his files or Mr Partellas’ files. However, he said that he did not have the invoice, and he did not know whether Mr Partellas had the invoice. When asked by the Tribunal whether he in fact got a receipt for payment, his answer was unhelpful: *“What I remember, I getted [sic] some document, sir”* (Tr 2400:4-2401:4).

254.3 In any event, Mr Türkkan contradicted his earlier evidence because he later admitted (when presented with the 2002 financial statements of Libananco) that no money was in fact paid to Mr Partellas’ firm until around the end of 2005 (Tr 2591:18-2592:5). Again, he was unable to explain why Mr Partellas’ firm would be willing to provide services on credit for a period of some three years (Tr 2592:11-2592:15). However, this is consistent with Mr Türkkan’s evidence that Libananco only opened a bank account *“around 2005... In Cyprus”* (Tr 2593:13-2593:22).

254.4 Mr Türkkan was referred to Exhibit H-22, which was Libananco’s 2002 financial statements. Page 12 of that document records the *“Administrative Expenses for the period ended 31 December 2002”*. This

was further broken down into the following components: legal and professional fees (US\$ 25,500); secretarial fees (US\$1,200); miscellaneous (US\$12,350); accountancy fees (US\$5,000); and audit fees (US\$15,000). Mr Türkkan's evidence was that:

*“most of the expenses here are also not the expense which is paid. These are just recorded for the accounting base... these amounts paid later on by the Libananco to them [i.e. Mr Partellas' firm and other professionals who rendered services to Libananco]... **Around like Year 2005**, and I have some monies for the Libananco, and I make it these expenses for them”* (Tr 2574:22-2576:10).

(emphasis added)

He confirmed again that expenses recorded in Libananco's 2002 financial statements were not in fact paid in 2002, but rather in 2005 – the reason for their appearance in Libananco's 2002 financial statements was that they were *“recording [sic] as a provision”* (Tr 2576:11-2576:18).

255. Mr Türkkan was referred to paragraph 14 of his First Witness Statement (*“I had never met or communicated with Mr. Sarris or anyone at Prontoservus prior to 1 April 2002, when I participated, by telephone, in a meeting arranged for the appointment of a new Board of Directors for Libananco”*).

255.1 When asked to explain why both Mr Partellas and Mr Sarris testified that no such board meeting took place on 1 April 2002, Mr Türkkan initially said that this was because the meeting took place over the telephone, but later said that there was in fact no telephone call: *“Sir, this Board meeting done, and it was done through the telephonically... There was nobody on the telephone call, sir... there is no direct telephone call like this. It is a paper meeting”* (Tr 2378:10-2379:3).

255.2 When asked to clarify the phrase *“I participated, by telephone”* (paragraph 14 of Mr Türkkan's First Witness Statement), he said that:

*“It means that there is a meeting done, it is type [sic], it's printed, and everybody knows that there is a meeting done, but nobody was in the same time... this is by telephone. This is not a direct one because it is a paper meeting”* (Tr 2379:9-2379:17).

256. Mr Türkkan was referred to paragraph 12 of his First Witness Statement, where he deposed that he flew to Nicosia, Cyprus in early April 2002 on a *“non-stop Royal Jordanian flight”*.

256.1 He said that he stayed two nights at the Nicosia Hilton. When presented with correspondence from Hilton International that it had no record of him staying there in 2002, he replied: *“I stayed on the 1<sup>st</sup> of April, 2<sup>nd</sup> of April, at the Hilton Hotel... it says it right on their letter that I was staying or not staying”*. When it was put to him that the correspondence from Hilton International confirmed that it had no record of any person

known as “*Ali Türkkan*” having stayed at the hotel then, he replied: “*I’m not Ali Türkkan, sir... I’m Ali Cenk Türkkan*” (Tr 2397:19-2397:21).

256.2 The question was posed by the Respondent’s counsel to Mr Türkkan: “*Is it your evidence that rather than having gone for a nonstop flight, as appears in your Witness Statement, you, in fact, went on an indirect flight via Beirut?*”. He responded: “*Sir, I fly there from Amman to Larnaca... it was a direct flight... The planes stop in Beirut, but it was not via Beirut*”. Mr Türkkan explained that it was a “nonstop” flight because: “*I didn’t get out from the plane*” (Tr 2398:10-2399:7).

257. Mr Türkkan was referred to paragraph 14 of his First Witness Statement (see paragraph 240.1 above), where he deposed that Mr Partellas only had some of the relevant paperwork ready for him to sign when he arrived in Cyprus in April 2002, and that he only received the Instrument of Transfer from Mr Partellas by mail once he returned to Amman, Jordan.

257.1 Mr Türkkan said that he was shown (but not given) the Instrument of Transfer when he was in Cyprus: “*He [i.e. Mr Partellas] showed me what he didn’t give me [sic], sir*” (Tr 2391:18-2391:19).

257.2 When asked why Mr Partellas did not give it to him, his response was that: “*Maybe I forgot to take it from him*” (Tr 2392:1).

257.3 When asked to clarify why then it was said in his First Witness Statement that some of the relevant paperwork was not ready for him to sign, Mr Türkkan’s reply was contradictory: “*No, sir. The documents was ready for to sign [sic], but I didn’t signed [sic] it. My request is from him I want to sign this document on [sic] front of my lawyer, and he is my witnesses [sic]*” (Tr 2392:6-2392:9).

258. Mr Türkkan was again referred to paragraph 14 of his First Witness Statement (see paragraph 240.1 above). He was asked why he did not sign the “original” Instrument of Transfer which was signed by Mr Sarris and his witness. He replied:

“*Because they are the original documents, sir... Because, if I signed it, the original document to Cyprus, I have no document in my hand... The important signature of the third parties [sic] which they were selling the company to us, that’s why it is the important one which I keep it with [sic] on our side*” (Tr 2407:4-2407:22).

259. Mr Türkkan was then referred to his First Witness Statement, in which he deposed that he reprinted and re-signed the Instrument of Transfer in 2007.

259.1 He was asked how he was able to print a copy of the Instrument of Transfer with only Mr Sarris’ and his (i.e. Mr Sarris’) witness’ signature on it. He was asked whether it was saved on a computer as an electronic file. His response was: “*I don’t remember, sir*” (Tr 2411:12).

259.2 He was asked how else he would have been able to print it (i.e. the Instrument of Transfer with only two signatures on it) unless it had been saved as a PDF file on a computer. His response was: “*Sir, I don’t remember*” (Tr 2411:15).

259.3 He was asked if he could explain how he was able to obtain a copy of the Instrument of Transfer with only two signatures on it, assuming this was done other than by printing it from a computer. His response was: “*Sir, I don’t remember how I did get this document*” (Tr 2411:19-2411:20).

259.4 He was asked whether, if that document had been reprinted in 2007 as he alleges, that would indicate that the document was indeed saved at some earlier stage onto his computer. His reply was: “*I don’t remember, sir*” (Tr 2412:5).

259.5 When asked directly how he was able to print or reprint that document, his response was similar: “*I don’t remember, sir*” (Tr 2413:6).

259.6 Although Mr Türkkan deposed at paragraph 15 of his First Witness Statement that:

*“I had sent the original [Instrument of Transfer] back to Mr. Partellas in April 2002, and had not kept a copy... [In 2007,] I therefore went to his [i.e. Mr Betar’s] Amman law office with a printed copy of the April 2002 version signed by Mr. Sarris and his witness. Mr. Betar and I then re-signed that version, and I sent it to Mr. Partellas in Nicosia to put Libananco’s files in good order”*,

he later appeared to give evidence to the contrary. When asked by the Tribunal whether Mr Sarris signed a new copy of the Instrument of Transfer, Mr Türkkan said that this was not the case as he (and Mr Betar) simply signed the same copy of the Instrument of Transfer that was originally signed by Mr Sarris in 2002 (Tr 2749:22-2750:10). Mr Türkkan said: “*We just signed the copy which was signed by Mr. Sarris and his witness... [That] document was signed in the Year 2002*” (Tr 2750:5-2750:10). This is contrary to his evidence in paragraph 15 of his First Witness Statement, which states that he had not kept a copy of the original Instrument of Transfer signed by Mr Sarris and his (i.e. Mr Sarris’) witness.

*(b) The alleged trust arrangement between Mr Türkkan and members of the Uzan family*

260. In relation to the alleged trust arrangement in respect of Libananco, Mr Türkkan was referred to paragraph 11 of his First Witness Statement (“... *in early 2002, I was asked by Hakan Uzan to purchase or establish a company in the Republic of Cyprus in trust for his family*”). He gave the following evidence.

260.1 When asked: “*If you are going to operate or manage property on somebody else’s behalf, you’ve got to know who the somebody else is,*



*don't you?", Mr Türkkan replied that: "It depends on the laws of the country... I'm not an expert on this matter; and, as I know, it depends on the country's law" (Tr 2355:16-2356:8).*

260.2 Mr Türkkan was asked whether he knew which law was applicable to the alleged trust arrangement. His reply was that: *"The trust belong to Cyprus, sir, Republic of Cyprus"*. He agreed, however, that he did not take any advice on the Cypriot law of trusts, and that he did not know anything about the Cypriot law of trusts (Tr 2357:3-2357:16).

260.3 When asked if he knew what the terms of the alleged trust were, he said that: *"on the beginning, nobody told me about the term of the trusting [sic]" (Tr 2357:18-2357:19).*

260.4 Mr Türkkan's evidence was specifically that, when Hakan Uzan asked him to establish a company in Cyprus to be held on trust for his family, Hakan Uzan did not say for whose benefit that company would be held: *"when he [i.e. Hakan Uzan] told me this, he didn't clarify exactly what is the members of his family" (Tr 2357:20-2359:2).*

(c) The minutes of Libananco's board and management meetings

261. Mr Türkkan was referred to paragraph 19 of his First Witness Statement (*"...Board meetings were conducted in Nicosia, Republic of Cyprus (although I always attended the meetings telephonically)"*). He was asked by the Tribunal to clarify what this meant. His response was:

*"When I prepared the Minutes, I was sending the fax to Nicosia, to Mr. Partellas' office, and I was telling him he will receive these documentations related to what it was [sic]. And I was requesting [sic] him to get the signature of Directors and also file it on the corporate files of Libananco in Cyprus on his office was keeping. That is the practice. **But I never called them and we were not in the same time on the telephone.** I explained then what was certain, it was writing on the documentation, and later on Mr. Partellas receive [sic] it, and they signed it on the document that I faxed to them" (Tr 2430:7-2430:19).*

(emphasis added)

262. His evidence in respect of the following documents was similarly to the effect these were all paper meetings which nobody attended, notwithstanding that it was recorded on the face of these documents that the directors of Libananco were present:

262.1 Exhibit H-14, which were the Minutes of Libananco's Management Committee Meeting of 23 September 2002;

262.2 Exhibit H-29, which were the Minutes of Libananco's Management Committee Meeting of 20 February 2003; and

- 262.3 Exhibit H-50, which were the Minutes of Libananco's Board of Directors' Meeting of 18 April 2003.
263. Mr Türkkan was referred to Exhibit H-13, which were the Minutes of Libananco's Directors' Meeting of 23 September 2002, a document allegedly drafted by him.
- 263.1 Mr Türkkan was questioned whether he drafted the minutes personally. His response was that he did (Tr 2324:20-2325:2).
- 263.2 He was asked to explain the meaning of the term "*mercantile transaction*" (which appears in paragraph 7(b) of that document). He first asked for a translation, but admitted that he did not know the meaning of that term (Tr 2442:6-2442:15).
- 263.3 He was unable to explain how he was able to draft paragraph 7(b) of that document, which referred to giving himself authority for monetary or mercantile transactions (Tr 2442:17-2442:22).
- 263.4 When asked to explain the meaning of "*debenture*", a term which appears in paragraph 7(d) of that document, he replied: "*I have to check on [sic] the dictionary, sir*" (Tr 2443:2).
- 263.5 When asked whether that document had in fact been prepared by an English speaker rather than by a Turkish speaker, he said: "*It could be, sir... I was asking some several persons in my office to check my English documents always*". When asked who these persons were, he said: "*There were lots, sir. I don't remember their name*" (Tr 2443:22-2444:13).
264. Mr Türkkan's evidence was that, in November 2005 (Tr 2456:9), he reprinted and signed "*all the Minutes of the Directors and all the Minutes of the Management... I printed it over [sic] again in Cyprus*" (Tr 2455:14-2455:16).
- 264.1 He confirmed this during direct examination, where his evidence was that, when he initially met with lawyers from Crowell & Moring LLP in November 2005, he brought with him a laptop computer that had the electronic versions of the STAs and the board and management minutes stored on it (Tr 2298:13-2298:17). At that time, he "*reprinted all the documents again, and [he] completed the documents with the [sic] resigning the documents*" – the reason being that:
- "there was [sic] some documents was [sic] missing and some documents was not readably [sic] very well because they are the fax, and because of it is [sic] fax, they were darker, and some were not working because the fax—it was not coming correctly on the fax machine mainly"* (Tr 2298:13-2299:10).
- 264.2 However, he denied that those minutes were being printed for the very first time in November 2005: "*... in 2002, 2003, 2004, they were signed.*"

*One copy was with me, and one copy was in the corporate files in Cyprus” (Tr 2456:15-2456:17).*

264.3 His evidence was that the documents (i.e. the board and management minutes) produced in the arbitration were the ones printed in Cyprus in 2005, and that the versions that had existed prior to November 2005 no longer existed (Tr 2456:18-2457:4).

264.4 In relation to the previous version of the minutes which were not produced in the arbitration, he said: “... *after I reprinted and re-signed, I put them out... I don’t know where it’s gone, but it’s not in the file” (Tr 2457:5-2457:12).*

265. In relation to certain of Libananco’s management and board minutes known as the “A1” minutes,<sup>8</sup> Mr Türkkan went further to say that these were drafted, printed and signed (Tr 2300:1-2300:4) in 2006: “*Sir, these documents and Minutes of the Directors [sic] meeting, and I prepared year [sic] 2006 to complete my corporate records of Libananco” (Tr 2299:11-2299:22).* His explanation for creating these documents in 2006 was as follows:

*“When I was checking my documents again, I found the Share Transfer Agreements quantities are not mentioned with the Director of—the Minutes [sic]. That’s why I completed my corporate files of Libananco. I prepared this Directors [sic] meeting, and I make it corporate files [sic]” (Tr 2473:3-2473:8).*

*(d) The omission of significant facts or events from Libananco’s minutes*

266. Mr Türkkan was cross-examined on two other aspects of Libananco’s minutes.

266.1 He was referred to Exhibit H-73, Minutes of the Libananco Board of Directors’ Meeting dated 11 March 2004. The first page of that document states, among other things: “*AGENDA/MINUTES: Up Date on Developments of International Legal Options; Danistay Developments; European Court of Human Rights Developments”*. He agreed that he followed the proceedings in the European Court of Human Rights (“ECtHR”) and the Danistay closely. The case before the ECtHR was brought by Kemal Uzan, whose argued there was that he was the majority shareholder of ÇEAŞ and Kepez. Mr Türkkan agreed this was wrong because Libananco (and not Kemal Uzan) was the majority shareholder in ÇEAŞ and Kepez (Tr 2698:21-2699:9). He was asked to explain why there was no reference in Libananco’s minutes noting that Kemal Uzan’s case before the ECtHR was inconsistent with Libananco’s position (i.e. that it was the majority shareholder in ÇEAŞ and Kepez). Mr Türkkan’s response

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<sup>8</sup> So named because “A1” is printed on the face of each of these documents as part of the document reference numbers. The “A1” minutes were the following: Minutes of the Libananco Board of Directors Meeting (A1), 15 November 2002 (Exhibit H-19); Minutes of the Libananco Board of Directors Meeting (A1), 20 February 2003 (Exhibit H-28); Minutes of the Libananco Board of Directors Meeting (A1), 18 April 2003 (Exhibit H-51); and Minutes of the Libananco Board of Directors Meeting (A1), 20 May 2003 (Exhibit H-63).

was not on point: “*Sir, on the report it is writing [sic] that there is a Application on [sic] the European Union*” (Tr 2701:16-2701:22).

266.2 Although the ÇEAŞ and Kepez share certificates located in the Rumeli and Doğu Buildings in İstanbul were seized in March 2004, Mr Türkkan had no explanation why the Libananco’s minutes did not refer to the fact that share certificates allegedly owned by Libananco had been seized by the Turkish Government (Tr 2702:14-2703:13).

267. In relation to dividend payments from ÇEAŞ and Kepez to its shareholders, Mr Türkkan was referred to Exhibit H-50, which were the Minutes of the Libananco Board of Directors’ Meeting dated 18 April 2003. He was unable to explain why there was nothing recorded in those minutes about dividend payments to Libananco (Tr 2626:5-2626:8). When asked in general about the latter dividends: “*And so, if I were to ask you what happened to these dividends, what were the arrangements, the answer is you have no recollection and you have no evidence to give; is that fair?*”, Mr Türkkan’s response was: “*Yes, sir*” (Tr 2626:19-2627:1).

*(e) The alleged “family divorce” and how the intra-family faxes came to be discovered on Mr Türkkan’s floppy disks*

268. Mr Türkkan was asked about the faxes purportedly evidencing intra-family share transfers, which were found as deleted files on his floppy disks and subsequently recovered.

268.1 When asked whether he was aware of the alleged “family divorce”, his response was: “*Sir, this is their business. I have no idea what they were doing on their level*” (Tr 2415:14-2415:15).

268.2 When asked why he saved those documents onto his floppy disks, he replied: “*Because I understand that they are the important documents like the Libananco documents, and I saved them*” (Tr 2417:8-2417:10).

268.3 When asked why he thought these documents were important, his response was: “*Because there is a sales [sic] between the family members*” (Tr 2417:12-2417:13). His evidence therefore shows that he was aware of the alleged intra-family share transfers between members of the Uzan family, even if he did not know about the alleged “family divorce” as such.

268.4 When asked why he saved those faxes on his floppy disks before subsequently deleting them, he said: “*They are the Sales Transfer Agreements between the family members. That’s why I saved them to Floppy Disks... I assumed that they informed me that these documents came to me by mistakenly, so that’s why I delete [sic] them*” (Tr 2418:19-2419:4).

268.5 However, he was unable to explain the circumstances in which those documents came to be saved on his floppy disks, and was likewise unable

to explain the specific circumstances in which he deleted them (Tr 2419:22-2420:4).

(f) The circumstances surrounding the alleged delivery of share certificates located in Switzerland and İstanbul to Libananco

269. In relation to the issue of *teslim* or delivery of the shares allegedly purchased by Libananco, Mr Türkkan's evidence was: "*there are some shares that were delivered in Switzerland at the beginning of April 2003*" (Tr 2632:1-2632:3).

269.1 However, he was unable to confirm or identify which of the share certificates in Switzerland were allegedly delivered to Libananco (Tr 2632:5-2632:7). He testified that he had no means of knowing which share certificates in Switzerland were the subject of the alleged *teslim*, and that he did not know whether anyone had any means of knowing the answer to that question (Tr 2633:14-2633:21). His evidence is also that no one provided him with any inventory or any other means by which he could have identified the share certificates located in Switzerland that were alleged to have been delivered to Libananco in early April 2003 (Tr 2635:8-2635:13).

269.2 When asked how *teslim* in respect of these unidentified or unascertained shares could have been accomplished, his response was:

*"Sir, it was informed to me by Mr. Hakan Uzan that he delivered the shares to Mr. Cem Uzan by the name of Libananco; and after then, we were planning to make it all the [sic] teslim documentation for this... But later on what's [sic] happened for the ÇEAŞ and Kepez we were not able to complete our teslim documentation"* (Tr 2632:12-2633:6).

269.3 Mr Türkkan was also referred to Exhibit H-50, which were the Minutes of the Libananco Board of Directors' Meeting dated 18 April 2003, and was asked why there was no reference in that document to the alleged *teslim* that took place in relation to the share certificates located in Switzerland. His response was that he did not know the answer to this question (Tr 2637:14-2637:19).

269.4 Crucially, Mr Türkkan then gave evidence that contradicted his earlier statement that the (unidentified) share certificates located in Switzerland had been "*delivered in Switzerland at the beginning of April 2003*" (see paragraph 269 above): "*we were planning to make teslim later on*" (Tr 2634:15-2634:16). He agreed that it was planned that *teslim* would occur, but did not in fact occur owing to the events of 12 June 2003 (i.e. the termination of the Concession Agreements held by ÇEAŞ and Kepez) (Tr 2635:3-2635:6).

270. Still on the issue of *teslim*, but in respect of the ÇEAŞ and Kepez share certificates located in İstanbul, Mr Türkkan was referred to paragraph 25 of his First Witness Statement (see paragraph 245 above).

270.1 He confirmed that he did in fact make a telephone call to Mr Çiğgin on either 13 or 14 May 2003 (Tr 2569:10-2659:11), in which he told Mr Çiğgin to inspect the ÇEAŞ and Kepez share certificates and conduct an inventory to accept delivery of the latter (Tr 2656:20-2657:2). He confirmed that by this he meant that Mr Çiğgin was to effect *teslim* in respect of the share certificates in İstanbul on behalf of Libananco (Tr 2657:7-2657:10).

270.2 At the time he instructed Mr Çiğgin, *teslim* in respect of the ÇEAŞ and Kepez share certificates in İstanbul had not previously occurred (Tr 2657:12-2657:15).

270.3 Delivery or *teslim* of those share certificates (i.e. those located in İstanbul) only occurred on 15 May 2003, and not before (Tr 2658:11-2658:21).

270.4 Mr Türkkan was also referred to Exhibit H-52, which were the Minutes of the Libananco Management Committee Meeting dated 18 April 2003. The first page of that document states, among other things, that:

*“It is Agreed that Saylan Ciggin, appoint a two lawyer team to go to site of the storage facilities, and actually physically recheck the storage of the shares, and the labeling of the storage under the name of Libananco. And to do this on a routine basis (once a month)”.*

Mr Türkkan was asked to explain the point of sending Mr Çiğgin to *“recheck storage of the shares which had not yet been delivered to Libananco”*. His response was unhelpful: *“Sir, later on doesn’t happen something like this because teslim happened”* (Tr 2660:5-2660:13).

271. On the related issue of the time of Libananco’s acquisition of the share certificates in question, Mr Türkkan was cross-examined on the following areas.

271.1 Mr Türkkan was referred to Exhibit H-61, which was Libananco’s Share Acquisition Report as of 20 May 2003. He confirmed that it was his evidence that Libananco could only acquire ownership of the share certificates in question after *teslim* had taken place (Tr 2681:18-2681:22).

271.2 However, he was unable to explain why the Share Acquisition Report (i.e. Exhibit H-61) purported to show shares being acquired by Libananco on various dates between November 2002 and April 2003 in the case of ÇEAŞ, and November 2002 and May 2003 in the case of Kepez. His response to this question was: *“I don’t know the reason why they are in the [sic] different dates, sir”* (Tr 2682:6-2682:14).

271.3 Mr Türkkan was referred to Exhibit H-21, which were the Minutes of the Libananco Management Committee Meeting dated 10 December 2002. The first page of that document stated, among other things:

*“It is noted that the first share transaction has been completed; As such; ÇEAŞ ... 33,000,000 shares at 500 TL/shares – Class C, 16,500,000,000 TL nominal value shares were purchased on 11 November 2002. Payment of 8,250,000 USD has been paid to the seller Hakan Uzan; It is agreed that Cenk Türkkkan take all necessary steps to record the acquired shares in the companies [sic] records”.*

Mr Türkkkan confirmed his understanding that *teslim* or delivery of those shares to Libananco had not yet, at that time, taken place (Tr 2541:17-2541:19). His evidence was that he recorded that information in Libananco’s minutes because he was told by Hakan Uzan that that transaction had been completed, and that Hakan Uzan was the person who told him what to record in Libananco’s minutes (Tr 2542:11-2542:19).

### **9. First Witness Statement of Antonis Partellas dated 24 April 2009**

272. Mr Partellas’ First Witness Statement was short, and described how he first came into contact with Mr Türkkkan in 2002, when Mr Türkkkan asked for his assistance to acquire a Cypriot company. He also gave evidence on the period during which Libananco allegedly acquired shares in ÇEAŞ and Kepez.

273. Mr Partellas deposed as follows.

273.1 He was the director of Latimer, which had been the Corporate Secretary of Libananco since 2002.

273.2 *“In early 2002, Mr. Ali Cenk Türkkkan contacted me and requested that I arrange to acquire a Cypriot company for him and his principal to use as an international business holding company.”*

273.3 *“I proceeded to contact a Cypriot lawyer, Mr. Polakis K. Sarris, whom I knew from previous experience to be competent in this area. On 1 April 2002, Mr. Sarris’ corporate organization and administration firm, Prontoservus Ltd, transferred all the shares of an existing company, Libananco, to Mr. Türkkkan.”*

273.4 *“At the same time, the two original directors of Libananco and the Secretary resigned and new Directors and Secretary were appointed. Thereafter, Mr. Türkkkan became the General Manager of Libananco and Latimer served at Mr. Türkkkan’s request as the Corporate Secretary of the company, a capacity in which it remains today.”*

273.5 *“Pursuant to Libananco’s business records, Libananco took steps to acquire 652,080,725 of stock in [ÇEAŞ] and 144,864,544 shares of stock in [Kepez] between the period of 29 October 2002 and 16 May 2003.”*

274. Mr Partellas also deposed that, as Libananco’s corporate secretary, Latimer had custody of the minutes of Libananco’s Board of Directors and Management Committee meetings.

**10. Second Witness Statement of Antonis Partellas dated 8 October 2009**

275. Mr Partellas' Second Witness Statement was likewise short and given in circumstances similar to Mr Türkkan's Second Witness Statement; namely, in response to an allegation made by the Respondent in relation to the hand stamp that was used to apply Libananco's common seal to the STAs (see paragraphs 248 to 249 above).

276. Mr Partellas corroborated Mr Türkkan's evidence that Mr Türkkan brought the original hand stamp (i.e. not the "Shiny" brand model stamp that was produced in this arbitration) along with "*certain documents from Amman, Jordan regarding Libananco's business*".

277. In relation to the original hand stamp which allegedly broke in transit, Mr Partellas deposed as follows.

277.1 "*... Mr. Türkkan produced a few dozen documents from his attache and also removed a small stamp machine he had brought from Amman which apparently contained the corporate seal. At that time, I recollect that the stamp machine, which was a simple and small plastic device, had broken and would no longer operate*".

277.2 "*As Mr. Türkkan wanted to leave the stamp machine and the papers with me as the corporate secretary, I instructed one of my staff to go to the Stellos Key Service to purchase a new stamp machine of similar size and utility...*".

277.3 "*The new stamp machine was purchased for a small amount of cash. We did not purchase or have made a new "Libananco" corporate rubber medallion as that small piece from the machine brought from Jordan apparently was still in working order. I believe Mr. Türkkan may have removed the medallion from the old machine and applied it to the new machine, although I cannot be certain*".

278. Mr Partellas also gave evidence on whether the new hand stamp machine that was purchased by his firm was used by Mr Türkkan to stamp any documents. He deposed that:

*"At the time Mr Türkkan came to my office in November 2005, I believe he may have used the new machine to stamp a few of the documents. I do not recall which of the documents were stamped by Mr. Türkkan at that time, or how many. However, I do recall that there were signatures on all of the documents which he had brought with him. Thereafter, we placed these documents in the existing Libananco file and they were produced for the lawyers when they arrived for their inspection"*.

(emphasis added)



## 11. Cross-examination of Mr Partellas

279. Mr Partellas was cross-examined mainly on his involvement in the setting up of Libananco by Mr Türkkan and its corporate affairs subsequent to that. The material evidence he gave during cross-examination may be broken down into the following broad areas or topics:
- (a) the time of his first contact and meeting with Mr Türkkan in connection with the setting up of Libananco;
  - (b) the Instrument of Transfer dated 1 April 2002 – specifically, why Mr Türkkan did not sign this document even though he was allegedly in Cyprus on 1 April 2002;
  - (c) whether and how he was paid his professional fees for the assistance that he allegedly rendered to Mr Türkkan in connection with the setting up of Libananco;
  - (d) why the financial statements and tax returns of Libananco were filed late;
  - (e) whether the necessary permission was sought from the Cyprus Central Bank when Mr Türkkan approached him to set up an offshore holding company in Cyprus; and
  - (f) the board minutes of Libananco.

### (a) Mr Partellas' first meeting with Mr Türkkan

280. In relation to his initial contact with Mr Türkkan, Mr Partellas confirmed that this was made over the telephone (Tr 916:6-916:9), towards the end of March 2002 (Tr 921:12-921:13). He said: *“I was very surprised, to be honest, but I was also very curious to see why he needed the HAPS (ph.) company, and also he was a Turkish national living in Jordan. He was not in Turkey at the time”* (Tr 913:4-913:7).
281. As to how Mr Türkkan managed to identify his firm, Mr Partellas gave evidence as follows.
- 281.1 Mr Türkkan found him *“[t]hrough directories over the Internet”* (Tr 916:14).
- 281.2 It was put to Mr Partellas that his firm's web site had only been established late in 2002. On that basis, he was asked how Mr Türkkan could have identified him in April 2002. His response was that: *“we were listed in various directories [on the Internet]... Accountants in Cyprus, for example”* (Tr 917:3-917:11).

281.3 Mr Partellas accordingly agreed that, in April 2002, it would have been impossible for anyone to identify his firm via its website because one did not exist at that time (Tr 918:17-918:18).

281.4 However, he said that: *“It was possible to identify us from other sources”* (Tr 918:15-918:16).

282. Mr Partellas confirmed that he first met Mr Türkkan in person around the period 1 April to 2 April 2002, but he could not remember the exact day (Tr 930:21-931:1).

282.1 He said it was possible that this meeting took place on 1 April 2002 (Tr 931:2-931:3). The location of the meeting was the lobby of the Hilton Hotel in Cyprus (Tr 1016:16-1016:17).

282.2 When the Respondent’s Counsel put to Mr Partellas that Mr Türkkan was not in fact in Cyprus at that time, Mr Partellas said: *“I am saying that he was there, and I saw him”* (Tr 932:13-932:14).

*(b) Why Mr Türkkan did not sign the Instrument of Transfer even though he was allegedly in Cyprus on 1 April 2002*

283. Mr Partellas gave the following evidence in relation to Exhibit H-4, the Instrument of Transfer of shares in Libananco signed by Mr Sarris and Mr Türkkan and dated 1 April 2002.

283.1 He was asked why Mr Türkkan did not sign the Instrument of Transfer when he was in Cyprus on 1 April 2002 (see paragraph 240.1 above). His response was:

*“Maybe it was not ready at that day. I cannot remember exactly... Maybe there was something missing or some mistake, and it was sent to him later... Maybe there was some mistake on [sic] the document. I cannot remember now”* (Tr 936:6-937:1).

283.2 He was asked about the version of the Instrument of Transfer that was actually signed by Mr Türkkan. His response was: *“This is given always to the beneficial owner, to the shareholder... We don’t keep anything here”* (Tr 938:2-938:3).

283.3 The Respondent’s Counsel pointed out to Mr Partellas that Mr Türkkan’s evidence was that the signed original was in fact returned to Mr Partellas for placement in Libananco’s files. Mr Partellas responded: *“No, I’m not sure if this is the case. Usually, one—that is one Instrument of Transfer being prepared, and this is given to the owner”* (Tr 938:9-938:11).

(c) Whether and how Mr Türkkan paid Mr Partellas his fees for professional services allegedly rendered in connection with the setting up of Libananco

284. Mr Partellas confirmed that whenever he conducted an audit, a professional fee would be charged, that fee would be recorded in an invoice, and there would *“be a record of that fee... both within [his] firm’s records and within the company’s records being audited [sic]”* (Tr 901:22-902:17).
285. In relation to the manner in which Mr Türkkan paid for his firm’s services, Mr Partellas gave the following evidence.
- 285.1 *“Mr. Türkkan paid us in cash when he came to Cyprus”* (Tr 922:13-922:14).
- 285.2 When asked whether it was recorded in his books that Mr Türkkan paid cash for professional services rendered by Mr Partellas’ firm, he said:
- “I’m just telling you what I remember... I’m not saying it was not recorded. I’m saying it was probably the net amount was recorded in our books after we paid Mr. Sarris as well. It is usually how it happens in Cyprus... Sometimes we have cash payments”* (Tr 924:8-924:22).
- 285.3 When questioned about the financial records which would show how Mr Partellas (or his firm) had paid Mr Sarris or Prontoservus (a company associated with Mr Sarris’ law firm) for the transfer of Libananco to Mr Türkkan, Mr Partellas said: *“I believe what happened is we paid cash to Mr. Sarris as well, and the difference was recorded in our books as sundry income”* (Tr 922:20-922:22).
- 285.4 When asked why this was recorded as *“sundry income”* and the nature of the income was not properly recorded, Mr Partellas responded: *“Because it was just a cash transaction, that’s why”* (Tr 923:5-923:6).
- 285.5 Finally, when questioned by the Respondent’s Counsel: *“lots of people have cash payments, but that doesn’t mean that you don’t record properly in your books if you’re keeping honest books what it is that you’re being paid, the amount, and what it relates to. Do you dispute that?”*, Mr Partellas responded: *“No”* (Tr 925:1-925:7).
286. Mr Partellas was referred to Exhibit H-22, which were Libananco’s 2002 Financial Statements dated on 14 January 2003.
- 286.1 It was pointed out to him that, on page 12, the administrative expenses for the period ended 31 December 2002 were shown. He agreed that Exhibit H-22 purported to show that Libananco had administrative expenses of US\$ 59,050 in 2002 (Tr 986:3-986:6).
- 286.2 He was asked whether these were actually incurred in 2002. He responded without giving a direct answer to that question:

*“Yes, but you’re allowed to make a provision in the accounts as well, and that is an expense... The profit and loss, as I explained, also includes provisions. It’s not just actual transactions that happened”* (Tr 985:21-987:13).

286.3 He explained that: *“a provision is an expense which has been incurred and will be paid”* (Tr 988:9-988:10).

286.4 He later accepted that the fee due to his firm recorded in Exhibit H-22 was actually paid. His evidence was that *“[p]art of this money”* was paid (Tr 995:14). He said that Mr Türkkan paid his firm in cash, but not the full amount stated in Libananco’s accounts: *“Not the amounts stated, no. Less”* (Tr 995:15-995:20).

*(d) Why Libananco’s tax returns, financial statements and notice of change of directors was not filed on time*

287. As a preliminary point, Mr Partellas confirmed that, during the material period (i.e. after Libananco was allegedly acquired by Mr Türkkan on 1 April 2002), it was mandatory for the tax returns and financial statements of a company to be filed (Tr 902:18-902:21).

287.1 His evidence was the annual accounts had to be filed:

*“[o]ne year after the end of the previous year”, and that “[t]he tax return is filed together with the accounts up to 2002. After 2003, only the tax return is being [sic] filed within a year from the previous financial year”* (Tr 909:9-909:19).

287.2 When asked about the late filing of Libananco’s accounts and tax returns, Mr Partellas replied:

*“Yes, we filed them late, and it is usual to file late accounts in Cyprus. The only effect of late filing of accounts is if there is tax payable, there is a penalty of 10 percent. If there are losses, there is no penalty”* (Tr 910:17-911:1).

287.3 Specifically, Mr Partellas said that: *“we filed [the accounts for] 2002, ‘3, and ‘4 in 2007... There was no actual reason. You can delay filing—”* (Tr 1001:17-1001:22).

287.4 He was asked by the Tribunal whether he was instructed by Mr Türkkan not to file Libananco’s accounts on time, to which he responded:

*“Probably yes, probably yes, but again in the cases of accounts where there are no losses, no profit, there is no penalty incurred at the Tax Office for late filing. It’s only if you have tax payable”* (Tr 1002:1-1002:7).

287.5 When asked if the 2002 accounts for Libananco should have been filed in 2004 instead, he said: *“Yes. If you follow the strict letter of the law, yes”*. Counsel for the Respondent then asked if it was indeed his business to ensure that his clients follow the strict letter of the law, to which he responded: *“We try”* (Tr 1007:2-1007:9).

287.6 The Tribunal questioned Mr Partellas as to the necessity of preparing audited accounts for the years 2002, 2003 and 2004 if the intention was to maintain confidentiality by not filing those accounts. He explained:

*“It was a request by the shareholder [i.e. Mr Türkkan] at the time secretly... It is true, we could have prepared a management account [sic] for this, but he wanted privacy of account. I don’t know for what reasons, but he wanted accounts, but he didn’t want them to be filed. He told us to wait”* (Tr 1008:14-1009:7).

287.7 Finally, in re-direct examination, Mr Partellas completed his evidence on this topic by saying that it would not be unusual at all to receive instructions from a managing director or a shareholder to hold off certain filings with the Cypriot government. He said that this was done for other clients as well (Tr 1014:7-1014:18). He also confirmed that it was common practice in Cyprus for a company to delay the filing of its accounts as there would be no tax penalties in the cases where the company suffers losses. He said that this was done for other clients as well, and that other accountants in Cyprus adopted the same practice (Tr 1015:1-1015:16).

287.8 Mr Partellas admitted (although his evidence here was not forthcoming as can be observed from the exchange below) that Cypriot law would have required notification in 2002 of Mr Türkkan’s acquisition of Libananco and the accompanying change of directors, but that in fact no notification was made until November 2005.

287.9 His initial evidence was that: *“There is no time limit”*; when Counsel for the Respondent cited the relevant provision from the Cypriot Companies Act which stipulated that such documents were required to be filed within 14 days of execution, he then said: *“Okay, but there is a small penalty”*. When asked why he denied that there was such an obligation in the first place, he said: *“I didn’t deny anything... This is the strict letter of the law, but in practice you can file it later, any changes”* (Tr 907:7-908:18). When asked whether it was his responsibility as the Company Secretary of Libananco to ensure that documents required to be filed were filed in a timely fashion, he responded: *“Yes, I agree. We do our best, but sometimes things—sometimes things get delayed”* (Tr 908:19-909:3).

287.10 Mr Partellas gave evidence to the effect that Mr Türkkan had asked him not to register the transfer of shares to Libananco:

*“Mr. Türkkan asked us for, afterwards when we met if it was possible not to record the transfer of shares until sometime later on. So,*

*because of this relaxation of the Exchange Controls [referring to the relaxation of regulations in Cyprus following its entry into the European Union], we decided not to ask for the permit at that time” (Tr 920:11-920:15).*

287.11 When asked what was the reason that Mr Türkkan gave for not notifying the Registrar of Companies, in accordance with Cypriot law, that there had been a change of directors of Libananco, he responded:

*“Because he was also to be appointed as Director and of course as shareholder, and for confidentiality, security reasons, he didn’t want this transfer to be made at the time when the company was purchased. So, as I explained before, we waited for his instructions, and we filed this in November ‘05” (Tr 951:2-951:8).*

*(e) Whether the necessary permission was sought from the Cyprus Central Bank to establish Libananco as an offshore holding company*

288. Mr Partellas was asked to confirm whether the offshore holding company in respect of which Mr Türkkan had asked for his help to acquire was an “IBC” (i.e. International Business Company). Mr Partellas agreed this was correct (Tr 919:14-919:18).

289. Mr Partellas was asked whether, in 2002, it was necessary for a foreigner to obtain permission from the Cyprus Central Bank in order to hold shares in an IBC. His response was that: *“at that time... it was just... a couple of years before we joined the E.U. ... it was a process of relaxation of the Exchange controls in Cyprus” (Tr 919:19-920:9).*

290. However, in re-direct examination, Mr Partellas clarified that the tax reforms in Cyprus only came into effect on 1 January 2003, and *“the relaxations permits from the Central Bank also began in late 2003” (Tr 1019:18-1019:22).*

*(f) Libananco’s minutes and board meetings*

291. Mr Partellas agreed that he was, as Corporate Secretary of Libananco, responsible *“for keeping a good record of Board meetings, management meetings, and the meetings of the General Assembly” (Tr 910:9-910:13).*

292. Mr Partellas was asked, in general terms, about Libananco’s meetings and the accompanying minutes.

292.1 He was asked whether he in fact attended any of the board meetings recorded in Libananco’s minutes. He confirmed that he did not do so: *“No. The Board Minutes were prepared by the Managing Director who was Mr. Ali Cenk Türkkan... I reviewed the Minutes after they were sent” (Tr 959:18-960:3).*

292.2 It was put to him that Mr Türkkan’s evidence was that the board meetings actually took place. He was asked to clarify whether this position

was correct. His response was: *“No, the Board meetings and minutes were prepared by Mr. Türkkan. He was the Managing Director. He was preparing the Minutes, and the two nominees were just signing”* (Tr 960:19-960:22).

292.3 Mr Partellas confirmed again that the two nominee directors of Libananco did not actually attend any board meetings: *“they were just nominee directors”* (Tr 961:1-961:3). He confirmed that Libananco’s corporate documents were sent to the nominee directors, who signed the documents in that capacity (Tr 961:4-961:7).

293. With regard to Exhibit H-9, which was an extract from the Minutes of the Libananco Board of Directors’ Meeting dated 1 April 2002, Mr Partellas gave the following evidence.

293.1 When asked by the Respondent’s Counsel whether a Board meeting (conducted over the telephone) actually occurred, Mr Partellas did not give an immediate answer:

*“Well, this is something that we discussed with him at the time, I believe. And the practice was to put everything on paper using this standard format... this Minute is prepared as a matter of routine following transfers of shares and changing Directors”* (Tr 927:7-927:21).

293.2 He later admitted as follows:

*“No. Again, I’m explaining that this is something we prepared following changes in Directors and approving the transfer of shares, and it’s prepared by the company Secretary. It doesn’t mean those people were there at the time”* (Tr 930:2-930:6).

He therefore agreed that no actual meeting took place over the telephone on 1 April 2002 as recorded in the minutes (i.e. Exhibit H-9) (Tr 930:8-930:16).

294. Mr Partellas was also referred to Exhibit H-11, which were the Minutes of Libananco’s Board of Directors’ Meeting dated 10 July 2002.

294.1 He observed that, on the second page of Exhibit H-11, the external auditing advisor of Libananco was recorded to be *“PARTELLAS KILLIARIS LTD”*. When asked whether this was odd, he replied: *“Maybe the “limited.” Maybe it wasn’t there at the time”* (Tr 969:18-969:19).

294.2 He testified that he only formed a limited company in 2005 (Tr 969:22).

294.3 When asked for an explanation as to this apparent inconsistency, he replied: *“Oh, it’s a very simple mistake that anybody can make”*.

## 12. Witness Statement of Polakis Sarris dated 22 April 2009

295. Despite his involvement in transferring legal ownership of Libananco from Prontoservus (a company associated with Mr Sarris' law firm) to Mr Türkkan, Mr Sarris' Witness Statement was reserved.
296. Mr Sarris' Witness Statement stated:

*“I have reviewed (i.) resignation letters signed by me, Mrs. E Petsa, and Mrs E. Kyriacou in relation to [Libananco], each dated 1 April 2002; and (ii.) the instrument of transfer of shares in Libananco to Mr. Ali Cenk Türkkan, **signed by me on behalf of Prontoservus Limited on 1 April 2002...** I hereby confirm that the documents referred to above... were in fact executed on 1 April 2002” .*

(emphasis added)

297. However, he clarified in direct examination that he did not in fact sign the Instrument of Transfer dated 1 April 2002. He said that it was signed instead by his employee Mr Starvos Ktorides (Tr 740:3-740:8).

## 13. Cross-examination of Mr Sarris

298. By way of background, Mr Sarris began by explaining that Prontoservus was a company owned by him, which was used to incorporate and then sell shelf companies to both local and foreign clients (Tr 741:15-742:3).
299. The cross-examination of Mr Sarris covered the following areas:
- (a) whether or not he signed the Instrument of Transfer dated 1 April 2002;
  - (b) whether or not his employees attended Libananco's board meeting on 1 April 2002;
  - (c) the manner in which Mr Partellas was billed (if at all) for the sale of Libananco to Mr Türkkan through Mr Partellas; and
  - (d) the requirements under Cypriot law for a change of ownership and/or a change of directors to be with the Registrar of Companies within 14 days.

### (a) Whether Mr Sarris signed the Instrument of Transfer dated 1 April 2002

300. Mr Sarris was asked to explain his testimony in his Witness Statement that he signed the Instrument of Transfer dated 1 April 2002 even though he clarified during direct examination that he did not in fact sign that document (see paragraphs 296 to 297 above).



301. He said that he simply did not know why this was the case: *“I don’t know really. I was surprised when I read it to come here, and I said, how did I sign this thing? Maybe I didn’t notice it. I don’t know”* (Tr 770:19-770:22).

302. He was then asked about whether he had any specific recollection, independent of the Instrument of Transfer dated 1 April 2002, of when Protoservus transferred Libananco to Mr Türkkan (through Mr Partellas).

302.1 He said that he did not, and explained that he knew that the transfer took place on 1 April 2002 only by looking at the Instrument of Transfer which bore that date: *“No, but it’s the dates which appear on the documents”* (Tr 771:18-771:19). He therefore confirmed that his evidence was based entirely on the fact of the document (i.e. the Instrument of Transfer) bearing that date (Tr 771:21-772:1).

302.2 When he was asked if he could otherwise recall the date on which the Instrument of Transfer was executed, he said he was unable to: *“No, not the actual date, no, but I rely on the date of the document”* (Tr 772:6-772:7).

302.3 He explained that his evidence was based on a presumption that the Instrument of Transfer was signed on the date that it bore:

*“I have 7,000 companies. All the documents, they have certain dates. Do you expect me to remember whether every day shown on every document is the actual date signed? Of course we presume that this is the date signed”* (Tr 775:15-775:19).

302.4 Mr Sarris also said that he never received a copy of the Instrument of Transfer dated 1 April 2002 that was signed by Mr Türkkan, the purchaser of Libananco (Tr 780:16-780:20). He explained that:

*“For this particular case, because I—it was selling the company to a firm of accountants, who were supposed to take over to have it executed by the transferee, and then keep it in their files, and then submit it to the reserve companies or whatever they think proper. But in our case when we set up companies and the client wants to keep anonymity, we used to give him the Instrument of Transfer undated for his own security...”* (Tr 781:7-781:16).

*(b) Whether Mr Sarris’ employees attended Libananco’s board meeting on 1 April 2002*

303. Mr Sarris was referred to Exhibit H-9, which was an extract of the Minutes of the Libananco Board of Directors' Meeting dated 1 April 2002. This stated that the following of his or his firm’s employees were “[p]resent” at that meeting: Mrs Eleni Kyriakou, Mrs Iro Petsa, Mr Andreas Partellas and Ms Antonia Kyriakou.

303.1 Contrary to what appears to have been recorded in Exhibit H-9, he confirmed that he and his employees did not attend any such meeting (Tr 777:19-777:20).

303.2 He explained:

*“We never have actual Board meetings. We draft the Minute, and we give it to the people, and they sign it. We don’t go in the actual meeting having a coffee and meet, you know, for business. We just start it on the computer”* (Tr 777:22-778:5).

*(c) The manner in which Mr Partellas’ firm was invoiced (if at all) for the sale of Libananco and the documents evidencing such a transaction*

304. Mr Sarris’ said that Mr Partellas would have been the person to bill for his services, and his firm therefore invoiced Mr Partellas for the services rendered (Tr 760:14-760:17).

304.1 When asked whether his records would show an invoice to Mr Partellas, he replied:

*“Supposed to... I don’t know. I was never involved, and I’m never involved in the accounting in this process, but with Mr. Partellas who had ongoing relationship with his companies, we must have sold him about 15 companies, but maybe he had a current account with the office. I don’t know”* (Tr 760:20-761:11).

304.2 It was put to Mr Partellas that if the matters alleged by the Claimant were to be true (i.e. the transfer of Libananco on 1 April 2002 to Mr Türkkan), then there would have been an invoice in 2002 reflecting this. He answered: *“There should be, yes”* (Tr 761:13-761:17). He also confirmed that the books of his firm would have recorded such a transaction (Tr 763:21-764:2).

304.3 It was suggested to Mr Sarris that if one were interested in determining whether or not the alleged transaction (i.e. the sale and purchase of Libananco) in fact took place in 2002, then the easiest way to find out would be to look at the records of his firm to see if such a transaction was in fact recorded on its books. He replied: *“Look, I have my own auditors for my accounts, and they do the accounting and the audit, so all the books are available because either way you’re checking”* (Tr 763:9-763:19).

304.4 Towards the end of his cross-examination, he appeared to change his evidence to say that the invoice relating to the transaction in question (i.e. the sale and purchase of Libananco) would not necessarily be in his firm’s files:

*“Not necessarily, and I will tell you why. Because with Mr. Partellas, we had an ongoing cooperation... We never had an invoice until we sell the company, and by selling the company to Mr. Partellas, maybe*

*there was—I don't know if there was an invoice. Maybe there is. I don't know. I don't remember, but Mr. Partellas had a current account with the office. I told you. He already start [sic] about 15 companies”* (Tr 783:4-783:16).

304.5 However, he clarified that, even if he did not have an invoice relating to this particular transaction, he might still have had an invoice relating to multiple sales which would reflect this particular transaction (Tr 783:17-784:4).

305. Significantly, Mr Sarris said that he had not looked in his files prior to giving evidence in this arbitration to find the relevant financial records establishing when the sale and purchased of Libananco took place. He said: *“Nobody asked me about that”* (Tr 784:5-784:9).

305.1 He was asked whether he knew that it was in issue in these proceedings whether Mr Türkkan in fact purchased Libananco in April 2002. He said:

*“Believe me, when they asked me to come here, I didn't know anything about what is a dispute or what is the subject matter. They told me here in Washington that I asked few questions [sic], and they told me what is the dispute [sic]. I didn't know anything”* (Tr 784:11-784:20).

305.2 Importantly, he confirmed that no one had asked him (prior to his coming to give evidence in this arbitration) to produce the financial records or to investigate the financial records of his firm to establish that the sale and purchase of Libananco to Mr Türkkan had in fact taken place in April 2002: *“Nobody asked me to provide it.... You should have asked me, and I could try to find it ”* (Tr 784:22-786:15).

*(d) The requirements under Cypriot law for a change of ownership and/or directors to be registered with the Registrar of Companies within 14 days*

306. Mr Sarris confirmed that, under Cypriot law, a change of ownership would have to be registered with the Registrar of Companies (Tr 748:12-748:18). However, he clarified that:

*“that doesn't mean that according to the law we had to do it immediately. It may wait months or years, unless we wanted [sic] Certificate from the Registrar of Companies evidencing and showing the actual shareholder, give the client the Shareholder Certificates. We are waiting for some”* (Tr 749:12-749:18).

307. He further confirmed that Cypriot law would require the registration, with the Registrar of Companies, of a change of directors by means of form “HE-4” which would have to be filed within “14 days” (Tr 750:10-750:22).

307.1 However, he qualified his answer:

*“Let me explain. This is when the handling of the whole matter is made by our office. I mean, if you come as a client and you want to buy a company and you want your name to appear as a Director or the shareholder and we continue to be the Secretary because it’s the Secretary who is responsible to do all this, then, yes, it was our office. But when we used to sell companies to auditors or accountants, and they were taking over, we were just giving them our resignations, and they were taking over all the formalities with the registered companies” (Tr 751:3-751:14).*

307.2 His evidence was therefore that, although form “HE-4” normally had to be filed within 14 days of a change of the directors of the company, and that his firm would usually take responsibility for this filing, this was not so in the present case since Libananco was sold to a firm of accountants (i.e. Mr Partellas’ firm, with the ultimate buyer being Mr Türkkan): *“No, in our office we never delay this. But as I told you, when we give it to an accountant firm that we used to incorporate, it’s them who take over all these formalities” (Tr 753:18-753:21).*

307.3 He explained that, once responsibility for complying with these formalities had been passed onto Mr Partellas’ firm, he did not follow up further on the matter:

*“I give them the resignations of my Directors, I give them the Instrument of Transfer of these shares and to the name they tell me is the new shareholder, and they take over. I don’t care. I don’t follow up and check whether they filed any Applications to... because we trust each other” (Tr 754:8-754:16).*

307.4 He confirmed that he trusted Mr Partellas’ firm to follow up on the necessary legal formalities:

*“Well, they always do. We never had for 30 years doing this business any incident that, you know, our Directors are still showing after five years, for example, the company was, et cetera. We always had it... as far as we are concerned, on the 1<sup>st</sup> of April of 2002, we, our Directors have resigned” (Tr 754:20-755:14).*

However, Mr Partellas’ evidence is that the relevant notifications or registrations in this regard were only made in 2005 (Tr 957:3-957:6).

#### **14. Witness Statement of Saylan Çiğgin dated 24 April 2009**

308. By way of background, Mr Çiğgin deposed that he began working for Star T.V. A.Ş. in 1993, and became the head of its legal department in 2000. Star T.V. A.Ş. was part of the Star Media Group, a group of companies owned by Cem Uzan. He explained that:

*“In addition to my primary role within the Star Media Group, I also advised Mr. Cem Uzan on certain other legal issues. Accordingly, I*

*was familiar with at least some of the legal issues that arose in connection with [ÇEAŞ and Kepez] which were Mr. Cem Uzan's other major businesses beyond the Star Media Group".*

He deposed that he provided legal advice to Cem Uzan on certain regulatory issues regarding ÇEAŞ' and Kepez's dispute with the Ministry over the proposed transfer of the companies' transmission lines to the Turkish Government.

309. Mr Çiğgin explained how he came to be involved in the present case as follows:

*"...in keeping with my role as his legal advisor on certain Utilities issues, in September 2002, Mr. Cem Uzan informed me that members of his immediate family would be transferring ownership of a substantial number of their bearer shares in the Utilities to Libananco..."*

*At the time he informed me of the planned transfer, Mr. Cem Uzan also informed me that Mr. Cenk Türkkkan, a trusted business manager for Mr. Cem Uzan, and the nominal owner and General Manager of Libananco, would oversee the administrative details of the transfer. Shortly thereafter, Mr. Türkkkan asked me to become a legal advisor to Libananco and I agreed to do so".*

310. The evidence in Mr Çiğgin's Witness Statement fell into the following broad categories:

- (a) how he was asked by Cem Uzan to prepare template STAs for use in connection with Libananco's acquisition of shares in ÇEAŞ and Kepez; and
- (b) his role in accepting delivery of share certificates on behalf of Libananco in İstanbul, Turkey.

*(a) Mr Çiğgin's preparation of template STAs*

311. He deposed that he was asked by Cem Uzan to prepare model or template STAs for use in connection with Libananco's acquisition of shares in ÇEAŞ and Kepez:

*"Mr. Cem Uzan had also requested that I prepare a model share transfer agreement for use by Mr. Türkkkan in connection with the planned transfer of bearer shares to Libananco. I prepared a model of such an agreement for use by Mr Türkkkan. The model STA was sent to Mr. Türkkkan by electronic mail. I was not present at the signing of any of the agreements. My role was simply to create the template for the transactions and to advise Mr. Cem Uzan and Libananco on Turkish legal issues surrounding the transfer".*

312. He then elaborated as to his understanding of the legal significance (or lack of) of the STAs under Turkish law:

*“In particular, I advised Mr. Cem Uzan in or around September 2002 that under Turkish law, it is not necessary to create a written record of a bearer share transfer. **To the contrary, ownership of such bearer shares is basically transferred via an intent to transfer and the transfer of possession to the buyer or “teslim” – literally “handover” in English.** I also recall that around that same time, Mr. Cem Uzan asked me about Turkish legal and regulatory requirements possibly affecting the Utilities’ bearer share transfers. I advised him that, while there would be certain regulatory reporting requirements, a failure to report at the time of the transfer would not affect the legal validity of the transfer under Turkish law, which was his primary concern at that time.*

*In view of my advice to Mr. Cem Uzan on this matter, it was my understanding that, **as share transfer agreements were not strictly necessary to accomplish the planned transfer, the model agreement I had prepared was only going to be used to provide written evidence of each family member’s intention and consent to transfer their bearer shares to Libananco. Thus, I prepared the model agreement using generic terms for a transfer, such as referring to cash being paid in return for the shares”.***

(emphasis added)

*(b) Mr Çiğgin’s alleged role in accepting delivery of the share certificates in İstanbul*

313. The next area of Mr Çiğgin’s evidence relates to the alleged delivery of the shares certificates to Libananco or *teslim* – specifically, his alleged role in accepting delivery of those share certificates on behalf of Libananco.
314. His evidence in relation to the alleged acts of *teslim* was as follows:

*“Again, sometime in late April or early May 2003, Mr. Türkkan called me and asked me to go, on behalf of Libananco, to the Rumeli and Doğu buildings in Mecidiyeköy, İstanbul, where he informed me that the bearer shares in the Utilities being transferred to Libananco by the Uzan family were held in secure areas. **Mr. Türkkan further instructed me to physically examine those bearer shares and to ensure that they were being stored for the benefit of Libananco.** In turn, I understood that my **physical examination and acceptance of the shares on behalf of Libananco would constitute “teslim”** which, as I already mentioned, was the necessary requirement for the transfer of ownership of the bearer shares to Libananco to be perfected under Turkish law.*

... I arrived at ÇEAŞ' office on 15 May 2003 and proceeded to the secure storage area in the Rumeli Building, opened the locked door with a key provided to me by Mr. Bal [one of the directors of ÇEAŞ], and conducted my inspection of the bearer share certificates. Thereafter, I went to the Doğu building and conducted a similar inspection of the bearer share certificates that were stored there.

**In each building, the bearer share certificates were wrapped in brown paper packaging and piled in stacks. Each of the individual packages of certificates was hand-labeled with the word "Libananco," and most of them also had the number and nominal value of the certificates that they contained noted thereon. Although I did not count each share (which would have been impracticable given their large number – there were many thousands of certificates), I did open all of the packages to verify that they in fact contained ÇEAŞ and Kepez bearer share certificates. At the same time, I also compared the labeling on the brown paper packaging enclosing the certificates with an inventory of share transfers, which indicated the type of shares being transferred, their quantity, and their nominal value, to ensure that the bearer shares intended to be transferred were indeed present and accounted for. Unfortunately, as it was only a checklist sent to me for my own use, I did not retain a copy of it once I had verified that the share certificates were being properly and securely stored for Libananco.**

*After I inspected Libananco's bearer share certificates, I called Mr. Türkkkan on the phone to report that I had inspected the shares and confirmed delivery to, and my acceptance of them on behalf of, Libananco. I also reported this inspection and acceptance process to Mr. Cem Uzan".*

(emphasis added)

315. He also gave evidence as to what happened to those share certificates after his alleged inspection:

**"Shortly after my inspection of the bearer share certificates, I learned from Mr. Cem Uzan that a large number of the shares that I had inspected had been moved from the premises where I inspected them to other secure locations. However, I know that not all of the share certificates were moved from the Rumeli and Doğu buildings at that time. I know this because several days after I heard from Mr. Cem Uzan that some of the shares had been moved, I received two share custody invoices executed by ÇEAŞ and Kepez, respectively, which indicated that share certificates representing approximately 14 to 16% of the capital value of the Utilities continued to be stored at the Utilities' offices in Mecidiyeköy. As far as I can recall, Mr. Bal brought the originals of these share custody invoices to me. After reviewing them, I sent a copy of the share custody invoices to Mr. Türkkkan in Jordan, and I gave the originals to Mr. Cem Uzan's office.**

*I assume that these originals were delivered to Mr. Cem Uzan. However, since his office was seized by the Turkish Government in February of 2004, all documents, personal possessions and other things were removed by Government agents.*

*In February 2004, the Turkish Government also seized the Rumeli and Doğu buildings, including those areas where Utilities' shares referred to in the share custody invoices had been stored and held for Libananco. The Government remains in possession of those buildings up to today”.*

(emphasis added)

### **15. Cross-examination of Mr Çiğgin**

316. Mr Çiğgin gave evidence in relation to the following material topics or areas:
- (a) the circumstances surrounding his retainer by Libananco as its legal advisor;
  - (b) his role in the preparation of the template STA, in particular his understanding of what legal role the STAs would come to play in relation to Libananco's alleged acquisition of shares;
  - (c) his central role in allegedly achieving *teslim* in respect of share certificates representing approximately 50 per cent of the total share capital of ÇEAŞ and Kepez respectively;
  - (d) the non-disclosure by Libananco, ÇEAŞ and Kepez of Libananco's alleged acquisition of the majority interests in the latter two companies, even though this was required by the Turkish Capital Market Law No. 2499 (specifically, its subordinate legislation); and
  - (e) his role in representing Cem Uzan before the Danistay in proceedings brought by ÇEAŞ challenging the cancellation of its Concession Agreement.

#### (a) Mr Çiğgin's role as Libananco's legal adviser

317. Mr Çiğgin testified that his involvement with Libananco ceased in May 2003: *“In May 2003, after the completion of the handover [of the bearer shares to Libananco] and once I received the receipts and passed them on to Cem Uzan, I took no legal steps”* (Tr 532:17-532:21).
318. Mr Çiğgin was referred to Exhibit H-13, which were Libananco's Minutes of Directors' Meeting dated 23 September 2002. The first page of those minutes recorded, among other things, that: *“1- It is proposed and agreed to Appoint Mr. Ali Betar, as company internal legal advisor; 2- It is proposed and agreed to Appoint Mr. Saylan Çiğgin, as company internal legal advisor”.*



318.1 However, Mr Çiğgin said that he was not aware that he was required to provide such a service, and that nobody had ever told him of such an appointment: “No, I was never requested [sic] such a service” (Tr 560:18-561:11).

318.2 Further, he also confirmed that he did not know Mr Betar (Tr 560:5-560:6).

319. Mr Çiğgin confirmed that he did not have any notes or records of any advice that he gave to Libananco. He also agreed that he did not have any e-mail messages or letters documenting his involvement with the present case (Tr 538:22-539:14).

(b) Mr Çiğgin’s role in preparing the model agreement or template STA

320. Mr Çiğgin confirmed that he prepared the template STA in September 2002 (see paragraph 311 above; Tr 579:4-579:7). He was asked by the Respondent’s Counsel why the metadata associated with the STAs were dated from April 2002, when his evidence was that he first prepared the template STA around September 2002. He was unable to explain why this was the case (Tr 580:7-580:11) but added that he “had a previous draft, and it could have been used by others” (Tr 581:7-581:13). However, Mr Çiğgin’s own evidence was that he provided Mr Türkkan with a template STA only in or after September 2002, when he was first informed of Libananco’s intended acquisition of shares in ÇEAŞ and Kepez.

321. Mr Çiğgin was referred, as an example, to Exhibit H-16, which was an STA relating to Kepez shares. It was stated on the STAs that:

*“The Transferee, has sold, transferred and assigned all rights, benefits, including the user fruct Rights of the below detailed shares, to the Buyer and has received the sale and transfer proceeds **in cash and in advance**” (emphasis added).*

321.1 He was asked to confirm whether it was his understanding that consideration for the transfer of the shares to the purchaser would be given in the form of cash. He said: “No... I was not given any details about the payments” (Tr 583:13-583:19).

321.2 When asked to explain why then he had drafted a template STA which purported to show that cash had changed hands, he said:

*“Because this was a general draft in the true sense of the word. It is a kind of draft you would use in the general practices of the companies. That’s exactly why I prepared the draft in that manner. Anybody could have easily changed this draft in any way they pleased, so anybody could simply say delete the part about cash payment and put in payment installments or whatever they please... this is a draft that was used generally by the companies in their implementations. I prepared*

*this for that purpose, and anyone would have been welcome to amend it in any way they pleased” (Tr 584:6-585:17).*

321.3 He elaborated further:

*“Cem Uzan simply asked me to prepare a model that Türkkan can use during these transactions. He asked me to prepare a model contract. He did not—I wasn’t given any detailed information as you suggest. Therefore, these agreements are mere drafts that contain very general phrases” (Tr 586:18-586:22).*

322. Mr Çiğgin was asked about his understanding of what the STAs (which were based on the model agreement drafted by him) were intended to achieve, i.e. whether they were intended to achieve a share transfer and assignment, or whether they were merely to evidence the intention to transfer shares.

322.1 He said:

*“it was not mandatory to have written documents in order for the transaction to be valid. If a document or rather if an agreement were prepared, it would have constituted written evidence of the intent of the Parties” (Tr 588:12-588:17).*

322.2 However, he agreed that the model agreement that he allegedly drafted purported on its face to be a document intended to be used as a “*Share Sale Transfer and Assignment of Rights Agreement*” as such (as opposed to merely a memorialisation of intent) (Tr 588:18-589:2).

322.3 Notwithstanding the above, he said that, when he drafted or prepared the template STA in 2002, it was only intended to be used as a means to memorialise an intent to transfer shares (and therefore would not be the actual sale and purchase agreement as such). He further understood that he would be involved in the process of achieving *teslim* in respect of the share certificates to be transferred to Libananco (Tr 727:7-727:14).

322.4 Mr Çiğgin testified that, in September 2002, he specifically advised Cem Uzan on “*how to transfer shares according to the Turkish Commercial Code*” (Tr 801:13-801:20), and that Cem Uzan (at the time):

*“asked [him] whether it’s really necessary to make such an agreement, whether a written agreement is completely compulsory, and probably [he] gave [his] advice to this effect when [Cem Uzan] asked [him] those question [sic]” (Tr 802:15-802:20).*

322.5 However, Mr Çiğgin’s later evidence was to the effect that Cem Uzan gave him no instructions either way (i.e. whether the template was to be used as an instrument to execute the actual transfer of ownership of the shares or whether its purpose was merely to memorialise the intent to transfer shares): “[*Cem Uzan*] only asked me to prepare a model Transfer

*Agreement. He never said that he was going to use it for the transfer of shares. I never heard him say that” (Tr 804:22-805:3).*

323. In relation to the issue of the dividends payable to shareholders of ÇEAŞ and Kepez, Mr Çiğgin agreed that the STAs were drafted on the premise that the shares were going to be transferred with all rights and benefits attached, including the right to receive those dividends (Tr 593:11-593:18). He agreed that Libananco as the transferee of the shares would be entitled to assume, based on the manner in which the STAs were drafted, that it was going to receive full title to the shares as well as the right to receive the corresponding dividends (Tr 594:7-594:13).

*(c) Mr Çiğgin’s alleged role in accepting delivery or accomplishing teslim in respect of ÇEAŞ and Kepez share certificates*

324. Mr Çiğgin said that he confirmed delivery of the ÇEAŞ and Kepez share certificates amounting to approximately 50 per cent of the total share capital of each of those companies (Tr 561:20-562:7) on 15 May 2003 (Tr 715:1-715:4). Although Libananco claims ownership of approximately 65 per cent and 60 per cent of the total share capital of ÇEAŞ and Kepez respectively, Mr Çiğgin’s evidence was that he had no knowledge of how *teslim* was achieved in respect of the balance of the shares (Tr 716:3-716:6). His evidence was therefore concerned only with the *teslim* that was allegedly accomplished on 15 May 2003.

324.1 In that regard, he confirmed that in May 2003 he had no knowledge that any STAs had been executed purporting to transfer shares to Libananco (Tr 730:2-730:4).

324.2 His evidence was that the basis on which he was going to accomplish *teslim* was by means of the:

*“list Ali Cenk Türkkkan sent me. In that list or in our conversations, there were no details to the effect that the agreements had been executed. I was simply told we will do a teslim, here are the documents, go do it. There were no details about the agreements” (Tr 730:8-730:13).*

325. Mr Çiğgin was referred to Exhibit H-61, which was Libananco’s Share Acquisition Report as of 20 May 2003. He agreed that Exhibit H-61 showed that all of the Kepez shares allegedly owned by Libananco had been purchased before 15 May 2003 (Tr 717:3-717:11). He agreed that his evidence (i.e. that *teslim* was accomplished in respect of approximately 50 per cent of Kepez shares on 15 May 2003 itself) was inconsistent with what was shown on the face of Exhibit H-61 (Tr 718:10-718:16).
326. In relation to the issue of the actual inspection of the share certificates, Mr Çiğgin gave the following evidence.

326.1 He was asked to explain his evidence in his Witness Statement in which he deposed that he was asked by Mr Türkkan to ensure that the share certificates located in İstanbul were “*being stored for the benefit of Libananco*”. He said that the share certificates were kept in the offices of ÇEAŞ and Kepez in Mecidiyeköy, İstanbul (Tr 809:21-809:22). However, he did not know who was responsible for the storage of those share certificates:

*“I don’t know who was responsible because nobody gave me any information about that. When I talked to Mr. Türkkan, he only told me where these shares were, and he said I could go examine and see them where they were... Mr. Türkkan or anybody else did not give me information as to who was responsible for keeping those shares, where they were kept”* (Tr 810:5-810:13).

326.2 He was referred to Exhibit H-52, which were the Minutes of Libananco’s Management Committee Meeting dated 18 April 2003. It was recorded in that document that:

*“It is agreed to continue the storage of the actual shares safely in the storage facilities of the Seller until such time as Libananco and the Management Committee decides [sic] to undertake other steps to locate and store the actual shares in an other [sic] location. It is agreed that Mr Çiğgin, appoint a two lawyer team to go to site of the storage facilities, and actually physically recheck the storage of the shares, and the labeling [sic] of the storage under the name of Libananco. And to do this on a routine basis (once a month)”*.

(emphasis added)

Mr Çiğgin confirmed that, in his telephone conversation with Mr Türkkan in early 2003, Mr Türkkan: “*also told me that the Share Certificates needed [sic] be checked at least once a month as long as they were stored in that facility*” (Tr 812:18-812:21). When asked by the Tribunal whether he specifically told Selahattin Bal that he was at the Rumeli Building to take over the share certificates on behalf of Libananco, he replied: “*No... I can’t really recall whether I used that term specifically when I was speaking to Mr. Bal*” (Tr 883:5-883:7).

326.3 He confirmed that he did not keep any record of the share certificates which he allegedly inspected in İstanbul on 15 May 2003 (Tr 813:19-813:22). He said he did not know (and did not otherwise have any record of) the serial numbers of the share certificates which he allegedly inspected (Tr 829:4-829:8). His evidence was that the process was: “*not documented other than what I spoke of*” (Tr 833:21-833:22).

326.4 In his Witness Statement, Mr Çiğgin deposed that he “*arrived at ÇEAŞ’ office on 15 May 2003 and proceeded to the secure storage area in the Rumeli building*”. He changed his evidence in cross-examination when it was suggested to him that there were in fact no ÇEAŞ offices in the

Rumeli building: *“In the Rumeli Building, I went to the secure area where the Share Certificates were stored. I didn’t go to ÇEAS’s [sic] offices in that building”* (Tr 816:8-816:11).

326.5 Also in his Witness Statement, Mr Çiğgin deposed that, when he arrived at the Rumeli Building, he: *“opened the locked door with a key provided to me by Mr. Bal [one of the directors of ÇEAS]”*. Again, when it was suggested to him that the share certificates were being stored by Adabank (and therefore not ÇEAS), he changed his evidence:

*“Let me make a correction there, too. Selahattin Bal did not give me a key. He didn’t give me a key, and he just set me free to go around in the building... We opened the door with him, so I was with him at the time”* (Tr 817:5-817:20).

326.6 When asked to explain why he did not correct these errors in his Witness Statement earlier, he said that he intended to make corrections to his Witness Statement if he was asked a question about something which required correction (Tr 818:5-818:12).

326.7 There were no representatives of Kemal Uzan or Ayşegül Uzan in their capacity as the sellers of the shares (Tr 821:14-821:19): *“Cenk Türkkkan had given me the information that the family had already completed the teslim procedures to Libananco, so I did not really think that the sellers had to be there”* (Tr 822:2-822:5).

326.8 He accordingly explained that, since the representatives of the sellers were absent (or that none were required in any event), the handover process or *teslim* was achieved in the following manner:

*“... in that area, the Certificates were already present and ready... for Libananco. So, there were packages with Libananco labels on them, and they were prepared, and I had received a list from Mr. Türkkkan, and everything corresponded to that list”* (Tr 823:3-823:13).

326.9 When asked how many share certificates were present in the Rumeli and Doğu Buildings, he said: *“I didn’t count them. As I said, they were in packages, and there were many of them. I can’t remember exactly how many”* (Tr 824:13-824:15).

326.10 When asked whether he knew who had labelled the individual packages of share certificates with the word “Libananco”, he said: *“I don’t know, and I had already told you, that I don’t know who had done this, who had prepared these”* (Tr 828:8-828:10).

326.11 When asked how long the alleged inspection on 15 May 2003 lasted, he replied: *“Hours. I can tell you that I went there in the morning at around 10:00 a.m., and I must have left in [sic] late afternoon, maybe 5:00, 6:00 p.m.”* (Tr 827:19-827:21).

326.12 His evidence was that he did not retain a copy of the inventory of share certificates (see paragraph 314 above). When questioned by the Tribunal about this, he testified that he made a conscious decision to destroy the latter:

*“Cem Uzan didn’t want a lot of people to know about the Share Certificate transfer procedures, as I didn’t want to keep them in my office because I was preparing—I was working in a very crowded office, and we didn’t have safes and lockers and all the shelves and the cabinets were accessible to everyone, including the secretaries, and I didn’t want anybody to see those documents, so ... I destroyed that document”* (Tr 864:19-865:6).

326.13 He was referred to Exhibit H-60, which were the share custody invoices dated 16 May 2003, purportedly issued by ÇEAŞ and Kepez respectively, which indicated that share certificates representing approximately 15.82 per cent and 13.9 per cent of the total share capital of ÇEAŞ and Kepez respectively continued to be stored in their offices in Mecidiyeköy, İstanbul on behalf of Libananco. It was suggested to Mr Çiğgin that the place of storage of the share certificates Exhibit H-60 purported to show was wrong.<sup>9</sup> He explained:

*“As a lawyer, it wasn’t my responsibility to confirm the truthfulness of this information. It was up to the person who prepared the document... I didn’t feel the need to verify the contents of these documents, and nobody asked me to do this. I wasn’t asked to do this. It wasn’t my responsibility”* (Tr 836:1-836:19).

326.14 Also on the subject of Exhibit H-60, Mr Çiğgin was asked how it was possible that, between his alleged inspection on 15 May 2003 and the time the share custody invoices were allegedly prepared on 16 May 2003, bearer share certificates adding up to more than 45 per cent of the total share capital of ÇEAŞ and Kepez respectively (some 50,000 share certificates) were moved out of the Rumeli and Doğuş Buildings, with the remaining share certificates being counted within that short space of time (the share custody invoices were specific and stated that share certificates adding up to 13.90904 per cent and 15.81972 per cent of the total share capital of Kepez and ÇEAŞ respectively were being kept in the Rumeli Building in İstanbul on behalf of Libananco). His explanation for this apparent feat was as follows:

*“I can’t comment on what others may have done. However, I can tell you that you don’t need to do a very thorough analysis in that although the packages had information about the number of shares based on nominal value. So, if you added these packages, you could easily*

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<sup>9</sup> The share custody invoices allegedly issued by ÇEAŞ and Kepez refer only to share certificates being stored in the Rumeli Building, but not in the Doğuş Building. Further, some of the share custody invoices referred to share certificates being stored on the eighth floor of the Rumeli Building but the Respondent alleged that neither ÇEAŞ nor Kepez had offices on that floor.

*understand to what percentage of the capital the shares corresponded to” (Tr 842:12-842:19).*

*(d) Non-disclosure of Libananco’s alleged acquisition of a majority interest in both ÇEAŞ and Kepez*

327. Mr Çiğgin was referred to Exhibit H-343, which was an excerpt of the Capital Markets Board Communique – Public Disclosure of Material Events, Serial No. VIII No. 20, published in Official Gazette No. 21629 on 6 July 1993. This was subordinate legislation under the Turkish Capital Market Law Number 2499.

327.1 His evidence was that he *“must have looked at it”* when he advised Libananco (Tr 640:10-640:15).

327.2 He confirmed that the effect of the subordinate legislation was that, if Libananco (or anyone else) were to acquire 10 per cent or more of the total share capital of either ÇEAŞ or Kepez, that fact would have to be disclosed (Tr 641:12-641:16).

327.3 When asked who was responsible for making public disclosure, he referred to Exhibit H-327, which was an excerpt of Capital Markets Law No. 2499, published in Official Gazette No. 17416 on 30 July 1981. He answered: *“It’s the members of the Board of Directors, General Manager, Assistant General Managers, and the shareholders holding 10 percent or more of the capital”* (Tr 642:7-642:10). He further agreed that in the case of a discrepancy or non-disclosure, a monetary fine would be imposed (Tr 642:17-642:22).

327.4 He agreed that, as far as he knew,: *“no notification was made at any stage to any of the Turkish authorities of Libananco’s alleged shareholding”* (Tr 672:10-672:13).

327.5 He also agreed that the directors of ÇEAŞ and Kepez (upon whom the obligation of disclosure fell) would owe duties to act in the best interests of the companies, and the interest of the companies and their shareholders as a whole would have been different from the interests of the Uzans (Tr 644:3-644:11).

327.6 When asked whether there could have been any conceivable reason for anybody to flout the law in that manner, he said: *“Well, for all we know, those people may have their own justification. I do not know... No, there isn’t. I don’t know. No”* (Tr 647:16-648:3).

*(e) Mr Çiğgin’s role in representing Cem Uzan in proceedings brought by ÇEAŞ before the Danistay*

328. Mr Çiğgin was cross-examined on ÇEAŞ’ claim before the Danistay, where the cancellation of the Concession Agreement held by ÇEAŞ was challenged.

328.1 He agreed that ÇEAŞ' case before the Danistay was that it was entirely a Turkish company (i.e. there were no foreign shareholders) (Tr 670:21-671:2).

328.2 He confirmed that he acted on behalf of Cem Uzan in those proceedings, who sought to be joined as an intervener (Tr 671:3-671:6).

328.3 Although by that time (i.e. by the time the challenge before the Danistay was brought by ÇEAŞ), Libananco had allegedly completed its acquisition of ÇEAŞ shares, Mr Çiğgin said that he took no steps to correct what was argued by ÇEAŞ before the Danistay (i.e. that it was domestically owned) (Tr 671:7-671:11).

328.4 In that regard, he confirmed that the statements made by ÇEAŞ and Kepez in the Turkish courts were inconsistent with any suggestion of Libananco being the majority shareholder of the latter companies (Tr 672:15-672:22).

#### **16. Witness Statement of Ayşegül Akay Uzan dated 28 April 2009**

329. Ms Uzan was unable to testify in person at the hearing owing to an alleged illness. On 4 December 2009, the Claimant submitted a letter from a psychiatrist Dr M Ozhan Pektas dated 3 December 2009 ("Medical Report"), the subject of which was the medical condition of Ms Uzan. According to the Medical Report, Dr Pektas has known Ms Uzan since 12 September 2002.

330. Having considered the contents of the Medical Report, which the Tribunal regards as being medical-in-confidence (and therefore neither necessary nor desirable to recite or otherwise reproduce), the Tribunal concludes as follows.

(a) It was possible that Ms Uzan was under heavy medication and not in a stable mental state at the time she allegedly signed the STAs.

(b) It is uncertain whether Ms Uzan signed her Witness Statement with full knowledge of its contents.

331. In this regard, the Tribunal recalls paragraph 14 of its Procedural Order of 18 December 2009, where it decided as follows:

*"Having considered the Parties' positions and the medical certificate provided by the Claimant, the Tribunal decides to disregard Mrs. [sic] Uzan's written statement from the Record pursuant to Article 4.8 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration".*

332. Accordingly, the Tribunal affirms its decision to disregard Ms Uzan's Witness Statement; and also heavily discounts her signature on the STAs in the absence of countervailing evidence that she was of sufficient mental capacity and/or in a stable mental state at the respective material times.



## 17. Witness Statements of Faruk Ulusoy dated 24 June 2009 and 8 January 2010

333. Mr Ulusoy was the Claimant's witness who did not testify at the hearing for fear of reprisal. The evidence given in his Witness Statement is key in respect of the *teslim* that was allegedly achieved on 15 May 2003 by Mr Çiğgin's alleged inspection of ÇEAŞ and Kepez share certificates, which were said to have been wrapped in brown paper and labelled "Libananco".

334. Mr Ulusoy deposed, among other things, as follows.

334.1 On 23 March 2004 (whilst he was an employee of Adabank – the agent bank responsible for the processing and payment of dividends to shareholders of ÇEAŞ and Kepez), he was summoned by personnel from the SDIF. As a result, he went to the basement of the Rumeli Building with SDIF personnel and police officers.

334.2 At that time, he knew that this was where the ÇEAŞ and Kepez share certificates were kept. This is because, since 1998, he was (as an employee of Adabank) in charge of the distribution of dividends for share certificates.

334.3 When (on 23 March 2004) he was in the basement of the Rumeli Building, he saw "*ÇEAŞ and Kepez stock certificates... wrapped in brown packing paper and were in bundles*".

334.4 His evidence was that:

*"We looked at the contents of the bundles by opening this packing paper... Furthermore, I remember that there was a name of a foreigner written on the brown packing paper that the bundles of stock certificates were wrapped in"*.

335. Taking Article 4(7)<sup>10</sup> of the IBA Rules of Taking Evidence in International Arbitration (2010 version) as a guideline, the Tribunal (in the absence of exceptional circumstances) accords no weight to Mr Ulusoy's statement as he did not testify at the hearing. However, as three of the Respondent's witnesses (Enis Güçlü Şirin, Deniz Bozkurt and Orhan Seyfi Guner) appeared at the hearing for the purpose of contradicting Mr Ulusoy's evidence, Mr Ulusoy's statement is necessary to put the evidence given by those three witnesses in context. Accordingly, the Tribunal maintains Mr Ulusoy's Witness Statement on the record.

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<sup>10</sup> Art 4(7) of the IBA Rules of Taking Evidence in International Arbitration (2010 version) states that: "*If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise*".

## 18. Witness Statement of Enis Güçlü Şirin dated 25 August 2009

336. Mr Şirin was an employee of the SDIF who had worked at its Collection Department in 2004, and was working in its Auditing Department at the time he gave his Witness Statement. He was (when working for the Collection Department in 2004) tasked with carrying out enforcement and attachment procedures. Within the scope of those duties, he participated in attachment procedures carried out with respect to various companies owned by the Uzan family.

337. He deposed, among other things, as follows.

337.1 On 29 March 2004, he went to the second floor of the Doğuş Building with some other SDIF officials and police officers to perform an inspection, and to carry out attachment procedures if valuable property was found.

337.2 His evidence was as follows:

*“On the 2<sup>nd</sup> floor, we found some safes in the office and lounge of Kemal Uzan, in the Board of Directors room, in Yavuz Uzan’s office and in the corridor. After the safes in the Board of Directors room were opened, I saw that there were stacked share certificates in open form in them (by “open form”, I mean the certificates were not wrapped or packaged). I took out and checked some of the share certificates and saw that they were ÇEAŞ and Kepez share certificates”.*

337.3 Although he and his team opened the safes in Kemal Uzan’s offices and in the corridor (in which they found, amongst other items, documents in packages), he saw no ÇEAŞ or Kepez share certificates packaged in brown paper, nor did he see the name “Libananco” written anywhere.

## 19. Cross-examination of Mr Şirin

338. The material portions of Mr Şirin’s oral testimony are as follows.

338.1 He confirmed that he did not participate in any attachment procedures in the Rumeli Building and therefore did not have any knowledge of the existence of packaging (or otherwise) of the share certificates in the Rumeli Building (Tr 435:7-435:13).

338.2 On 29 March 2004, the purpose of his visit to the Doğuş Building was to attach property belonging to a company called Rumeli Holding Incorporated. However, his team *“put down everything that [they] found there in as much detail as possible in the Minutes [of Attachment]”* (Tr 443:5-443:20). If any property marked “Libananco” was sighted, this would have been recorded in the Minutes of Attachment as well (Tr 444:6-444:8).

## 20. Witness Statement of Deniz Bozkurt dated 25 August 2009

339. Deniz Bozkurt stated that on 25 January 2005, he started working as Company Manager in the Uzan Group companies. He explained during the hearing that none of the members of the Uzan family were associated with the latter companies once he became the manager because those companies were taken over by the SDIF. It was therefore the Board of Directors of those companies (who were in turn appointed by the SDIF) that appointed him as Company Manager of the Uzan Group companies (Tr 453:7-453:20).
340. In March 2004, prior to the commencement of his duties, attachment proceedings had been carried out on property found on the basement floor of the Rumeli Building and on the second floor of the Doğuş Building.
341. After assuming his duties, he went to the basement floor of the Rumeli Building and the second floor of Doğuş Building together with one Devrim Yücel, the custodian of these areas (then already sealed by the SDIF).
342. The crux of his evidence was as follows.
- 342.1 In the basement of the Rumeli Building, he saw about 90 steel cabinets mostly containing share certificates in *“open form ... not wrapped or packaged”*.
- 342.2 On the second floor of the Doğuş Building, he saw share certificates in the safes located in the Board of Directors meeting room and lounge, stacked in *“open form”*.
- 342.3 Further, he participated in the inventory process of the share certificates in the basement of the Rumeli Building from 7 March 2005 to 20 June 2005. 91 steel cabinets containing share certificates and coupons were located there. Many of the share certificates found in the basement of the Rumeli Building were ÇEAŞ share certificates, but none of the cabinets were marked “Libananco”.
- 342.4 The share certificates on the second floor of the Doğuş Building were documented in a similar fashion from 7 July 2005 and 11 August 2005. However, these were stored in safes and in a less ordered arrangement. If there was a name written at the place where the inventoried share certificates were located, that name would have been entered into the inventory records. Again, the name “Libananco” was not recorded in any of those entries.
343. Mr Bozkurt supplemented the evidence in his Witness Statement as follows during direct examination.
- 343.1 He went to both the Rumeli (basement) and Doğuş Buildings (second floor) some time after he started work as Company Manager in the Uzan Group companies (i.e. after January 2005) (Tr 450:6-451:1).

343.2 Although there were share certificates in both locations, he did not see any packages with the name “Libananco” on them, nor had he heard of “Libananco” at that time (Tr 451:12-451:22).

## **21. Cross-examination of Mr Bozkurt**

344. The material portions of Mr Bozkurt’s oral testimony are as follows.

344.1 The attachment proceedings of which he was in charge were directed only at the 118 companies in relation to which he had been appointed Company Manager (Tr 458:4-458:9).

344.2 He confirmed that, although attachment proceedings had been carried out on property found in the basement of the Rumeli Building and the second floor of the Doğuş Building in March 2004 (prior to his appointment as Company Manager in January 2005), he himself did not take part in those proceedings (Tr 454:15-455:1).

344.3 He only visited the Rumeli and Doğuş Buildings “around 10 to 15 days” after his appointment in January 2005. Accordingly, he could not confirm the state of the share certificates (i.e. wrapped or otherwise) in March 2004. However, he testified that his colleagues who carried out the inspection and attachment procedures in March 2004 had advised him that the share certificates were not packaged (Tr 465:7-465:10).

344.4 There were one million and 250,000 ÇEAŞ and Kepez share certificates respectively in the Rumeli and Doğuş Buildings at the time he and his team conducted the inventory. He was asked whether he looked at all 1,250,000 of these share certificates. His response was that:

*“... obviously the inventory process took a long time. Had they been in packages, we would have been able to see them without necessarily having to count the Share Certificates” (Tr 473:11-473:17).*

## **22. Witness Statement of Orhan Seyfi Güner dated 25 August 2009**

345. Mr Güner started working at the SDIF in 2001. In 2004, he was appointed as the President of the Collection Department Group. He deposed that, on 3 July 2003, İmar Bank’s (a bank owned by the Uzan family) licence to carry out banking operations and accept deposits was revoked by the Banking Regulation and Supervision Agency. Thereafter, proceedings were initiated in order to collect the debts resulting from the unlawful operations of İmar Bank.

346. To this end, inspection and attachment procedures were carried out at the Rumeli Building on 23 March 2004 and the Doğuş Building on 29 and 30 March 2004. Mr Güner’s evidence was, among other things, as follows.

346.1 He was present throughout the inspection and attachment procedures on 23 March 2004 at the Rumeli Building and on 30 March 2004 (the

second day of the inspection and attachment procedures) at the Doğuş Building.

346.2 There was a room containing steel cabinets in the basement of the Rumeli Building. The names “Metaş” and “Simetri” were written on some of those cabinets. Some of the cabinets had share certificates stacked on the shelves inside them. However, these share certificates were not wrapped.

346.3 He deposed that:

*“Contrary to what Faruk Ulusoy says in his witness statement, the ÇEAŞ and Kepez share certificates we saw were positioned on the shelves in the steel cabinets in open form and were not packaged, in brown paper or otherwise. Thus we did not open any packaging paper as he suggests.*

*I was present in the basement area [of the Rumeli Building] for the entire time that Faruk Ulusoy was present. I saw no wrapping around the share certificates and no name written on them. I do not understand Faruk Ulusoy’s reference to the “foreign name.” I can say that I did not see the name “Libananco” anywhere during the inspection”.*

347. During direct examination, Mr Güner was asked whether it would have been a significant observation to him if the share certificates were wrapped or packaged in brown paper. His response was:

*“Of course, it would have been because when we go for attachments, we see the ... Share Certificates there. If they had been bundled in paper, we must have had unwrapped them before we saw the Share Certificates... And if there had been a share [sic] with a name on it, then I would have been reminded of the owner of that share [sic]. This was important for us because ... I remember them in live form and [sic] no wrapping and no name on them” (Tr 378:21-379:9).*

### **23. Cross-examination of Mr Güner**

348. The material portions of Mr Güner’s oral testimony are as follows.

348.1 Mr Güner confirmed that he saw about a hundred steel cabinets in the basement of the Rumeli Building. There were share certificates stacked on the shelves inside the first one or two cabinets that were opened. These share certificates, which had no wrapping on them, were those of ÇEAŞ, METAS, Gaziantep Cement and Bartın Cement. In addition, there were “many coupons of the Kepez company” (Tr 396:18-397:14).

348.2 Mr Güner was asked whether he had the opportunity to look inside all “100” of the cabinets in the Rumeli Building. His response was as follows:

*“I looked at most of them ... I don’t think there were too many that I didn’t look at, but, of course, it’s not possible for me to know whether they are wrapped or not ... in a few of the cabinets that I didn’t look at, of course, I can’t say if there were Share Certificates or if they were wrapped or not” (Tr 409:13-411:3).*

348.3 The Minutes of Attachment corresponding to the procedures at the Rumeli Building on 23 March 2004 (Exhibit H-209) showed that he and his team arrived at the location at 11.30 am. He testified that he and his team probably left at about 6.30 or 7.00 pm in the evening, and that he was in the room where the steel cabinets were located throughout the entire process, save for a toilet break (Tr 423:16-424:9).

348.4 The share certificates in the Doğuş Building were positioned in the same manner as those in the Rumeli Building and were likewise *“not packaged in any way”* (Tr 402:19-402:21).

***D. Forensic analysis of the documents produced by the Claimant***

349. Pursuant to the Respondent’s document request, the Tribunal, on 1 May 2008, ordered the Claimant to produce several categories of documents upon which the Claimant’s claim was based for examination. On 2 June 2008, the Claimant produced, among other things, the following photocopied documents:

- (a) the Instrument of Transfer purportedly reflecting the acquisition of Libananco by Mr Türkkan on 1 April 2002;
- (b) the 32 STAs relating to the ÇEAŞ and Kepez share certificates allegedly purchased by Libananco from Kemal Uzan, Hakan Uzan and Ayşegül Uzan between 30 October 2002 and 15 May 2003;
- (c) a “Share Acquisition Report” dated 20 May 2003, which likewise reflected that Libananco’s share acquisitions occurred between 30 October 2002 and 15 May 2003;
- (d) Libananco’s board minutes bearing dates from 2002 and 2003, recording the purported transactions in the same range of dates (i.e. between 30 October 2002 and 15 May 2003);
- (e) an unsigned financial statement for the year ending 31 December 2002, allegedly reflecting a shareholder loan by means of which Libananco had paid for the share certificates in question; and
- (f) Libananco’s tax return for the year ending 31 December 2002.

350. By its letter of 9 October 2008, the Respondent subsequently sought production of the originals of the documents produced by the Claimant on 2 June 2008. On 3 November 2008, the Tribunal ordered the Claimant to make the originals of those documents available for forensic inspection in Washington, D.C. The Claimant provided some (but not all) of the originals of the said documents for

inspection by the Respondent's forensic document experts RWL in November and December 2008. These documents were marked and identified as LIB-1 through LIB-119.

351. The Respondent's experts reported their findings on LIB-1 through LIB-119 in a Laboratory Report dated 3 March 2009. The Claimant's forensic document experts in turn filed their respective reports on the same as follows: (i) report of 25 May 2009 by Aginsky Forensic Document Dating Laboratory, Inc.; (ii) report of 22 May 2009 by Lloyd W Cunningham; (iii) reports of 26 May 2009, 1 June 2009, 27 July 2009 and 3 September 2009 by Document Examination Consultants, Inc.; (iv) report of 1 June 2009 by Peter V Tytell; and (v) Declaration of Howard Rile of 27 May 2009. In response to all the Claimant's expert reports on document forensics, the Respondent's experts filed a Second Laboratory Report of 14 August 2009. In further response to the latter, all the Claimant's experts collectively filed a Combined Report of Claimant's Forensic Document Examination Experts of 8 October 2009.
352. Finally, on 31 October 2009, the experts from both sides filed a Joint Report of Forensic Document Experts relating (again) to the documents marked LIB-1 through LIB-119. This report identified general areas of agreement and disagreement organised by category of documents. The categories of documents were as follows:
  - (a) the minutes of directors' meetings and minutes of management meetings bearing dates between July 2002 and October 2002;
  - (b) the Instrument of Transfer bearing the date 1 April 2002;
  - (c) the three letters showing the individual resignations of Mrs Ero Petsa, Mrs Eleni Kyriacou and Mr Polakis Sarris from Libananco's Board of Directors, each bearing the date 1 April 2002;
  - (d) the STAs which bore dates between 30 October 2002 and 15 May 2003; and
  - (e) the share custody invoices (i.e. Exhibit H-60) bearing the date 16 May 2003.

It was acknowledged in the Joint Report of Forensic Document Experts that neither side's experts made any significant forensic findings in relation to LIB-37 through LIB-43 (i.e. the Share Acquisition Report dated 20 May 2003) and LIB-48 through LIB-111 (Libananco's financial statements and tax returns for the years 2002 to 2004), all of which were photocopies and therefore not original documents.

353. Further, on 3 May 2009, Libananco produced (submitted together with the C.CM) copies of purported board and management committee meeting minutes which bore dates spanning from 12 August 2002 to 22 June 2005. In October 2009, the Respondent's experts RWL examined what purported to be originals of 28 such documents, comprising 34 pages in total and similarly marked and

identified as LIB-128 through LIB-161. The Respondent's experts presented their findings on these documents in a supplementary report dated 20 October 2009. The Claimant's experts Dr Valery Aginsky and Mr Peter V Tytell responded to the latter by way of a Response dated 8 February 2010.

354. The principal purpose of the forensic examination was to determine whether the documents in question (i.e. LIB-1 through LIB-119 and LIB-128 through LIB-161) were created on the dates they bore. In addition, the STAs were also examined by the Parties' experts to determine whether or not the signatures on them were genuine. The significance of the extensive forensic examination undertaken by both Parties' experts is that the Claimant's case would be weakened if it was proved that the documents in question (many of which were key to establishing the Tribunal's jurisdiction in these proceedings) were backdated and/or not otherwise created before the critical date of 12 June 2003.
355. The documents in question were subject to a battery of tests by the experts from both sides. However, after the Parties' expert reports were submitted, the Claimant's witness Mr Türkkan gave evidence to the effect that many or all of the documents originally supplied for forensic examination had in fact been reprinted in the period 2005 to 2007.
356. The Tribunal therefore has to consider the forensic analysis of the categories of documents listed in paragraphs 352(a) to (e) and 353 above in the light of this significant admission by Mr Türkkan. It now does so.

356.1 The minutes of directors' meetings and minutes of management meetings which bore dates between July 2002 and 22 June 2005. The Tribunal considers that forensic analysis of these documents did not give any meaningful or conclusive result since Mr Türkkan admitted that these documents were reprinted in November 2005, and that these (i.e. the reprinted documents) were the very documents produced in the arbitration by the Claimant. He further confirmed that the originals of the minutes had either been misplaced or discarded (see paragraph 264 above). Further, in relation to the "A1" minutes (which were likewise examined), Mr Türkkan admitted that these were not only printed and signed but also drafted in 2006 (see paragraph 265 above).

356.2 The Instrument of Transfer dated 1 April 2002. Mr Türkkan, in his First Witness Statement, likewise confirmed that this document was reprinted and/or re-signed by him sometime in 2007 (see paragraphs 240.2 to 240.4 above). Further, both Parties' experts agree that the Instrument of Transfer could not have been produced until 2007, owing to the presence of a counterfeit protection security code found in the colour toner used to print this document.

356.3 The resignation letters of Mrs Ero Petsa, Mrs Eleni Kyriacou and Mr Polakis Sarris from Libananco's Board of Directors, each dated 1 April 2002. The Parties' experts had relatively little to say about these documents. The findings in respect of these documents were not addressed or mentioned in the Joint Report of Forensic Document Experts.



The Tribunal does not consider that significant or helpful conclusions can be drawn from the forensic evidence relating to these documents.

356.4 The STAs which bore dates between 30 October 2002 and 15 May 2003. Mr Türkkan likewise admitted that the STAs were reprinted in November 2005 (see paragraphs 264 and 264.1 above). Although it is not clear whether *all* of the STAs that were subject to forensic examination were reprinted, Mr Türkkan's evidence suggests that at least *some* of the latter were printed (or reprinted) in 2005. Unsurprisingly, therefore, both Parties' experts were able to agree on, among other things, the following matters (all of which are not inconsistent with the fact that a number of the STAs were printed after the dates that appeared on the face of those documents).

- (i) Seven of the 32 STAs produced by the Claimant were all stamped sometime after 14 February 2005, based on the presence of a transitory defect in the stamp impressions, and letters from the manufacturer and distributor of the stamp pad.
- (ii) Ink transfer was present on the back page of 29 of the 32 STAs (i.e. inked areas visibly similar in colour to the "Libananco" stamps on the front page of the documents), indicating that these STAs could have been in contact with each other shortly after the "Libananco" ink stamps were applied.
- (iii) Although impression evidence alone could not establish the specific dates on which the STAs were signed (by either the seller or the buyer) or otherwise prepared, it was capable of establishing the order in which the documents were signed, and could determine if the order was consistent with the dates which appeared on the documents. The impression evidence in this case was a basis for the following conclusions:
  - (1) thirteen of the STAs which bore dates earlier than 15 May 2003 were "*probably*" signed sometime *after* the STA dated 15 May 2003 was created;
  - (2) two of the STAs which bore dates earlier than 13 May 2003 were "*probably*" signed sometime *after* the STA dated 13 May 2003 was created;
  - (3) three of the STAs which bore dates earlier than 6 May 2003 were "*probably*" signed sometime *after* the STA dated 6 May 2003 was created;
  - (4) two of the STAs which bore dates earlier than 17 April 2003 were "*probably*" signed sometime *after* the STA dated 17 April 2003 was created; and

- (5) one STA which bore a date earlier than 17 April 2003 was “probably” signed sometime *after* the STA dated 17 April 2003 was created.

356.5 The share custody invoices dated 16 May 2003. The Parties’ experts had relatively little to say about these documents. In any event, the Respondent’s experts RWL observed that these documents were photocopies. The observation was not contradicted by the Claimant’s experts. The Tribunal does not consider that significant or helpful conclusions can be drawn from the forensic evidence on these documents.

357. The other documents provided to each Party’s document forensic experts (i.e. the Share Acquisition Report dated 20 May 2003 and Libananco’s financial statements and tax returns for the years 2002 to 2004) need not be considered by the Tribunal for present purposes since these were also not original documents, the consequence of which was that both Parties’ experts made no significant forensic findings in respect of these documents.
358. Given these circumstances, the Tribunal considers that, despite the high professional quality of the experts’ work, the forensic evidence provides little assistance on the central issue of whether Libananco acquired shares in ÇEAŞ and Kepez before 12 June 2003. Accordingly, the Tribunal finds that it is unnecessary to make any further determination in relation to the forensic document evidence.

***E. Forensic analysis of the floppy disks produced by Mr Türkkan***

359. In the course of the hearing, in June 2009, the Claimant produced eight floppy disks that Mr Türkkan allegedly used to backup the STAs and other corporate documents. The Claimant sought to rely on the metadata associated with the electronic versions of the documents stored on the floppy disks as proof that the documents in question were created on or before the dates they bore on their face (and hence were not backdated).
360. These floppy disks contained: (i) the STAs; (ii) the model agreement based on which the actual STAs were drafted; (iii) Libananco’s corporate minutes as well as (iv) a series of faxed documents which were intra-family agreements. The Claimant submitted that the category of documents (i) to (iii) were backup files which were stored on the floppy disks. The last category of documents discovered on the floppy disks (i.e. the faxed documents) were deleted files recovered in the course of forensic examination. The intra-family agreements were those that, according to Hakan Uzan, were executed in order to accomplish the internal transfers of shares within the Uzan family prior to any transfer of shares to Libananco (see paragraphs 210 and 211 above).
361. The floppy disks were subject to examination by the Claimant’s forensic experts Stroz Friedberg and Mr Eoghan Casey, and by the Respondent’s forensic experts Curtis W Rose & Associates.

362. The Claimant made the following submissions, based on the forensic analysis of the floppy disks.

362.1 Metadata associated with the electronic versions of the STAs and Libananco's minutes constituted proof that the STAs and minutes were created on or before the date they were signed (hence the STAs were not backdated). In other words, its experts found affirmative "*evidence of authenticity*" on the files stored on the floppy disks, suggesting that the STAs were created in 2002 and 2003, and that Libananco's minutes were created over the period 2002 to 2005 (i.e. the dates that appeared on the face of the documents produced in the arbitration).

362.2 If the floppy disks contained fraudulently backdated documents, a computer forensics expert would be able to identify significant traces of backdating. The Claimant's experts found no such evidence and, indeed, their findings were to the contrary.

362.3 Additional evidence of the authenticity of the files on the floppy disks came in the form of 16 deleted faxes that had been sent in April 2003, saved to one of the floppy disks and then subsequently deleted. The deleted faxes contained information in the fax headers showing the date and time they had been sent, and these were consistent with the file system metadata (and/or other data) relating to those files as well as the dates which those documents bore. This was significant evidence of authenticity of the deleted faxes since the date and time information came from an independent source (i.e. the fax headers).

362.4 The Claimant's experts found that many of the documents discovered on the floppy disks revealed characteristics that were typical of what one might expect to see in documents that were created, used and edited in real time over an extended period ("Pattern of Use Evidence"). The Pattern of Use Evidence showed the authenticity of those documents since such changes had to be made manually by a person over time, and could not have occurred as a result of some automatic process.

363. On the other hand, the Respondent argued that the floppy disks contained anomalies consistent with backdating, and made the following submissions, based on the forensic analysis of the floppy disks.

363.1 The only way to know for certain whether the documents on the floppy disks were backdated was to examine the source computer which was used to create, store, edit, print or produce the electronic files on the floppy disks. However, since Mr Türkkan, by his own admission, intentionally destroyed or abandoned his computers, the Tribunal should infer that the electronic documents stored on the floppy disks were not authentic.

363.2 There was an anomaly on Floppy Disk 1 which the Claimant's experts concede was consistent with intentional backdating. The disk contained metadata which indicated that no file activity took place after 15 April

2002, but yet the disk contained a deleted file with associated metadata which indicated that the file was saved to the disk six months later (on 24 October 2002).

363.3 There was an anomaly on Floppy Disk 7. This disk contained two types of files: template STAs and the deleted fax files. The metadata associated with the deleted faxes showed that they were saved to the disk on 4 April 2003, whilst that of the template STAs showed that they were saved to the disk on 7 April 2003. An analysis of the metadata and the root directory structure of the disk showed that, consistent with normal computer operations, the deleted fax files should have been overwritten by the template STAs, which were saved later in time, but this was not the case.

363.4 The Pattern of Use Evidence referred to by the Claimant could have been easily manipulated to create a false impression of normal use.

363.5 The Claimant's argument that the deleted faxes were authentic documents on the basis that the fax headers independently confirm the time at which they were faxed is flawed. This was because fax headers can be backdated. The Respondent's experts were able to create a backdated fax for demonstration purposes, with header and metadata information matching those found on Floppy Disk 7.

364. In addition, the Respondent raised the following issues in relation to the floppy disks themselves.

364.1 The belated appearance of the floppy disks in these proceedings was suspicious since they were only disclosed in 2009, although they should have been disclosed in 2008 (assuming that the disks had existed at that time).

364.2 The Claimant's explanations regarding the provenance of the floppy disks undermined their authenticity.

365. The experts on both sides produced a Joint Report of Computer Forensics Experts dated 27 October 2009 pursuant to the Tribunal's Procedural Order dated 8 July 2008, setting out the areas of agreement and disagreement.

366. The Tribunal observes that the experts on both sides were able to agree on, among other things, the following propositions.

366.1 Floppy disks represent only a snapshot in time of the lifecycle of questioned documents. It would be preferable to have access to the computers used to create, edit and/or store the documents because they would provide access to external reference points and could reveal important information concerning the lifecycles of the documents.

366.2 Although anomalies can be identified in the absence of the originating computer system(s), the original systems could reveal additional

information that would indicate alteration or manipulation of the files in a data set such as the floppy disks. (In addition, the Claimant's experts submitted that the originating computer system(s) would also be able to reveal additional information indicating the authenticity of the files examined.)

366.3 When a computer is available, validating the accuracy of the computer clock is an important step in assessing the authenticity of electronic files like Microsoft Word and Microsoft Excel documents because the computer clock can be incorrect.

366.4 It is possible to fabricate a backdated floppy disk with no anomalies.

367. In addition, the Parties' experts made the following observations.

367.1 The Claimant's experts submitted that no evidence was found that negated the authenticity of the files on the floppy disks or proved that the files were backdated. The Respondent's experts' position was that Floppy Disks 1 and 7 both had anomalies *"that [could] be explained by backdating"*.

367.2 The Claimant's experts submitted that the anomalies on Floppy Disk 1 could be the result of backdating, but they could also occur in the absence of backdating. With the available evidence, it was not possible to determine definitively whether the anomalies on Floppy Disk 1 were the result of backdating or the result of normal user activity. The Respondent's experts' position on this point was that without the originating computer(s), *"a significant amount of evidence that could prove backdating was unavailable for forensic examination"*.

367.3 The Claimant's experts submitted that, for each of the sixteen deleted fax files, the date and time information on the fax header and that of the file system metadata were from independent sources, yet both reported the same date. The Respondent's experts' reply was that the fax header information *"could easily be manipulated during a backdating process"*.

367.4 The Claimant's experts submitted that the Pattern of Use Evidence referred to above is common when people are creating, editing and formatting digital documents over time during the normal course of business. In the case of the floppy disks, these showed clear and compelling behavioral usage patterns typical of documents which were created and modified over time during the normal course of business. The Respondent's experts' position was that:

*"Patterns of use such as small document changes may or may not be normal characteristics for this data set. As such, they may or may not support the authenticity of the dataset. In addition, such patterns could be reproduced by an operator engaged in creating a backdated dataset"*.

368. However, the computer forensics experts on both sides had diametrically opposed views in relation to the following statement posed to them: “*It would be difficult to fabricate a realistic set of backdated documents like those on the Floppy Disks*” (Joint Report of Computer Forensics Experts dated 27 October 2009, p 9).

368.1 The Claimant’s experts’ view was as follows:

*“Agree. It would have been difficult to fabricate a realistic set of backdated documents like those on the Floppy Disks. For example, it would have been necessary to change the computer clock date alone more than 30 times, in such a way to coincide with external events in the past. In addition, to fabricate just the Share Transfer Agreement spreadsheets, it would have been necessary to resize column widths, reset margins, reset print areas, change certain cell colors, change certain cell alignment [sic], change certain label names and change certain descriptor labels. Furthermore, it would have been necessary to independently configure a fax machine to send the documents to a computer running the WinFax application. Finally, this was all completed with a relatively small number of date discrepancies compared with a large number of consistencies”.*

368.2 The Respondent’s experts’ view was as follows:

*“Disagree. Fabricating a realistic set of backdated documents like those on the floppy disks would not be difficult, given proper planning and resources. **The dataset is not a replication of an actual dataset, so there is no established baseline for comparison, making the fabrication much easier, especially considering the fact that the external reference points, e.g. the originating computer(s), are not available.** Finally, areas presented as complex, such as the referenced “consistent date relationships” from the deleted carved files, are actually the byproduct of the creation process. As the dataset grows larger, it may become a more complex undertaking to backdate; however, with only the external media (the floppy disks) for review, the dataset actually becomes eight independent datasets that **can potentially be fabricated without difficulty.** Combining the eight datasets and corresponding relationships, with proper planning and preparation, **may potentially be accomplished** without any particular difficulty (especially considering that there is no baseline or reference point)”.*

(emphasis added)

369. Based on the expert reports submitted by both Parties, the Tribunal is able to arrive at the following views.

369.1 Although the Respondent’s experts submitted that there were anomalies on Floppy Disks 1 and 7, they were unable to provide any concrete forensic evidence to substantiate the allegations of backdating.

The position of the Respondent's experts was merely that the anomalies identified could be the result of backdating, but may not necessarily have been so. This is not an affirmative conclusion and the Tribunal is unable to accept it as such.

369.2 In relation to the fax headers, the Respondent's experts likewise submitted that they could have been manipulated, but this may not necessarily have been done as there was no forensic evidence either way.

369.3 In addition, the causal link or relationship between the existence of the anomalies in question and the backdating of documents on the floppy disks has not been clearly established by the experts on both sides. This is especially so since both Parties' experts agreed that it was possible to create backdated documents on floppy disks with no anomalies.

369.4 Further, since both Parties' experts agreed that: (i) the floppy disks represented only a snapshot in time of the life cycle of the documents in question and (ii) it was impossible to be certain of whether the documents on the floppy disks were backdated without having had the chance to examine the source computer(s) used to create, store, edit, print or otherwise produce the electronic files, the Tribunal considers that it should be slow, in the absence of objective forensic evidence either way, to conclude (as the Respondent has suggested) that the documents on the floppy disks had been backdated.

370. On this basis, the Tribunal finds that the computer forensic evidence is not conclusive of the issue of when the documents stored on the floppy disks were created or otherwise accessed.

371. Further, the Tribunal observes that the electronic versions of Libananco's minutes and the STAs stored on the floppy disks were unsigned soft copies. This being the case, even if the files on the floppy disks were not backdated, they can only, at best, be evidence of when the documents were electronically created or otherwise accessed on the source computer(s), and are therefore not evidence of when those documents were actually signed and/or executed.

372. For all the foregoing reasons, the Tribunal finds that, despite the high professional quality of the experts' work, the computer forensic evidence is of limited assistance in determining whether the documents in question (i.e. those set out in paragraph 360 above) were backdated. Consequently, the Tribunal declines to give further consideration to the electronic files stored on the floppy disks.

***F. Audio evidence: admissibility of Exhibits R-113 and R-771***

373. The Respondent tendered, and sought to admit as evidence, transcripts of selected portions of audio recordings of telephone conversations between Hakan Uzan and Cem Uzan. The first was Exhibit R-113 (the alleged transcript of a telephone call on 16 August 2004) and the second was Exhibit R-771 (the alleged transcript of a telephone call on 8 October 2004).

374. The Respondent contended that these recordings of conversations which took place between Cem Uzan and Hakan Uzan were legitimate as they were authorised under Turkish law. The Respondent submitted that Cem Uzan and Hakan Uzan were proper subjects of criminal investigation. The conversations at issue formed part of an extensive set of recordings (551 in total) intercepted by the Respondent over a period of months and contained on 21 CDs.
375. The contents of Exhibits R-113 and R-771 are prejudicial to the Claimant's case. In addition, the Tribunal accepts the Claimant's submission that the transcripts in question (i.e. Exhibits R-113 and R-771) appeared, on their face, to be an incomplete account of the conversations they purported to transcribe and further that they were transcribed by the Respondent's agents. The Tribunal also observes that the transcripts were in English, but the telephone conversations so transcribed were (according to the transcripts themselves) conducted in three languages (i.e. English, German and Turkish). The Respondent's own witness Ahmet Teke (of the Turkish National Police) admitted that the transcripts included only portions of the conversations relevant to the investigations being carried out. The Claimant therefore contended that the transcripts in question violated the common law rule of completeness with respect to evidence (which requires evidence to be considered in context and, in cases where only part of a record is presented, for the whole of the record in question to be examined if necessary).<sup>11</sup> In any event, the Claimant's witnesses Cem Uzan and Hakan Uzan disputed the authenticity of the transcripts.
376. For the foregoing reasons, the Tribunal considers that Exhibits R-113 and R-771 may only be admitted as evidence in these proceedings if the Tribunal is satisfied that they were accurate transcriptions of actual telephone recordings.
377. The Claimant's forensic audio expert Bek Tek LLC (whose senior forensic examiner Mr Bruce E Koenig testified ) examined a CD containing the audio recording of the telephone conversation which allegedly related to Exhibit R-113. The Respondent's forensic audio expert Audio Forensic Center (whose associate Dr Durand R Begault testified in these proceedings) had before it for its analysis the complete set of 551 audio recordings spread over 21 CDs (as described above).
378. It is necessary (for reasons which will soon become apparent), before delving into the technical issues and expert evidence, to state the provenance of the audio recordings in question. In this regard, the Witness Statement of the Respondent's witness Serkan Gerçel dated 11 August 2009 stated as follows:

*“... I have been working at the National Intelligence Organization of the Republic of Turkey (NIO) since 1996.*

...

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<sup>11</sup> The Claimant relies on rules of evidence in Canada and the USA as legal authority for this proposition, but acknowledges that the Tribunal is neither bound by nor required to consider domestic rules of evidence.



*The satellite interception system (Technical System) that was installed at the NIO at that time automatically recorded the communications it detected on the telephone numbers entered into the System. It automatically recorded the called and calling numbers, the starting and ending date and time of the calls, and other identifying information. The Technical System did not allow any interference by an operator in the recording process.*

...

*In this case, since the call recordings would be transmitted to a user outside the organization, once the Technical System created the audio files, I burned the files onto a CD or CDs using the computer on the same network as the Technical System that I used. I assigned names to the files contained in these CDs in a systematic manner. **When I burned the file of a conversation onto a CD, this audio file was deleted from the Technical System...** the CDs at issue were then transmitted in a closed envelope to the representative designated by the General Police Directorate (GPD).*

...”

(emphasis added)

379. The Claimant’s position was that the transcripts should not be admitted as evidence because the underlying recorded conversations were not authenticated. According to the Claimant, this was because the “original” file could no longer be accessed. In this regard, the Claimant’s expert witness Mr Koenig deposed in his Witness Statement of 18 June 2009 as follows:

*“It is impossible to authenticate this conversation without access to the recording(s) in their original, native system format. This is required for a proper scientific analysis of the recording(s) in context with other voice data and metadata that was written by the system just before, during, and just after the designated conversation; such information would not be retained when converted and written to a CD.*

*... The only way to authenticate this conversation would be to examine the recording as stored in the system used by NIO [i.e. Turkey’s National Intelligence Office], using the software NIO used to record and store it. **A CD copy of the conversation in isolation is incapable of permitting authentication of the conversation, since a CD would not contain the related data and metadata necessary to verify that the recording has not been altered in any way”.***

(emphasis added)

380. On the other hand, the Respondent’s position was (necessarily) that the audio recordings underlying the transcripts in question were authentic. Its expert

Audio Forensic Centre stated in its report of 14 August 2009 that (at paragraph 63):

*“we conclude that it is highly likely that the 551 audio files of the Main Set of Recordings – including the recordings of the calls made on 16 August and 8 October 2004 – are unaltered recordings of contemporaneous events”.*

The methodology of the Respondent’s expert was set out in its report (at paragraph 2):

*“Audio Forensic Center was asked to investigate forensically whether the recordings of the conversations were consistent with an unaltered record of contemporaneous events. **To do this, we inspected sound file metadata (complementary digital data associated with the sound files), considered external corroborative information and records and in some cases performed audio forensic analysis on the sound files themselves. Our techniques included:***

- ***Comparison between metadata and sound file duration;***
- *Analysis of the consistency of indicated satellite telephone system data;*
- ***Comparison of external telephone records and metadata for dialed telephone number;***
- *Analysis of the consistency of the main features of the audio data (e.g., sample rate, encoding, and number of channels);*
- *Over selected files, waveform analysis and critical listening; and*
- *Between files that should logically be identical, MD5 checksum analysis”.*

(emphasis added)

381. The principal difference of opinion between the experts from both sides was the issue of whether the audio recordings in question could be examined forensically, independent of the device used to create the recording, allowing experts (as a result of that analysis) to draw conclusions on the integrity of those audio recordings. The positions of the respective experts on this key issue as stated in the Joint Report of Audio Experts (paragraph 19) are set out below:

*“(a) Begault [Respondent’s expert]: AGREE. First, the recordings can be analyzed for signs of tampering or alteration. Begault 1st, ¶ 4, Begault 2nd, ¶ 19. Second, they can be analyzed for consistency with extrinsic evidence. Begault 2nd, ¶¶ 51-53. Third, conclusions can be drawn concerning whether or not the recordings are consistent with an unaltered record of contemporaneous events. Begault 2nd, ¶ 2. As a*

*result, an audio forensic expert can opine on the likelihood of alteration based on a collection of observed facts and using scientific procedures. Begault 2nd, ¶ 20.*

*(b) Koenig/Lacey [Claimant's expert]: Disagree. As already explained in great detail above and below in this document and in the BEK TEK LLC Laboratory Report of September 21, 2009, the converted copies on the Main Set of CDs and the R-113 disc can never be scientifically authenticated since they are not original. Concerning the recording system used by the Turkish Intelligence Agency (which would only be helpful if the original recordings were available): if at all possible, the digital authenticity examinations of logging systems should be conducted on the original or an identical recording system with the same proprietary software, and the original audio and metadata re-installed from a direct backup system. Logging systems almost always use proprietary file formats, compress the audio information to save space, record the digital data with small time segments of audio input from different sources being recorded in a continually interleaved process, and have one or more separate metadata files or tables cataloguing the locations of all the audio input segments. Such systems then use their proprietary software to locate the audio information for a particular recording, such as a telephone conversation, from its many small segments and then convert them to a continuous recording in a more standard audio file format. **This conversion does not provide any of the system information regarding the segmented recordings or any of the other audio data interspersed within the pertinent conversation from other audio signals. Additionally, not all of the descriptive metadata may be included in the new file format, either due to the software instructions or limitations on the metadata configuration in the new format. If an authenticity examiner does not have access to the original recorded audio and metadata of such systems, it is impossible to verify that the audio and metadata information is accurate, complete, and unaltered.***

...

*While it is true that some individuals may “draw conclusions regarding [the] integrity” of converted copies, this method of examination and any conclusions drawn from such analyses have no scientific support in peer-reviewed, published literature and “best practices” documents, and is not an accepted practice among properly-trained examiners in the field.*

...”.

(emphasis added)

382. Both Parties' experts were able to agree on a Joint Report of Audio Experts dated 27 October 2009. Based on that joint report, the Tribunal observes that both Parties' experts were able to agree on the following facts and/or

propositions (with additional comments from the Claimant's experts where elaboration was necessary).

382.1 The original recordings (i.e. those produced directly by and onto the recording system during the actual telephone conversations) no longer existed. (However, the Tribunal notes that the definition of an "original" recording was disputed).

382.2 The audio recording underlying Exhibit R-113 could not be scientifically confirmed as being "bit-for-bit" copies or clones of the original recordings. (The significance of this statement is as follows; the Claimant's experts accepted that, if the recording was found to a "bit-for-bit" copy or clone of the original, then conclusive authenticity results could still be obtained even though the original was not subject to forensic examination.)

382.3 The embedded metadata and file names for the audio recording relating to Exhibit R-113 could be altered without detection. In that regard, the Claimant's expert submitted that metadata and file names:

*"can be altered independently or in concert, as appropriate, without leaving traces of the alterations. These alterations include, but are not limited to, modifying the metadata and file name to reflect a different telephone number as the receiving or initiating party, and modifying the metadata and file name to reflect a different date or time of the conversation".*

382.4 Metadata produced by an operating system for a particular file could be modified through common functions (moving or copying the file to another place on the hard drive or copying the file to a CD), or through the use of third-party software.

382.5 The dates and time assigned by the operating system to a particular file may not have been the time during which the alleged conversations actually took place. Furthermore, the accuracy of the assigned dates and times were limited to software settings and the accuracy of the clock of the computer which had assigned those dates and times.

382.6 The audio data for the recording underlying Exhibit R-113 could be altered without detection. In addition, the Claimant's experts had the following comment:

*"These alterations include, but are not limited to, removing portions of the audio recording while maintaining the duration of the file by muting select portions of one party to the other".*

382.7 The audio data for the recording underlying Exhibit R-113 contained numerous portions of audio samples having zero amplitude, referred to as digital "0s". According to the Claimant's experts, the presence and

significance of digital “0s” could be explained in the following way (paragraph 2(c) of Bek Tek LLC’s report of 21 September 2009):

*“To save storage space, these systems often do not record low-amplitude audio information during the original recording process. Then when the original recordings are exported as converted audio files, the system adds digital “0s” to the unrecorded portions, which are within and between segments of speech or other audio information. **These unrecorded portions in the converted audio copies can then be used not only for easy editing, as noted above, but these dropout areas can also be shortened or lengthened to cover up various editing processes.** For example, if four seconds of speech were removed during an editing process, then digital “0s” could be added to a number of locations within the file to make up for the four second loss”.*

(emphasis added)

The Claimant’s experts therefore made the following comment (in paragraph 17(a) of the Joint Report of Audio Experts):

*“As demonstrated in the BEK TEK LLC report dated September 21, 2009, audio information can be removed through a muting process, which would leave absolutely no artifacts and would be indistinguishable from any of the digital “0” portions introduced by the recording process. Other forms of alterations to the audio information can be performed in a similar manner”.*

382.8 Taken in their totality, 56.30 per cent of the audio samples contained in the recording underlying Exhibit R-113 were digital “0s”.

383. The Tribunal makes the following findings in relation to the audio recordings underlying Exhibits R-113 and R-771.

383.1 Neither of the Parties’ experts was able to confirm that the audio recordings in question were authentic, since the original recordings or “bit-for-bit” clones of the original recordings were not available for forensic examination. In that regard, the Respondent’s experts were able to say no more than that the audio recordings in question were *“highly likely... [to be] unaltered recordings of contemporaneous events”*.

383.2 The method of forensic analysis adopted by the Respondent’s experts was highly dependent on an examination of the file metadata and a comparison between the file metadata and external records (e.g. telephone records). This is significant because file metadata can be altered without detection (both Parties’ experts agree that this is the case). The Tribunal accepts the evidence of the Claimant’s experts that the file metadata could be altered without detection to change the telephone number and the date and time of the telephone call. Accordingly, the Tribunal considers that it is unsafe to rely on the metadata associated with the audio files as evidence of the authenticity of the recordings. To the extent that the

Respondent's experts relied on such analysis to reach their conclusions, such findings are discounted by the Tribunal.

383.3 Importantly, both Parties' experts agreed that the audio data itself for the recordings in question could be altered without detection.

383.4 Although the Tribunal considers that the combination of factors set out above provides a sufficient basis for it to arrive at a conclusion as to the non-admissibility of Exhibits R-113 and R-771, a further reason for the rejection of Exhibit R-113 is that 56.30 per cent of the audio samples contained in the recording underlying Exhibit R-113 were digital "0s" (that recording was thus susceptible to alteration and modification). The Tribunal considers that (in the absence of an examination of the original underlying recording, which both Parties accepted no longer exists) this significantly reduces the probability that the recording underlying Exhibit R-113 was authentic.

384. Given the prejudicial nature of the contents of Exhibits R-113 and R-771, and in the light of the factors set out above, the Tribunal concludes that it would be unsafe to admit those exhibits as evidence in these proceedings. Exhibits R-113 and R-771 are accordingly not admitted.

***G. Requirements for a valid transfer of ownership under Turkish law***

385. At the heart of this dispute is the issue of whether Libananco acquired ownership of the share certificates in question before 12 June 2003. The issues are therefore whether the following acts alleged by the Claimant were effective (under Turkish law) to transfer ownership of the shares in question from members of the Uzan family (specifically, Kemal Uzan, Hakan Uzan and Ayşegül Uzan) to Libananco:

(a) Hakan Uzan's telephone call to Mr Türkkan in April 2003, informing the latter of (among other things) the transfer of ownership of the share certificates located in Switzerland to Libananco;

(b) the inspection and/or acceptance of delivery of the share certificates located in the Rumeli and Doğu Buildings by Mr Çiğgin on 15 May 2003; and

(c) the inspection and/or acceptance of delivery of the share certificates located in İkitelli by Hakan Uzan on 15 May 2003.

386. Accordingly, the Tribunal will now examine the law in relation to transfer of bearer share certificates to determine whether any or all of the acts alleged were sufficient to transfer ownership of the share certificates to Libananco.

387. It is undisputed that the ownership of bearer share certificates under Turkish law is collectively governed by the Turkish Commercial Code and the Civil Code. The Parties' position on the various requirements for a valid transfer of ownership of the bearer shares (i.e. the share certificates) was as follows.

- 387.1 Agreement to transfer ownership: It was agreed that the parties to the agreement must understand and agree that the purpose of the transfer of possession is to transfer ownership from the transferor to the transferee. However, the Respondent submitted that the Claimant had no written proof that this requirement has been satisfied. The Claimant submitted that this requirement had been fulfilled through the conclusion of the 32 STAs which were presented to the Tribunal.
- 387.2 Right of the transferor: The Parties were agreed that the transferor must have the right to dispose of the share certificates being transferred, i.e. the right to transfer ownership. The Respondent alleged that this requirement was not fulfilled because the Claimant had not shown that the purported transferors of the shares to Libananco owned shares corresponding to the quantity he or she allegedly transferred to Libananco. The Claimant's response was that: (i) the Respondent's allegations were wrongly based on ÇEAŞ and Kepez dividend payouts because of the Respondent's erroneous assumption that, within the Uzan family, such dividends were received in proportion to each individual's shareholding; and (ii) there were, in any event, intra-family agreements discovered on Mr Türkkan's floppy disks (as deleted faxes) which showed how each transferor obtained many of the shares in ÇEAŞ and Kepez that he or she eventually transferred to Libananco.
- 387.3 Teslim (i.e. transfer of possession or delivery of the property): The Parties were agreed that there must be transfer of possession before the rights associated with ownership of the share certificates will accrue to the transferee of such shares. The respective positions of the Parties on this issue are set out in paragraphs 390 to 394 below.
- 387.4 Cause: The Respondent submitted that the Claimant is also required to establish that there was a valid legal cause for the transfer, i.e. *causa*. The Claimant did not accept that *causa* is a requirement for a valid transfer of ownership under Turkish law. However, the Claimant submitted that, even if such a requirement exists, it had been fulfilled on the facts since Cem Uzan's evidence (as appears from both his Witness Statements) is that the purpose of the transfers of shares to Libananco was to provide it with a viable asset base.
- 387.5 Documentation in writing: The Respondent further submitted, among other things, that to establish its ownership, the Claimant would have to show that the alleged deliveries of ÇEAŞ and Kepez share certificates to Libananco in April and May 2003 respectively were proved by a written instrument (since, under Turkish law, legal transactions with values exceeding 40 million liras have to be proved by a written instrument). The Claimant's position was, among other things, that the Respondent's contention is incorrect, and that the Claimant's possession of the share certificates themselves is sufficient proof of both delivery and ownership.

388. The Respondent submitted that, under Turkish law, all the above requirements had to be met in order to effect a valid transfer of ownership.
389. Although the Parties disagreed as to whether each of the above elements had been fulfilled (or, in the case of *causa* and documentation in writing, needed to be fulfilled in the first place), the central battleground in the present case was the issue of transfer of possession or *teslim*. In that regard, the Claimant did not dispute that it would have failed to establish that the shares were validly transferred to Libananco if this requirement was not met.

### **1. The Claimant's position on *teslim***

390. Article 977 of the Turkish Civil Code states as follows:

*“Possession must be transferred by delivery of the thing; or delivery of the means of control over the thing to the transferee; or when the transferee gains the right of control over the thing with the previous owner's consent”.*

391. Article 570 of the Turkish Commercial Code states as follows:

*“All commercial paper will be accepted as bearer shares as long as it is clear from the text or format of the paper that the possessor is the one who is entitled to the rights relating to the share”.*

392. The Claimant acknowledges that, only after delivery of the bearer share certificates to the transferee, can the transferee claim rights *vis-à-vis* the company or a third party. In this regard, it cites Article 415 of the Turkish Commercial Code: *“Transfer of bearer shares to the holder can have effects vis-à-vis the company and third parties only after their delivery”*. It further agrees that the transferee lacks actual ownership (including the right to defend against third parties who might claim ownership of the share certificates) until such time as delivery occurs.
393. The Claimant's position is that the possession of the share certificates themselves is sufficient proof of delivery to Libananco and hence also proof of Libananco's ownership in respect of those share certificates. According to the Claimant, this is because the question of whether delivery had been accomplished under Turkish law is a question that was bifurcated to the merits phase of this arbitration (on the basis that if it were to be unable to prove its ownership of *all* the share certificates it claimed to own, this would simply reduce the amount of damages it would be entitled to recover). The Claimant therefore submitted that the fact of Libananco's possession of a substantial number of *bona fide* share certificates (acquired before 12 June 2003) was sufficient to demonstrate ownership for the purpose of establishing the Tribunal's jurisdiction – regardless of how they were acquired, including whether there was a valid transfer of possession or *teslim* under Turkish law. Its position on this point is set out more fully in paragraphs 146 above.



## 2. The Respondent's position on *teslim*

394. The Respondent's position was follows.

394.1 Article 415 of the Turkish Commercial Code (which the Claimant agreed was applicable) provides: "*Transfer of bearer share certificates is enforceable vis-à-vis the company and the third parties only upon delivery thereof*".

394.2 Bearer share certificates are a type of negotiable instrument and are therefore also subject to Article 599/I of the Turkish Commercial Code: "*For the transfer of a negotiable instrument for the purpose of creating ownership or another real right, transfer of possession of the instrument is compulsory in any event*".

394.3 A bearer share certificate is movable property and Article 763/I of the Turkish Civil Code provides as follows: "*Transfer of possession is required for transfer of ownership of movables*".

394.4 In accordance with these provisions, the Claimant must prove that the share certificates were delivered and that there was a transfer of possession.

394.5 Article 973/I of the Turkish Civil Code defines possession as follows: "*A person who has physical control over something is the possessor thereof*". Accordingly, delivery or *teslim* may only be accomplished by handing property from the transferor to the transferee physically.

## 3. The Tribunal's analysis on the requirement of *teslim*

395. Article 763 of the Turkish Civil Code states provides as follows: "*Transfer of possession is required for transfer of ownership of movables*".

396. Articles 973/I of the Turkish Civil Code defines a possessor as the person who has physical control over the property in question (see paragraph 394.5 above). Article 977 of the Turkish Civil Code further state as follows:

*"Possession will have been transferred upon delivery to the acquirer of the property or the instruments that will confer control over the property or when the acquirer becomes capable of exercising control over the property with the consent of the former possessor"*.

397. The Respondent cited a Turkish treatise, Poroy, Tekinalp and Camoglue, *Law of Companies and Cooperatives (Ninth Edition)* (Exhibit H-448), which states as follows:

*"1113. For the purposes of transfer, possession must be passed with the intention of transferring ownership. BSC is bearer negotiable instrument in the real sense. "Transfer [...] is enforceable vis-à-vis the company and third parties only upon delivery thereof" (Turkish Commercial Code Art. 415). That is to say, for passing ownership,*

***possession of the certificate must be transferred with such intention. We can set out the necessary conditions as follows: 1) Possession must be transferred from the transferor to the transferee: For this, it is not compulsory to become an immediate possessor, but acquisition through an agent, constitutum possessorium, assignment of right to possession and delivery by short hand is also possible; 2) Transfer of possession must be made with the purpose of passing ‘ownership’ to the transferor [sic] and the parties must have agreed thereon. Although such agreement is not mentioned in Article 763 of Turkish Civil Code, in the civil law doctrine, it is stated that the agreement is essentially inherent in the transfer of possession. (Oguzman/Selici, Esya Hukuku (Law of Properties, p. 645 and those cited therein). This is because, unless a person acquires something with the intention of becoming the owner thereof, he does not become the owner. Moreover, Turkish Commercial Code expressly provides for this factor. In Article 599/1 of [the] Turkish Commercial Code, it is stated as “...transfer of a negotiable instrument for the purpose of creating ownership...” 3) The person passing the possession must be authorized to transfer the ownership. This is the rule. In principle, those lacking such authority cannot transfer ownership to others...”***

(emphasis added)

398. Based on the above authorities, the Tribunal arrives at the following conclusions.

398.1 A transfer of possession is required for the transfer of ownership of the bearer share certificates. Until such time as a transfer of possession occurs, the purported transferee is not the owner of the property in question, and consequently would not be entitled to claim against third parties in respect of the property.

398.2 Since a transfer of possession is required for the transfer of ownership of property, the bare fact of possession (without more) is insufficient to establish ownership over the property in question.

398.3 Physical control is the crux of possession.

398.4 It follows that the person purporting to transfer ownership needs to have physical control over the property in question in the first place. If the transferor does not have physical control over the property at the purported time of transfer, there cannot logically be a transfer of possession.

398.5 However, it is not necessary for either the transferor and/or the transferee to be immediate possessors of the property sought to be transferred. Each of the following is deemed to constitute a legal transfer of possession:

(a) transfer of possession through an agent (i.e. where the agent transfers or acquires possession on behalf of the transferor or transferee, as the case may be);

- (b) an assignment of the right to possession (i.e. in a situation where immediate possession is exercised by a third party, the transferor, as the indirect holder of the property, assigns his claim for return or surrender of the property to the transferee; alternatively, the transferor directs the third party to exercise possession for the benefit of the transferee; the transferee thereby becoming the new indirect holder of the property, even though immediate possession has not changed);
- (c) *constitutum possessorium* (i.e. where the delivery of the property proceeds on the basis that the transferor and transferee agree that the transferor will continue to hold the property for and on behalf of the transferee); and
- (d) delivery by short hand (i.e. delivery by consent between the transferor and transferee in the case where the transferee has prior possession of the property).

398.6 In respect of the means of transfer of possession set out in paragraphs 398.5 (a) and (b) above, the Tribunal observes that, under Turkish law, indirect possession (i.e. through an agent or third party) and therefore a transfer of indirect possession would be recognised as valid. In other words, it is possible for possession to change by a direction of the owner to his agent or a third party (i.e. the immediate possessor of the property) to exercise immediate possession of the property for the benefit of the transferee (or the transferee's agent).

398.7 However, in all cases, possession must be passed with the intention of transferring ownership in order to effect a valid transfer of possession or *teslim*.

398.8 For the reasons given above, the Tribunal rejects the Claimant's submission that the mere fact of physical possession of the bearer share certificates (at the material time) was sufficient to demonstrate its ownership. The burden is on the Claimant to prove that there was a *transfer* of possession to Libananco before 12 June 2003 of the share certificates it now claims to own.

399. In sum, the Claimant has to prove both *when* and *how* it came to acquire possession and hence ownership of the ÇEAŞ and Kepez share certificates in question. Contrary to the Claimant's submission, this is properly an issue to be addressed in the current phase (i.e. the jurisdictional phase) of this arbitration.

***H. The Tribunal's analysis on whether Libananco acquired timely ownership of the shares in ÇEAŞ and Kepez***

400. Having carefully considered all the relevant factual and expert evidence, the Tribunal now delivers its findings in relation to the various issues relevant to the

question of whether Libananco acquired timely (i.e. before 12 June 2003) ownership of shares in ÇEAŞ and Kepez.

**1. The reasons given by Cem Uzan and Hakan Uzan for their choice of Mr Türkkan to acquire Libananco**

401. Cem Uzan explained at length the reasons for the creation of Libananco – amongst other things, this was to consider his Immediate Family’s future investment strategy in relation to concerns about the Turkish economy as well as the possibility of political reprisal as a result of his decision to enter Turkish politics in early 2002 with the intention of challenging the ruling party. Mr Türkkan was chosen to set up Libananco because he was “*a sophisticated, multi-lingual businessman*” and “*a trusted business associate*”.
402. Hakan Uzan added that Mr Türkkan was a trusted senior executive who had personally worked for him for some five years prior to his acquisition of Libananco.
403. On the Claimant’s case, Mr Türkkan played a central role in matters relating to the acquisition of Libananco and its acquisition of interests in ÇEAŞ and Kepez.
404. However, the picture of Mr Türkkan that emerged was quite different. The Respondent produced an e-mail message from Mr Türkkan’s supervisor, who referred to him in less than flattering terms and recommended that his salary be halved. Although the Claimant’s witnesses Cem Uzan and Hakan Uzan spoke highly of Mr Türkkan in their Witness Statements, they were unable to rebut the fact that Mr Türkkan’s salary was cut by half following a recommendation to that effect from his supervisor.
405. Having observed Mr Türkkan in person, the Tribunal did not find him to be the worldly, sophisticated business person that the Claimant’s witnesses Cem Uzan and Hakan Uzan had represented him to be. For example, when the Tribunal asked Mr Türkkan how he came to choose, on an internet directory, Mr Partellas’ firm over other listed firms, his reason was that this was because Mr Partellas’ firm was on the top of the list. The Tribunal also observes here that Mr Türkkan changed his evidence; he deposed in his First Witness Statement that he located Mr Partellas through *his* website. However, Mr Partellas did not have a website until late in 2002. Mr Türkkan then changed his evidence to say that he found Mr Partellas on an internet directory.
406. The evidence relating to Mr Türkkan’s experience, qualifications and abilities (as well as his demeanour and evidence at the hearing) did not support Cem Uzan’s and Hakan Uzan’s choice of him as a person capable of the duties expected of someone entrusted with the establishment and management of a new offshore company and the acquisition and transfer of investments of several billion dollars. This casts some doubt on the plausibility of the Claimant’s account of how Libananco was acquired or otherwise established and subsequently came to acquire shares in ÇEAŞ and Kepez.

## **2. Mr Türkkan's alleged visit to Cyprus in early April 2002 to undertake work in connection with Libananco**

407. Mr Partellas testified that he first met Mr Türkkan sometime around 1 April 2002 in the lobby of the Cyprus Hilton in Nicosia. This meeting is significant as it is central to Mr Türkkan's alleged acquisition of Libananco in April 2002. One of the pillars on which the foundation of the Claimant's case rests is that Libananco was acquired by Mr Türkkan by way of an Instrument of Transfer dated 1 April 2002.
408. The Tribunal now turns to consider the issue of whether this alleged meeting in fact took place.
409. By way of background, the Tribunal notes that it has been alleged by the Claimant that Mr Türkkan's passport for the relevant period was in the possession of the Turkish authorities. However, this is denied by the Respondent. In any event, the Tribunal did not have the benefit of Mr Türkkan's passport as evidence before it on this important issue. Accordingly, the Tribunal must base its decision on all the other evidence available on the record.
410. The natural starting point is Mr Türkkan's First Witness Statement where he deposed that he first flew to Cyprus in early April 2002 *"on a non-stop Royal Jordanian flight from Amman and stayed two nights at the Nicosia Hilton"*.

### **a) The Parties' submissions**

411. The Parties relied on numerous documents in relation to this issue. These are set out and described below, together with the Tribunal's and/or the Parties' observations (where applicable) on each of them.

411.1 The Respondent submitted a letter from one Mr Stephen Humphreys, Vice President and Senior Counsel of the Legal Department of Hilton International Co. dated 2 September 2009 (Exhibit H-121). That letter stated as follows:

*"a person known as Ali Türkkan stayed at the [Hilton Nicosia Archbishop Makarios III Avenue Nicosia 1516 Cyprus "Hilton Nicosia"] on the following dates (all inclusive) 9<sup>th</sup> November 2005 to 11<sup>th</sup> November 2005; 25<sup>th</sup> November 2005 to 26<sup>th</sup> November 2005; and 29<sup>th</sup> March 2006 to 1<sup>st</sup> April 2006. ... However, we have no record of any person known as Ali Türkkan having stayed at the Hotel in April 2002"*.

At the hearing in November 2009, the Claimant challenged this letter on the basis that it did not specifically state that Mr Türkkan did not stay at the Hilton Nicosia in April 2002. On 10 March 2010, the Respondent's Turkish counsel Mr Aydın Coşar wrote to Mr Humphreys to request confirmation that the Hilton Nicosia possessed records of guests who stayed at that hotel in April 2002, and that these did not include any record of Mr Türkkan having stayed at the Hilton Nicosia in April 2002 (Exhibit

R-1015). On 16 March 2010, Mr Humphreys replied to Mr Coşar confirming that his understanding was correct (Exhibit R-1016).

411.2 The Claimant submitted a letter (printed on Royal Jordanian letterhead) from Mr Moh'd Hashem Murtada (whose designation was the Head of Airport Services Department) dated 1 October 2009 (Exhibit C-242). That letter purported to confirm that Mr Türkkan was a passenger on board a Royal Jordanian flight from Amman, Jordan to Larnaca, Cyprus on 1 April 2002:

*“We have consulted our records and can confirm that Mr Türkkan was a passenger on a RJ flight from Amman to Larnaca Cyprus on 1 April 2002 and took a return flight back to Amman on 3 April 2002. For security reasons, we cannot share with you the internal records confirming this information”.*

411.3 The Claimant submitted another letter (also printed on Royal Jordanian letterhead) dated 22 October 2009 from the same Mr Murtada (Exhibit C-269). Attached to that letter was a report which listed the travel records of Mr Türkkan from 2002 to 2004. Those entries purported to show, among other things, that he left Jordan for the Republic of Cyprus on 1 April 2002 at 9.10 a.m., and returned to Jordan on 3 April 2002 at 11.17 p.m.

411.4 The Respondent submitted a letter dated 4 November 2009 from Mr Hani Kurdi, Legal Advisor at Royal Jordanian (Exhibit R-910). This letter referred to Exhibits C-242 and C-269 above (see paragraphs 411.2 and 411.3 above). Mr Kurdi stated in his letter that: (i) both those documents were neither issued nor authorised by Royal Jordanian; and (ii) contrary to what was stated in Exhibit C-242, Royal Jordanian did not operate a flight on 1 April 2002 to Larnaca, Cyprus. However, Mr Kurdi wrote again on 11 November 2009 to clarify that there was indeed a *“Flight to Larnaca via Beirut (RJ flight number 401) as a special (non-regular) flight”* on 1 April 2002, and further that Exhibit R-910 (i.e. his earlier letter) should be *“disregarded”* as the information there was based primarily on Royal Jordanian’s table of scheduled operations, which did not show special (i.e. unscheduled) flights (Exhibit C-271). Attachment 2 to this letter indicated that Royal Jordanian Flight 401 departed Amman, Jordan at *“1755”*.

411.5 Following from Exhibit C-271 (which stated that the Royal Jordanian flight on 1 April 2002 from Amman to Larnaca was via Beirut), the Respondent requested information from the Rafic Hariri International Airport (*“Beirut Airport”*) through a Lebanese judge on 11 March 2010 (Exhibit R-1017). On 16 March 2010, Mr Daniel El Haibi, the President of the Beirut Airport replied as follows (Exhibit R-1018):

*“We certify that the named Ali Cenk Türkkan or whatever similar name does not appear in the list of passengers who were on board flight 401 of the Royal Jordanian Airline from Amman to Beirut on the 1<sup>st</sup> of April 2002 which landed in the [Beirut Airport] at 18:50 GMT”.*

411.6 In October 2009, the Respondent submitted what purported to be immigration records of Mr Türkkan's various visits to Cyprus (Exhibit R-893). This letter was signed off: "*ANDREAS LEONIDOU... LIEUTENANT*". The earliest entry indicated that Mr Türkkan visited Cyprus from 11 November 2004 to 17 November 2004. The Claimant submitted a letter dated 31 October 2009 written by the same Mr Leonidou (whose designation appeared as the Inspector at the Aliens & Immigration Office of the Republic of Cyprus) stating that Exhibit R-893 (i.e. the earlier document signed by him): "*[did] not constitute an official document of the Republic of Cyprus. ... The entries into computers which relate to arrivals and departures of aliens in the Republic are of a confidential nature*" (Exhibit C-270).

411.7 The Claimant submitted a letter dated 11 November 2009 from one Mr Mohammad Qutashat, Director, Queen Ali Airport Border Control, Airport Police Management Office, Jordan which purported to confirm that one "*Ali Cenk Türkkan ... Turkish Nationality ... passport number 991491*" departed from Queen Ali Airport ("Amman Airport") on 1 April 2002 for Larnaca, Cyprus and returned to Amman Airport from Larnaca on 3 April 2002 (Exhibit C-272). According to Mr Qutashat's letter, Mr Türkkan "*departed through us [i.e. Queen Ali Airport Border Control] on April 1<sup>st</sup> 2002 to Larnaca at 19:35:20 and on April 3<sup>rd</sup> 2002 arrived from Larnaca at 9:28:41*".

411.8 In the R.PHM, the Respondent submitted that the evidence in Exhibit C-269 contradicted that in Exhibit C-271. Specifically, Exhibit C-269 stated that Mr Türkkan left Amman on 1 April 2002 at 9.10 a.m., but Exhibit C-271 purported to show that Mr Türkkan's departure from Amman took place at 5.55 p.m. The Claimant's response was that this could have been a transcription mistake.

#### **b) The Tribunal's analysis**

412. Based on the evidence considered at paragraphs 411.1 to 411.8 above, the Tribunal finds that it has not been rebutted by either Party that Royal Jordanian in fact operated a special (i.e. non-regular) flight from Amman to Larnaca via Beirut on 1 April 2002 ("RJ Flight 401").

413. The Tribunal considers that a significant portion of the documentary evidence set out in paragraphs 411.1 to 411.8 above is conflicting. The Tribunal is thus unable to make any finding, based solely on the documentary evidence above, as to whether Mr Türkkan was on board RJ Flight 401 on 1 April 2002.

414. However, the Tribunal considers that the evidence set out below has probative value in relation to the issue of whether Mr Türkkan travelled to Cyprus on 1 April 2002 to undertake work in connection with Libananco. These are as follows. Where applicable, the Tribunal's findings are also recorded below.

414.1 Exhibit H-9 purported to show that a meeting of Libananco's Board of Directors took place in Nicosia on 1 April 2002. Mr Türkkan, Mr Partellas

and Mr Sarris were all recorded as being present. Although Mr Türkkan deposed in his First Witness Statement that he participated in this meeting by telephone, he gave evidence to the contrary when he was cross-examined. He testified that there was in fact no actual meeting (whether by telephone or otherwise) and that it was a “*paper meeting*”. This about turn in Mr Türkkan’s evidence was corroborated by Mr Partellas’ testimony that no such meeting actually took place on a 1 April 2002. Mr Sarris likewise confirmed that his employees did not attend any such meeting. Whilst not offering any determinative conclusion, this contradiction of Mr Türkkan’s evidence by himself and two of the Claimant’s other witnesses brings into question the reliability of his evidence that he was in fact in Cyprus on 1 April 2002.

414.2 Mr Türkkan testified that he stayed at the Hilton Nicosia on 1 April and 2 April 2002. When he was shown correspondence from Hilton International which stated that it had no record of a person known as “*Ali Türkkan*” staying at the Hilton Nicosia on those dates, his response was: “*I’m not Ali Türkkan, sir ... I’m Ali Cenk Türkkan*”. The Tribunal did not find this explanation persuasive and is thus unable to accept Mr Türkkan’s testimony that he stayed at the Hilton Nicosia in April 2002.

414.3 Only two of the Claimant’s witnesses were able to testify that Mr Türkkan was in Cyprus on 1 April 2002. These were Mr Türkkan himself and Mr Partellas.

414.4 Mr Türkkan deposed in his First Witness Statement that he flew on a Royal Jordanian flight “*non-stop*” from Amman, Jordan to Cyprus on 1 April 2002. However, the evidence before the Tribunal is that Royal Jordanian operated only one flight from Amman to Cyprus on 1 April 2002, and that flight had a stopover in Beirut, Lebanon. When confronted with this fact, Mr Türkkan testified that it was a “*non-stop*” flight because he “*didn’t get out from the plane*” when it landed in Beirut. The Tribunal does not find this explanation persuasive and is likewise unable to accept Mr Türkkan’s evidence on this point. The Tribunal further observes that the President of the Beirut Airport authority did not find Mr Türkkan’s name on the list of passengers on board RJ Flight 401, which flew from Amman to Beirut on 1 April 2002 (see paragraph 411.5 above).

415. For the reasons given in paragraph 414 above, the Tribunal has doubts as to whether Mr Türkkan travelled to Cyprus on 1 April 2002 to undertake work in connection with Libananco (and its alleged acquisition of the shares in question). On the other hand, certain aspects of the evidence presented by the Claimant indicate that Mr Türkkan travelled to Cyprus in April 2002. Therefore, the Tribunal will determine this issue based on a consideration of the other evidence on the record.



### **3. The other circumstances surrounding Mr Türkkan's alleged purchase of Libananco in April 2002**

416. The other aspects of Mr Türkkan's involvement in the purchase of Libananco in April 2002 are naturally also key pillars of the Claimant's case. In that regard, the Tribunal found the following pieces of evidence probative. Where applicable, the Tribunal's observations are also set out below.

416.1 Mr Türkkan deposed in his First Witness Statement that he was able to locate Mr Partellas' firm through its website in March 2002. However, when he was cross-examined, Mr Türkkan changed his evidence to say it was not actually Mr Partellas' firm's website that he found, but rather a website containing a directory or list of accountants and law firms in Cyprus. He explained that he chose Mr Partellas' firm because its name or Mr Partellas' name was at the top of that list. The Tribunal cannot accept the account given by Mr Türkkan of how Mr Partellas' firm came to be selected.

416.2 Mr Türkkan said that Mr Partellas' firm provided their services to him on credit and on trust before Mr Partellas received payment from him (after some three years) at the end of 2005. This seems unlikely, given that: (i) accountants normally ask for a payment on account from new clients before undertaking work on their behalf; (ii) Mr Türkkan himself said that he had not met Mr Partellas prior to 1 April 2002; and (iii) Mr Partellas also needed to involve a third party in the establishment of Libananco, i.e. Mr Sarris. For these reasons, the Tribunal does not accept Mr Türkkan's testimony here.

416.3 Mr Sarris was unable, to produce the invoice or receipt relating to Mr Türkkan's alleged purchase of Libananco from Prontoservus (a company associated with Mr Sarris' law firm) in April 2002. Mr Sarris first testified that there would have been an invoice, but upon further cross-examination, he testified that there might not have been one because Mr Partellas had a current account with his office. Mr Sarris ultimately said that he did not produce the records evidencing the sale of Libananco because no one had asked him to do so. He explained that he did not know the subject matter of the present proceedings. Considering that Mr Sarris is a trained and experienced attorney, the Tribunal does not find this explanation satisfactory.

417. For the reasons given at paragraph 416 above, the Tribunal has doubts as to whether Mr Türkkan in fact purchased Libananco in April 2002 and will return to a conclusion on this issue based on a consideration of the other evidence on the record.

#### **4. The alleged trust arrangement in respect of Libananco**

418. The Claimant alleged that, although Libananco was acquired by Mr Türkkan on behalf of the Uzan family in April 2002, it was beneficially owned by Cem Uzan and his Immediate Family.
419. Hakan Uzan specifically confirmed that he had asked Mr Türkkan to set up Libananco and to hold the company on trust for members of his family. However, he admitted that there were no documents to record or otherwise evidence the alleged trust arrangement.
420. Whilst giving oral testimony, Hakan Uzan also wavered when asked to list the alleged beneficial owners of Libananco pursuant to this trust arrangement. He did not give any concrete answer when asked whether Libananco was held on trust for just him and his brother Cem Uzan, or also for Kemal Uzan and Ayşegül Uzan. Instead, he clouded the issue by saying that there was no clear answer to that question because of the “family divorce” in the background.
421. Hakan Uzan also said that the terms of the alleged trust arrangement were never communicated to Mr Türkkan, so it was impossible for Mr Türkkan to know who the beneficiaries of the alleged trust were. He even went so far as to admit that it would be impossible to prove the existence of the trust if Mr Türkkan were to meet with an unfortunate accident. His evidence was corroborated by Mr Türkkan, who said that he was not told about the terms of the alleged trust.
422. The Tribunal was not persuaded by the evidence that there was a trust arrangement in respect of Libananco in favour of Cem Uzan and his Immediate Family, and subsequently in favour of Cem Uzan alone after the alleged “family divorce” took place. In any event, the Tribunal does not consider that the evidence presented by the Claimant to support the “family divorce” to be persuasive for the reasons set out in paragraphs 460 to 465 below.
423. Accordingly, the Tribunal finds that the Claimant has failed to prove the existence of any trust in respect of Libananco.

#### **5. Instrument of Transfer dated 1 April 2002**

424. The burden of proof is on the Claimant to show that this document was created and/or executed on 1 April 2002.
425. This aspect of the Claimant’s case was similarly riddled with inconsistencies, and the Claimant’s witnesses gave conflicting evidence on this point.
426. First, even though Mr Türkkan claimed he was in Cyprus on 1 April 2002, he said that he did not sign the Instrument of Transfer on that day. He swung from saying (on the one hand) that the document was not ready for him to sign, to suggesting (on the other hand) that the document was ready to sign but he did not sign it then because he wanted to “*preserve*” the original document. Mr Partellas agreed that the Instrument of Transfer was in fact not signed on 1 April 2002, but he was unable to give any convincing reason for this.

427. Mr Türkkan himself admitted that the Instrument of Transfer produced in this arbitration was reprinted and signed by him in 2007. However, he was unable to give any explanation as to the provenance of the reprinted Instrument of Transfer, which he said contained the signature of Mr Sarris and of the witness for his (i.e. Mr Sarris') signature.
428. Mr Sarris' evidence is also relevant here, since his company (or a company associated with his law firm) Prontoservus, which provided corporate secretarial services, is alleged to have transferred all of the shares in Libananco to Mr Türkkan. Although Mr Sarris deposed in his Witness Statement that he personally signed the Instrument of Transfer on behalf of Prontoservus on 1 April 2002, he subsequently changed his evidence, and said (in direct examination) that he did not in fact sign that document. Rather, it was signed by his employee, Mr Starvos Ktorides. When questioned on this, he expressed surprise at his own Witness Statement.
429. In any case, his evidence that the Instrument of Transfer was signed on 1 April 2002 has little or no weight since (by his own admission) Mr Sarris testified that he had no independent recollection that the Instrument of Transfer was signed on that date other than by looking at the date printed on the document itself. He testified that he presumed the document was signed on that date.
430. Libananco was allegedly sold to Mr Türkkan through Mr Partellas' firm, but Mr Sarris did not produce an invoice written out to Mr Partellas' firm or to any other entity. He said that he did not produce this invoice because no one asked him to look for it. His explanation was that he did not know anything about this arbitration other than that he had to give evidence.
431. The Tribunal finds Mr Sarris' evidence as presented unreliable. At the hearing, he disavowed the gist of his Witness Statement, which was that he personally signed the Instrument of Transfer on 1 April 2002. He could not explain why he signed a Witness Statement that was inaccurate in several material aspects.
432. There is therefore no proof that the Instrument of Transfer (or any version of it) was in fact signed in April 2002, and, indeed, that it was signed at any time before 2007.

**6. The failure of the Claimant and its witnesses to comply with the necessary legal requirements under Cypriot law in connection with the transfer and operation of Libananco**

433. It is relevant to observe at this juncture that Cem Uzan deposed that there was no public disclosure (to the Turkish or Cypriot authorities) of Libananco's acquisition of interests in ÇEAŞ and Kepez until 2005. He said that this was done to maintain confidentiality, and that Mr Türkkan was so instructed. In that regard, the Tribunal observes, for the reasons given below, that notifications, filings and other legal procedures required under Cypriot law (in relation to the transfer and operation of a company in Cyprus) were not complied with by the Claimant and/or its witnesses.

434. First, Mr Partellas confirmed that Libananco’s accounts had to be filed annually, within a year from the end of the previous financial year. According to him, Libananco’s accounts for 2002, 2003 and 2004 were only filed in 2007.

434.1 He agreed that the accounts should have been filed earlier, but did not give any convincing explanation why this was not done. The best evidence he could give was that the filings were “*probably*” delayed because of his instructions from Mr Türkkan to do so. He also said it was common practice in Cyprus to delay such filings. Having regard to its overall impression of Mr Partellas’ evidence, the Tribunal did not find this to be a satisfactory explanation.

434.2 It is also uncertain whether audited accounts were prepared contemporaneously for the years 2002, 2003 and 2004 when there was no intention to file them promptly. As stated in paragraph 254.3 above, Mr Partellas rendered no bills from 2002 to 2005, so no contemporaneous documentary evidence exists of such work having been done in those years.

435. Second, on the issue of the legal requirement under Cypriot law for Libananco to have filed a notification of change of its directors, Mr Sarris agreed that any change would have to be registered in the Registry of Companies within fourteen days.

435.1 In Libananco’s case, however, Mr Partellas admitted that this was only done in 2005. His evidence in this regard was also inconsistent as he initially denied that there was any time limit for filing that notification.

435.2 Mr Sarris said that the notification of change of directors was typically not delayed in other cases, but he left the responsibility to do so to Mr Partellas in this case since Libananco was sold through Mr Partellas’ firm. Considering that Mr Sarris’ own employees would have remained on the record as directors of Libananco (and would be potentially liable as such) if this change was had not been registered, the Tribunal does not find Mr Sarris’ explanation to be credible.

436. Third, the Respondent submitted that, in 2002 (the year in which Libananco was allegedly acquired by Mr Türkkan), it was illegal under the Cypriot Exchange Control Law (“ECL”) for a non-resident such as Mr Türkkan to acquire shares in a Cypriot company without permission from the Central Bank; nor could shares in Libananco have been acquired on behalf of non-resident beneficial owners, such as the Uzans, without such permission. The Respondent cited Article 11(1) of the ECL as being the relevant legal provision.

436.1 The Respondent asserted that if the Cypriot Central Bank had granted permission for Mr Türkkan to acquire Libananco (on behalf of the Uzan family), then it would necessarily have done so by issuing a license converting Libananco from an ordinary Cypriot company (which could only be owned by residents of Cyprus) into an “international business company” (“IBC”). However, the distinction between IBCs and domestic

companies, together with the attendant licensing requirements, were eliminated from 2004 onwards by the introduction of legislative amendments.

436.2 The Respondent submitted that there was no evidence on the record to show that Mr Türkkan applied for permission from the Cyprus Central Bank pursuant to Article 11(1) of the ECL, or that Libananco was otherwise licensed as an IBC.

436.3 The Claimant's witness Mr Partellas appeared to suggest that the necessary licence and/or permission was not necessary since the regulatory requirements pursuant to the ECL were relaxed prior to Cyprus' accession to the European Union. However, in re-direct examination, Mr Partellas stated that the relaxation of regulatory requirements only began in "*late 2003*". On that basis, the Tribunal does not accept Mr Partellas' evidence that the above permission and/or licenses were not required in connection with the acquisition of Libananco by Mr Türkkan in April 2002.

437. All the significant omissions described above rendered Mr Partellas' role as the corporate secretary of Libananco suspect. These discrepancies gave the impression that work on Libananco began only in 2005 (or later). The Claimant has not proved that Mr Partellas, or indeed any of the other individuals alleged to have been involved in the acquisition and running of Libananco (including Mr Türkkan), commenced work for and/or in relation to Libananco in 2002.

#### **7. Was Libananco acquired by Mr Türkkan on 1 April 2002?**

438. For all the foregoing reasons, the Tribunal is unable to reconcile the Claimant's case with the evidence given by its witnesses. The Claimant was also unable to produce documents which would normally be expected to exist if its story were true. As stated at paragraph 115 above, the Claimant bears the burden of proof on the main issue of whether it acquired timely ownership of the shares in question. Based on its combined observations and findings at paragraphs 412 to 415, 423, 432 and 437 above, the Tribunal finds the following to be improbable.

(a) That Mr Türkkan travelled to Cyprus on 1 April 2002 for the purpose of undertaking work in connection with Libananco (and its alleged acquisition of the shares in question).

(b) That Libananco was acquired by Mr Türkkan on 1 April 2002 or early April 2002.

439. Accordingly, the Tribunal finds that the Claimant has failed to prove the occurrence of the facts it has alleged as stated in paragraphs 438 (a) and (b) above. For the avoidance of doubt, the Tribunal observes that the Claimant's case is only that Libananco was purchased in April 2002. The Claimant has not submitted evidence as to the acquisition of Libananco by Mr Türkkan (or any other individual) at any other time, nor does any such argument form part of its case.

## 8. Exhibit R-821 and the issue of dividends

440. According to the Respondent, Exhibit R-821 was a fax sent by Hakan Uzan's secretary to him on 14 July 2003 which sets out the family's ownership interests in ÇEAŞ and Kepez. The Respondent obtained this document as a result of ongoing SDIF activity following from the İmar Bank fraud, pursuant to which the SDIF legally assumed supervision of Telsim, the Uzans' mobile phone company. As a result, the SDIF was able to gain access to Telsim's computer servers. Exhibit R-821 was found on those servers.
441. Exhibit R-821 appeared on its face to be a document that shows a breakdown of the Uzan family's shareholding in various companies. Hakan Uzan, in his Witness Statement, vigorously disputed the authenticity of that document on various grounds.
442. Exhibit R-821 appeared to comprise of two e-mail messages.<sup>12</sup> The same two documents were both attached to each of those e-mail messages. The first attachment was entitled "*History.txt*".<sup>13</sup> Also attached (although it was not clear from the hard copy of the tendered exhibit whether this was part of the file "*History.txt*") was an eleven page list in tabular form in English of each of the Uzans' shareholdings in various companies.
443. That tabular list in Exhibit R-821 showed the following:
- 443.1 Hakan Uzan owned 6.01 per cent of the shares in ÇEAŞ and 0.43 per cent of the shares in Kepez;
  - 443.2 Cem Uzan owned 8.56 per cent of the shares in ÇEAŞ and 9.89 per cent of the shares in Kepez;
  - 443.3 Ayşegül Uzan owned 4.69 per cent of the shares in ÇEAŞ and 5.32 per cent of the shares in Kepez;
  - 443.4 Kemal Uzan owned 47.62 per cent of the shares in ÇEAŞ and 42.52 per cent of the shares in Kepez; and
  - 443.5 Yavuz Uzan (Hakan Uzan's uncle) owned 0.19 per cent of the shares in ÇEAŞ and 2.3 per cent of the shares in Kepez.
444. These figures were in most cases almost identical to the dividend percentages that each Uzan family member received in May 2003. This was confirmed by the Depository Bank Report, which was prepared by the Depository Bank in response to a request by the General Directorate of Energy Affairs of the

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<sup>12</sup> The first e-mail message was from a sender named "*Fax Server*" to what appeared to be "*Nilufer Baser ~[illegible text] Telsim*". The subject of the first e-mail message was: "*A new 11 page fax has arrived from <unknown>*", dated 14 July 2003, 8.50 pm. Three minutes later, that e-mail message (including both its attachments) was forwarded by the same "*Nilufer Baser ~[illegible text] Telsim*" to Hakan Uzan.

<sup>13</sup> This was a record of an automatic forward by "*[ARSVCI]*" upon receipt to "*Nilufer\_Baser*" and "*Yuksel\_YuceI*".

Ministry to analyse the ÇEAŞ and Kepez share certificates in Switzerland and Vienna as well as those seized by the SDIF. The Depository Bank is a Turkish institution that provides share certificate settlement and custody services.

445. Specifically, paragraph 42 of the Depository Bank Report was a table that showed the members of the Uzan family whom were the recipients of the dividends paid by ÇEAŞ and Kepez to their respective shareholders in May 2003. The table reported the individual shareholding of each member of the Uzan family in ÇEAŞ and Kepez based on the nominal value of their shareholding (which was in turn calculated by examining the share certificates that were presented for the collection of dividends) calculated as a percentage of the total share capital of the company.
446. The figures which represented the individual shareholding of each member of the Uzan family in paragraph 42 of the Depository Bank Report (calculated based on the May 2003 dividend) were identical to the tabular list in Exhibit R-821.
447. However, the Claimant submitted that the dividends received by members of the Uzan family did not bear any relationship to their actual respective shareholdings in ÇEAŞ and Kepez.

447.1 Cem Uzan deposed that the share certificates and the dividend coupons were separate bearer instruments and that the dividend coupons in respect of the ÇEAŞ and Kepez share certificates had been detached prior to the transfer of interests to Libananco.

447.2 Hakan Uzan also gave evidence to the effect that actual ownership of shares in ÇEAŞ and Kepez was not in any way related to the dividends claimed in 2003. Rather, it was agreed between members of the Uzan family who would claim the dividends (and in what proportion). In that regard, Hakan Uzan deposed that, as part of the alleged “family divorce”, it was agreed that his father Kemal Uzan would receive the largest share of the dividends of ÇEAŞ and Kepez in 2003 as part of the consideration for relinquishing his interest in certain companies to be owned by Cem Uzan and Hakan Uzan.

448. There is substantial evidence to the contrary.

448.1 It was not recorded in any of Libananco’s minutes who was supposed to have received the dividends that would be paid to shareholders of ÇEAŞ and Kepez. This was a significant and telling omission in view of the fact that Libananco was alleged to have conducted no business other than the acquisition of interests in ÇEAŞ and Kepez. Mr Türkkan was unable to give any explanation for this omission.

448.2 Although Mr Çiğgin was asked to draft the template STA which was allegedly used by Libananco, he was not instructed that the dividend coupons would be retained by the transferors (i.e. members of the Uzan family). He agreed that the STAs on their face purported to show that the

transferee (i.e. Libananco) would receive the shares together with all rights and benefits, including the right to receive the corresponding dividends. There was similarly no explanation for this discrepancy.

448.3 Share certificates representing 83 per cent of the total share capital of Kepez (Series 1 through 6) had no dividend coupons for the 2002 dividend year. A letter from Kepez to Adabank employee Mr Ulusoy dated 16 May 2003 (Exhibit H-175) stated, among other things, that:

*“There are no more dividend coupons for 2002 attached to 1., 2., 3., 4., 5., and 6. Series share certificates... The main bodies of these certificates will be stamped as “DIVIDEND FOR 2002 PAID” and the payment will be made against the receipt enclosed herewith”.*

Accordingly, with respect to certificates representing 83 per cent of Kepez’s total share capital, there was nothing to detach and nothing that could be exchanged for a dividend payment. To receive a dividend, the owner of the share certificate would have had to present the certificate itself for stamping. Even with respect to the limited number of Kepez share certificates that had coupons for the dividend paid in May 2003 (the Series 7 certificates), there was evidence that Kepez had a standing policy that shareholders could not claim dividends by presenting a dividend coupon alone, but rather were required to present the certificate along with the coupon. A letter from Kepez to one Mazlum Ercan dated 21 January 2003 (Exhibit H-988) stated that: *“Without the share certificates, no action can be taken with regard to the share certificate dividend coupons you have sent, and they are hereby returned to you”.* According to the Depository Bank Report, members of the Uzan family collected dividends from Kepez corresponding to some 63.46 per cent of the total shareholding in Kepez in total.

448.4 In respect of ÇEAŞ, dividends for the 2002 dividend year were paid out in two instalments: the first on 20 May 2003 and the second on 19 September 2003.<sup>14</sup> Since ÇEAŞ share certificates had only one 2002 dividend coupon, the first instalment was paid upon presentation of “rights coupon no. (5)” and the second instalment upon presentation of the 2002 dividend coupon.<sup>15</sup> Libananco produced a number of ÇEAŞ share certificates in Vienna that still had “rights coupons no. (5)” attached – these certificates represented approximately 35 per cent of the total share capital of ÇEAŞ.<sup>16</sup> All the ÇEAŞ share certificates located in Switzerland (subsequently seized by the Swiss authorities) also had “rights coupons no. (5)” attached – these certificates represented a further 25 per cent of the total share capital of ÇEAŞ.<sup>17</sup> In total, share certificates representing some 60 per cent of the total share capital of ÇEAŞ were found to have had “rights coupons no. (5)” attached. According to the Depository Bank

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<sup>14</sup> See paragraph 9 of the Depository Bank Report.

<sup>15</sup> See Exhibit H-274, the İstanbul Stock Exchange Daily Bulletin No. 90 of 14 May 2003.

<sup>16</sup> See paragraph 68 of the Depository Bank Report.

<sup>17</sup> See paragraphs 24 to 25 of the Depository Bank Report.



Report, individual members of the Uzan family collected dividends corresponding to some 67.07 per cent of the total shareholding of ÇEAŞ.

449. For the reasons set out at paragraphs 448.1 to 448.4 above, the Tribunal is unable to accept the evidence of the Claimant's witness Cem Uzan that dividends in respect of ÇEAŞ and Kepez were paid to the holders of the dividend coupons (which had allegedly been detached from the share certificates) and not the holders of the share certificates themselves.
450. In the light of the persuasive evidence to the contrary, the Tribunal is unable to accept the Claimant's submission that the dividends paid by ÇEAŞ and Kepez to members of the Uzan family had no correlation with their respective shareholdings prior to Libananco's alleged acquisition of shares in ÇEAŞ and Kepez.
451. The figures in Exhibit R-821 are further supported by Cem Uzan's contemporaneous financial disclosures of 23 October 2002, 20 February 2003 and 6 March 2003, where he declared that he owned 8.56 per cent of ÇEAŞ capital and 9.9 per cent of KEPEZ capital (see Exhibits H-138, H-151 and H-154). In addition, according to Adabank's records of dividend payments made in prior years, the dividends that Cem Uzan received in the period 1999 to 2003 corresponded to practically identical shareholding percentages (see Exhibit H-1135).
452. The Tribunal is cognisant that the table showing the breakdown of shareholding in Exhibit R-821 is undated. However, the Tribunal considers that this does not detract from the suggestion that Exhibit R-821 shows that individual members of the Uzan family (and not Libananco) owned a majority interest in ÇEAŞ and Kepez at *some point in time*.
453. Whilst Hakan Uzan disputed the accuracy of this document as at 14 July 2003, he admitted it would have been accurate at an earlier date, thus accepting (by necessary implication) that the 20 May 2003 dividend payment corresponded to the Uzan family members' individual ownership interests at some point in time. This was in effect an admission that the payment of dividends to individual members of the Uzan family was in fact proportionate to their respective shareholdings in ÇEAŞ and Kepez at some point in time. Hakan Uzan therefore contradicted his own evidence in his Witness Statement that the payment of dividends was not linked to each family member's shareholding in ÇEAŞ and Kepez. Accordingly, the Tribunal does not find Hakan Uzan's evidence in relation to the authenticity of Exhibit R-821 to be credible.
454. The Tribunal is therefore not persuaded by Hakan Uzan's evidence that Exhibit R-821 was not an authentic document. It is pertinent to note the provenance of Exhibit R-821 (which the Claimant has not rebutted). This was a document recovered from the computer servers of a company controlled by the Uzans, containing information that was either personal to the Uzan family or confidential in nature; it was therefore likely to have been created by a person closely connected to the Uzan family. In the light of the Tribunal's observation at paragraphs 443 and 444 above, and all the other evidence on the record, the

Tribunal finds that it is more probable than not that Exhibit R-821 evidences the respective shareholdings of the individual members of the Uzan family in ÇEAŞ and Kepez at or around 20 May 2003, including the period leading up to 12 June 2003 (it is relevant to note, in this regard, that on the Claimant’s own case, no transfer of ÇEAŞ and Kepez share certificates was alleged to have taken place after 20 May 2003).

455. The Tribunal accordingly finds that Exhibit R-821 is likely to be an authentic document.
456. Based on Exhibit R-821, the Tribunal is of the view that members of the Uzan family owned shares corresponding to 67.07 per cent of the total shareholding in ÇEAŞ and 63.46 per cent of the total shareholding in Kepez during the period in question (i.e. from 20 May to 12 June 2003). This is ultimately irreconcilable with Libananco’s alleged ownership of 65.2 per cent of the total shareholding in ÇEAŞ and 60 per cent of the total shareholding in Kepez before 12 June 2003.

### **9. The alleged “family divorce”**

457. The Claimant’s case is that there was a “family divorce” which occurred over the approximate period October 2002 to May or June 2003. It was said that, pursuant to the “family divorce”, there was a consolidation in the various shareholdings within the Uzan family and it was agreed that, among other things, Cem Uzan would become the sole beneficial owner of Libananco.
458. The “family divorce” alleged by the Claimant is of more than peripheral relevance. The Respondent argued that based on dividend records (on the assumption that dividends received by each shareholder corresponded to their respective individual shareholdings), Hakan Uzan owned far less of ÇEAŞ’ and Kepez’s shares than that which he allegedly transferred to Libananco, and that the same was true in relation to the ÇEAŞ shares which Ayşegül Uzan allegedly transferred to Libananco. The Claimant’s response to this was that, as part of the “family divorce”, intra-family agreements were entered into; as a result of which Hakan Uzan and Ayşegül Uzan acquired significantly larger interests in ÇEAŞ and Kepez<sup>18</sup> than was the case before the “family divorce”. The Claimant’s case is that these shares were then transferred to Libananco (by Hakan Uzan and Ayşegül Uzan) in April and May 2003 (i.e. when the alleged acts of *teslim* were said to have occurred).
459. If there was in fact no “family divorce” that occurred along the lines suggested by the Claimant’s witnesses, this brings Libananco’s alleged acquisition of the shares of ÇEAŞ and Kepez into question since the burden would then be on the Claimant to demonstrate the source of the shares allegedly acquired by Libananco (i.e. the identity of the sellers or transferors).
460. Considering also that the “family divorce” was said to have taken place between October 2002 to May or June 2003, and that Cem Uzan gave evidence to the

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<sup>18</sup> But only Hakan Uzan (and not Ayşegül Uzan) acquired shares in Kepez as a result of these intra-family agreements.

effect that the “family divorce” was intended to achieve a split of both ownership and control, Kemal Uzan’s continued involvement in certain day to day issues relating to ÇEAŞ and Kepez remains unexplained by the Claimant. Significantly, Kemal Uzan was involved in dealing with the central issue of the cancellation of the Concessions Agreements. This is inconsistent with the Claimant’s contention that Cem Uzan acquired ownership (through Libananco) and control of ÇEAŞ and Kepez pursuant to the “family divorce”.

461. Further, as late as June 2003, Kemal Uzan, Hakan Uzan and Ayşegül Uzan even incorporated a new company together. This does not appear to be consistent with the occurrence of a “family divorce” earlier that year.

462. The purported intra-family transactions were also far from clear.

462.1 Hakan Uzan said that, although he was not the majority shareholder in ÇEAŞ and Kepez in 2002, he sold the largest quantity of shares to Libananco in 2003 because there was an “intermediate” movement of shares within that period.

462.2 These transactions were conducted in a roundabout manner with no satisfactory explanation for the manner in which the transactions were structured. For example, shares were purportedly transferred to Hakan Uzan by Kemal Uzan, Cem Uzan and Ayşegül Uzan, only for him to later transfer those shares to Libananco.

462.3 The manner in which the transfers were carried out also did not make sense considering that, on the Claimant’s own case, it had by that time been decided that Cem Uzan would own all the family’s shares in ÇEAŞ and Kepez. If the intra-family transactions are treated as genuine (i.e. actually having occurred) then one has to believe that Cem Uzan transferred shares to Hakan Uzan, who in turn transferred those shares to Libananco (allegedly beneficially owned by Cem Uzan by that time) – a full circle, so it seems.

462.4 Hakan Uzan’s evidence (in his Witness Statement) was that the transactions were so structured because each had (or was intended to have) a *quid pro quo* counterpart in another transaction involving another company in which members of the Uzan family had shares in common. However, there was no evidence of any such practice. Hakan Uzan also deposed that the transactions were so structured for political reasons, i.e. so that Cem Uzan would not be seen transferring shares to a Cypriot company. The Tribunal likewise did not find this explanation persuasive. No sensible reason has otherwise been put before the Tribunal to explain the convoluted and roundabout nature of the intra-family transactions.

462.5 It is also telling that Cem Uzan admitted that (as a leader of a political party) he would have had to file financial disclosures in respect of material changes in his assets if and when the said intra-family transactions were executed. But he was unable to give any satisfactory explanation why this was not done.

463. In addition, the circumstances surrounding the alleged intra-family transactions remain ambiguous. No evidence has been given to show how the alleged intra-family transfers took place. In particular, the Claimant has maintained its silence on the issue of how *teslim* was accomplished in respect of the transfer of the underlying share certificates. Although the Claimant has produced the intra-family agreements which were allegedly used, the Tribunal has found (at paragraph 371 above) that the metadata in respect of the electronic versions of those documents was not conclusive of the date on which they were created. Further, the intra-family agreements would, on their own, have no legal effect, since the other requirements for a valid transfer of ownership (e.g. *teslim*) have not been demonstrated.
464. Further, the intra-family agreements were of questionable provenance. They appeared as deleted files on Mr Türkkan's floppy disks (subsequently produced in these proceedings). The appearance of those floppy disks remains a mystery. Mr Türkkan was questioned on this in cross-examination but the Tribunal did not find any of his explanations to be satisfactory. On the one hand, he said that he saved these documents because he thought they were important; on the other hand, he also said that he deleted them subsequently, as he assumed they were sent to him by mistake. Curiously, he gave no explanation as to how those documents came into his possession.
465. Significantly, the intra-family agreements were the only documents that the Claimant produced to evidence the occurrence of the alleged "family divorce".
466. For all the foregoing reasons, the Tribunal does not find the "family divorce" as put forth by the Claimant to be persuasive. Accordingly, the Claimant has failed to explain the following:
- (a) how Hakan Uzan came to acquire a substantial interest in ÇEAŞ that would have enabled him to transfer shares corresponding to 35.53 per cent of its total share capital to Libananco when (according to dividend records as of 20 May 2003) he only owned shares corresponding to 6.04 per cent of its total share capital;
  - (b) how Hakan Uzan came to acquire a substantial interest in Kepez that would have enabled him to transfer shares corresponding to 44.08 per cent of its total share capital to Libananco when (according to dividend records as of 20 May 2003) he only owned shares corresponding to 0.43 per cent of its total share capital; and
  - (c) how Ayşegül Uzan came to acquire a substantial interest in ÇEAŞ that would have enabled her to transfer shares corresponding to 17.48 per cent of its total share capital to Libananco when (according to dividend records as of 20 May 2003) she only owned shares corresponding to 4.69 per cent of its total share capital.

For the above analysis, the Tribunal has calculated the percentage of the shareholding in each company allegedly transferred to Libananco by individual

members of the Uzan family by identifying the transferors or sellers in each of the STAs and then adding up the percentages for each individual transferor or seller (across the various STAs allegedly executed by him or her) in respect of each company.

### **10. The Share Transfer Agreements**

467. The STAs were a central feature of the Claimant's case.
468. Early on in these proceedings, the Claimant submitted that the STAs were effective to transfer ownership of the shares in ÇEAŞ and Kepez to Libananco on various dates between October 2002 and May 2003 (i.e. the respective dates on the face of the STAs). However, the Claimant subsequently admitted that the STAs were, without more, insufficient to effect a transfer of ownership unless *teslim* was also accomplished. Accordingly, its present position is that the STAs were entered into merely to memorialise the intent of the individual transferors to transfer their shares to Libananco.

#### **a) The earlier version of the Claimant's case was that the share transfer agreements were effective to transfer ownership of shares in ÇEAŞ and Kepez**

469. Mr Çiğgin deposed that Cem Uzan had asked him to prepare model agreements or template STAs for Libananco for use in connection with its intended acquisition of shares in ÇEAŞ and Kepez. This was consistent with Cem Uzan's evidence in his Witness Statement that Libananco acquired those shares over the period October 2002 to May 2003. Mr Partellas had the same understanding because he gave evidence to similar effect.
470. Hakan Uzan's evidence that the transfers were to be completed in tranches as a matter of business practice in the Uzan family suggests that the STAs were intended to effect a legal transfer of the shares. In that regard, he was responsible for deciding the quantity of shares in each company (i.e. ÇEAŞ and Kepez) that would be transferred to Libananco at any particular time, and by whom. Hakan Uzan went further to say that these individual transactions would be closely monitored by the Shareholder Services Department of ÇEAŞ and Kepez.
471. Mr Çiğgin agreed that the STAs purported on their face to be documents intended to be used instruments for an actual transfer of ownership of the shares.
472. The sum of the above evidence is that the STAs were intended to effect legal transfers of the shares in question.
473. This is consistent with the initial version of the Claimant's case, i.e. that Libananco: (i) acquired ownership of interests in ÇEAŞ and Kepez over the approximate period October 2002 to May 2003; (ii) acquired its first shares in ÇEAŞ and Kepez in November 2002 and October 2002 respectively; and (iii) made its last acquisitions in May 2003.

- 473.1 The underlying premise of the Claimant's case was that Mr Türkkan acquired Libananco on behalf of Cem Uzan and his Immediate Family in April 2002, and that they remained the beneficial owners of Libananco.
- 473.2 In relation to the transactions described above, Mr Türkkan allegedly prepared a Share Acquisition Report dated 20 May 2003 (Exhibit H-61), which shows the breakdown of individual acquisitions as having occurred between 30 October 2002 and 15 May 2003.
- 473.3 Libananco's board minutes, purportedly dating from 2002 and 2003, also recorded the transactions described above as having been executed in the same range of dates.
- 473.4 These pieces of evidence are all consistent with the initial version of the Claimant's case that the STAs themselves were legally effective to transfer ownership of the shares in ÇEAŞ and Kepez on various dates between October 2002 and May 2003. However, as described earlier, the Claimant has departed from its initial position. The evidence set out above is therefore not only meaningless in the light of the Claimant's abandonment of its initial position, but is also contradictory to the Claimant's current position.

**b) The Claimant's subsequent change of position**

474. The present version of the Claimant's case may be outlined as follows.

- 474.1 In his Second Witness Statement, Cem Uzan deposed that, in accordance with the alleged "family divorce", the Uzan family divided its assets among Kemal Uzan, Hakan Uzan and himself, and agreed, in particular, that he would receive the family's stake in ÇEAŞ and Kepez and would therefore become the sole beneficial owner of Libananco. Consequently, the beneficial ownership of Libananco changed in January 2003.
- 474.2 Cem Uzan deposed that, as a result of the alleged "family divorce", his relations with his father Kemal Uzan and brother Hakan Uzan became increasingly strained. For that reason, he considered it was important that the members of his Immediate Family memorialise their intention to irrevocably surrender their ownership interests in ÇEAŞ and Kepez to Libananco to avoid potential disputes in the future.
- 474.3 Following January 2003 therefore, STAs continued to be executed to memorialise the intent of the members of his Immediate Family to transfer their shares in ÇEAŞ and Kepez to Libananco.
- 474.4 The necessary implication of this (which the Claimant accepted) was that the STAs had no legal significance in the sense that they did not effect any legal transfer of interests in ÇEAŞ and Kepez. The Claimant has therefore shifted its case to say that the transfers of ownership in

respect of the shares took place only when *teslim* in relation to the share certificates occurred in April and May 2003.

475. The Tribunal observes that the two main versions of the Claimant's case described and elaborated upon above contradict each other in material aspects, and that the Claimant's witnesses were unable to give any convincing explanation for this significant change of position.

**c) The share transfer agreements reflected that "cash" was paid by Libananco for the purchase of the shares**

476. It was recorded on the face of the STAs that "*cash*" would be given as consideration by Libananco in return for the transfer of shares. Hakan Uzan's evidence was that, if the unfortunate events of 12 June 2003 had not happened, Libananco would have settled this debt eventually and would have made payment to the individual transferors or sellers.
477. However, Hakan Uzan was unable to maintain his evidence in cross-examination. When questioned, he said instead that his father Kemal Uzan would not be paid by Libananco for the transfer of shares to Libananco. He explained that Kemal Uzan received, in exchange for the transfer of shares to Libananco, an especially large dividend, subsequent to which there would be no further monies due (from Libananco) to him.
478. Hakan Uzan was also unable to explain why (assuming there was indeed a debt recorded in Libananco's books in favour of the sellers of the shares) the 2003 financial statements of Libananco recorded a US\$ 234 million debt that was owed to Mr Türkkän (who did not transfer any shares to Libananco).
479. These were yet further discrepancies for which no satisfactory explanation was given by the Claimant.

**d) The Tribunal's conclusion on the share transfer agreements**

480. The reason for the creation of the STAs is suspect as the evidence of Mr Çiğgin (who allegedly drafted the template STA), when taken as a whole, was not coherent on this point.

480.1 Mr Çiğgin deposed that, when he was asked to draft the template STA in 2002, it was only intended to memorialise each transferor's intent to effect the respective transfers. His evidence was that, in September 2002, he advised Cem Uzan on the requirements under the Turkish Commercial Code for a legally effective share transfer; namely that STAs would not be necessary to accomplish the planned transfer.

480.2 But yet he admitted in cross-examination that the template STA which he prepared purported on its face to be an instrument to effect the transfer of legal ownership of the shares as such, i.e. the STAs themselves would be capable of bringing about a legally effective transfer of ownership.

480.3 Mr Çiğgin was unable to explain why he prepared a template STA in that manner when his evidence was that the template STA which he prepared was intended (in accordance with his advice to Cem Uzan on the requirements for a legally effective transfer of ownership) only to memorialise each transferor's intent in relation to the shares.

480.4 Mr Çiğgin also testified in cross-examination that he received no instructions from Cem Uzan as to whether the template STA was intended to be used as an instrument to effect the actual transfer of ownership of shares as such, or whether its purpose was merely to memorialise the intent to do so on the part of each transferor or seller. This does not explain or clarify Mr Çiğgin's otherwise contradictory evidence.

480.5 The Tribunal did not find Mr Çiğgin's evidence on this issue persuasive.

480.6 The Tribunal further observes that Mr Çiğgin's evidence that the template STA was intended only to memorialise each transferor's intent to transfer ownership of the shares inconsistent with the earlier version of the Claimant's case that the execution of the STAs themselves was intended to effect a legal transfer of ownership in respect of the shares.

481. Further, although the STAs were said by the Claimant to have been created and executed in 2002 and 2003, the evidence that has emerged casts considerable doubt on this.

481.1 Hakan Uzan's evidence that Libananco's acquisition of shares was specifically structured to be carried out in tranches is meaningless in the light of the Claimant's change of position (i.e. the Claimant eventually submitted that the transfer of ownership occurred pursuant to acts of *teslim* and not by way of execution of the STAs). This renders both the reason(s) for the creation of the STAs and the time at which they were created suspect.

481.2 Mr Türkkan's evidence was that he would often receive several signed STAs in a bundle (suggesting that they had all been signed at the same time) and that sometimes he would not receive a particular document back at all, and would have to create a new one. This is difficult to reconcile with Hakan Uzan's evidence that the transfer of shares was meant to occur in a structured manner.

481.3 In 2009, the Claimant produced the hand stamp that it alleged was used to apply the Libananco company seal to the STAs. It was only when the Respondent pointed out that this hand stamp was of a "Shiny" model which could not have been purchased before 2005 that the Claimant submitted Mr Türkkan's Second Witness Statement, in which he deposed that there had been an earlier hand stamp that had broken in transit. Mr Türkkan said that it was indeed this earlier hand stamp (which has, to date, not been produced) that had been used to stamp some of the STAs.



481.4 Crucially, Mr Türkkan said that all of the STAs produced in this arbitration were printed in 2005 because some documents were missing and some were not readable.

481.5 Mr Türkkan further admitted that some of the STAs could have been stamped in 2005. His evidence was corroborated by Mr Partellas, who deposed in his Second Witness Statement that Mr Türkkan “*may have*” used the new stamp machine on some documents in November 2005.

482. Libananco’s Share Acquisition Report dated 20 May 2003 (Exhibit H-61), is related to the STAs since its entries correspond to the information contained in the individual STAs. This was therefore a document intimately connected with the STAs themselves. The Claimant has no choice but to accept that the entries in Exhibit H-61 are not accurate, since it subsequently submitted that *teslim* only occurred in April and May 2003 (whereas Exhibit H-61 purported to show Libananco’s acquisition of shares from October 2002 onwards). It follows that Exhibit H-61, even on the Claimant’s own case, is not an authoritative or accurate document. The Claimant has not given any satisfactory explanation for this discrepancy, which serves only to further discredit the STAs.

483. For the reasons set out above, the Tribunal is not satisfied that the STAs were likely to have been created on the dates that appear they bear.

### **11. Libananco’s board and management minutes**

484. There were likewise a number of indications that Libananco’s board and management minutes were not likely to have been created on the dates that they bore.

485. To begin with, Mr Türkkan (who claimed to be responsible for the preparation of Libananco’s minutes) was unable to explain some of the English terms used in the minutes. At one point in the cross-examination, he even asked if he could consult a dictionary. This brings into doubt his evidence that he personally drafted the minutes.

486. More importantly, Mr Türkkan changed his evidence dramatically when, having deposed in his First Witness Statement that the corporate meetings of Libananco took place over the telephone, he later testified that there were in fact no telephone calls, and therefore (by necessary implication) that those purported meetings were in fact not attended by anyone at all. This was corroborated by Mr Partellas’ evidence which was to the effect that none of his employees (who were nominee directors in Libananco) attended any of Libananco’s corporate meetings – they merely signed the minutes after they were prepared by Mr Türkkan. The sum of Mr Türkkan’s and Mr Partellas’ evidence was therefore that none of the meetings reflected in Libananco’s minutes actually occurred as was alleged by Mr Türkkan in his First Witness Statement; rather, they were all paper meetings.

487. There were also tell-tale signs that, contrary to what the minutes purported to show, those documents were not likely to have been prepared in 2002 and 2003.
488. Although Libananco's Minutes of Directors' Meeting of 23 September 2002 (Exhibit H-13) purported to record the appointment of Mr Çiğgin as Libananco's legal advisor, Mr Çiğgin testified that he was unaware of that appointment and, in fact, had never been asked to provide such a service. Even if he had provided any legal advice in relation to Libananco to either Hakan Uzan or Cem Uzan, there was no proof of this – Mr Çiğgin did not have any notes, letters, e-mail messages or other records to document his involvement in the present case.
489. In the Minutes of Libananco's Board of Directors' Meeting of 10 July 2002 (Exhibit H-11), it was recorded that "*PARTELLAS KILLIARIS LTD*" would be appointed as Libananco's auditors. However, Mr Partellas testified that he only formed a limited company in 2005. He explained this was a simple mistake that anybody could have made. In the light of all the other available evidence, the Tribunal did not find his evidence here persuasive.
490. Significantly, Mr Türkkan testified that he "*reprinted*" all of Libananco's minutes in 2005. Those were the only versions of the minutes produced in this arbitration. Although the Claimant alleged that the original documents remained in existence or had existed at some earlier point in time, none of those originals were produced and no satisfactory explanation was given for their absence.
491. Taking into consideration all the evidence as set out above on this point, the Tribunal is not satisfied that the minutes are likely to have been created on (or around) the dates that they bear .

**12. Was legal ownership of the share certificates of ÇEAŞ and Kepez in İstanbul validly transferred to Libananco by 12 June 2003?**

492. This is the linchpin of the Claimant's case. The Claimant fails on the present jurisdictional issue if it is unable to establish that it acquired ownership of the share certificates before 12 June 2003.

**a) Were the share certificates located in the Rumeli and Doğuş Buildings wrapped in brown paper and labelled "Libananco"?**

493. The starting point must be the act which, in the Claimant submission, constituted *teslim* in relation to the share certificates in İstanbul.
494. The Claimant submitted that certain share certificates which belonged to members of the Uzan family and were destined for Libananco were stored in the Rumeli and Doğuş buildings in İstanbul. The intent of the transferors to have those shares transferred to Libananco was signified by the wrapping of the share certificates in brown paper and labelling them with the name "Libananco". On that basis, the Claimant contended that Mr Çiğgin's inspection of the share

certificates on 15 May 2003 on behalf of Libananco (coupled with the wrapping and labelling of the share certificates which signified the intent of the transferors) was sufficient to accomplish *teslim*, consequent upon which the ownership in the shares so inspected passed to Libananco.

495. The Tribunal has assumed (without deciding) for the purposes of the present analysis that the method outlined above (i.e. the wrapping of the share certificates in brown paper and subsequent labelling) would, under Turkish law, be factually sufficient to demonstrate the intention of the transferors to transfer ownership of the share certificates to Libananco. The findings below proceed on this basis.

496. On this issue, the evidence of Messrs Ulusoy, Şirin, Bozkurt and Güner is relevant. The Tribunal makes the following observations and/or findings.

496.1 The Claimant's witness Mr Ulusoy gave evidence that the share certificates in the Rumeli Building were indeed wrapped in brown paper on 23 March 2004 and that the "*name of a foreigner*" was marked on the packaging. However, no weight has been accorded to Mr Ulusoy's Witness Statement for the reasons given in paragraph 335 above.

496.2 Mr Bozkurt only visited the Rumeli and Doğuş from January 2005 onwards, more than one and a half years and therefore a substantial period of time after the date in question (i.e. 15 May 2003). Accordingly, his evidence that the share certificates were not packaged in March 2004 was hearsay (i.e. not direct or firsthand testimony which could be tested by cross-examination). It is therefore not admitted in the circumstances since there was direct testimony from Messrs Şirin and Güner on the same issues.

496.3 Mr Şirin confirmed that he had no part in the attachment procedures in the Rumeli Building, but that he was on the second floor of the Doğuş Building on 29 March 2004 where he saw ÇEAŞ and Kepez share certificates (which he deposed were not wrapped or otherwise packaged).

496.4 Mr Güner was the only one of the Respondent's witnesses who testified that he was present at both the Rumeli and Doğuş Buildings on 23 March and 30 March 2004 respectively. Although he deposed that he saw no wrapping around the share certificates in the basement of the Rumeli Building, he admitted in cross-examination that he did not look through all of the steel cabinets at that location. Mr Güner gave little elaboration in relation to his observations at the Doğuş Building.

497. Assuming (but not deciding) that the evidence of the Respondent's witnesses on this point is accepted, this only establishes the state of some (but not all) of the ÇEAŞ and Kepez share certificates in the Rumeli and Doğuş Buildings as at March 2004, some nine months after the date in question (i.e. 15 May 2003). Further, in the light of the observations set out in paragraph 496 above, the Tribunal is unable to make a positive finding, based only on the evidence given by the Respondent's witnesses, that there were no ÇEAŞ and Kepez share certificates wrapped or packaged in brown paper and marked "Libananco" in the

Rumeli and Doğuş Buildings as at March 2004. However, this is ultimately of no moment since it is the Claimant which bears the burden of proof on this issue.

498. Since Mr Ulusoy's evidence has been given no weight in these proceedings, Mr Çiğgin's evidence (i.e. that the share certificates were wrapped in brown paper and marked "Libananco") determines the Tribunal's findings on this issue. For the reasons given at paragraph 504 below, the Tribunal does not find Mr Çiğgin's overall account of the events of 15 May 2003 to be persuasive. Accordingly, there was no satisfactory evidence from the Claimant that the share certificates were so packaged and labelled other than the bare assertion of Mr Çiğgin, which was otherwise uncorroborated by facts on the record.
499. The Claimant has therefore failed to show that, on 15 May 2003, the share certificates in the Rumeli and Doğuş Buildings were wrapped in brown paper and labelled "Libananco". For that reason, the Tribunal is unable to accept the Claimant's submission that the immediate possessors of the share certificates in the Rumeli and Doğuş Buildings were holding the share certificates with instructions and/or the intention to deliver those share certificates to Libananco for the purpose of effecting a transfer of ownership to Libananco. Consequently, the Tribunal concludes that the immediate possessor of those share certificates did not have the authority and hence the right to deliver the latter to Libananco.

**b) Mr Çiğgin's alleged inspection of the share certificates  
in the Rumeli and Doğuş Buildings in İstanbul**

500. Mr Çiğgin's evidence here is critical to the Claimant's case since he was the only witness who attested to the inspection of the share certificates in the Rumeli and Doğuş Buildings on 15 May 2003. The Claimant's position stands or falls on his evidence.
501. Before coming to Mr Çiğgin's evidence on the alleged inspection, the Tribunal observes that certain aspects of the Claimant's evidence more generally are not consistent with the case it has put before the Tribunal. The following are examples.

501.1 The Minutes of the Libananco Management Committee Meeting dated 18 April 2003 (Exhibit H-52) stated that Mr Çiğgin was to "*appoint a two lawyer team to... actually physically recheck the storage of the shares, and the labeling [sic] of the storage under the name of Libananco... on a routine basis (once a month)*". However, there was no evidence that any two-lawyer team was ever established, nor that any routine checks were ever planned or executed, other than the alleged inspection on 15 May 2003 for the purposes of accomplishing *teslim*.

501.2 Mr Türkkân deposed in his First Witness Statement that Mr Çiğgin was instructed to "*re-check the storage of the shares and their labeling [sic] under Libananco's name... and conduct an inventory*". But there was no evidence that such re-checking ever took place, let alone that a written inventory was ever established or maintained by Mr Çiğgin.

- 501.3 Mr Çiğgin himself confirmed that, in early 2003, he had a telephone conversation with Mr Türkkkan during which he was instructed by Mr Türkkkan that “*the Share Certificates needed [sic] be checked at least once a month as long as they were stored in that facility*”. There was similarly no evidence that such monthly checks were ever planned or executed.
502. It is surprising that Mr Çiğgin (an experienced Turkish attorney) did not keep any record of the share certificates that he was alleged to have inspected. He did not have any record of the serial numbers of the share certificates that were allegedly inspected and admitted that the entire process was undocumented.
503. Mr Çiğgin explained that, at the time of the alleged inspection, he was in possession of the inventory of share certificates that were to be inspected (the inventory not being one he created on his own, but rather a document that was sent to him by someone else whom he did not identify). However, he testified that he destroyed that list because he did not want anyone to see it. There was no evidence that such a document existed at any point in time other than Mr Çiğgin’s uncorroborated oral testimony.
504. There were other parts of Mr Çiğgin’s evidence that the Tribunal found unpersuasive.
- 504.1 He did not know who was responsible for the storage of the share certificates which he had allegedly inspected. This reinforces the Tribunal’s conclusion at paragraph 499 above that the Claimant has failed to prove that the person(s) responsible for the storage of the share certificates had the authority and hence the right to transfer possession to Mr Çiğgin (since the Claimant was unable to identify such person(s) in the first place).
- 504.2 Based on Mr Çiğgin’s evidence, there was no indication that he acted on Libananco’s behalf to assume possession of the share certificates on 15 May 2003 (e.g. by way of transporting the share certificates to another destination or by otherwise assuming constructive possession); on the contrary, Mr Çiğgin’s evidence was that he did no more than to perform a visual or physical inspection of those share certificates.
- 504.3 Mr Çiğgin was unable to explain in a satisfactory manner how, after the large denomination share certificates representing more than 45 per cent of the total share capital of ÇEAŞ and Kepez respectively were counted and moved out of the Rumeli and Doğuş Buildings on 15 May 2003 (the date of his alleged inspection), the remainder of the small denomination (and hence bulky) share certificates were counted by 16 May 2003 (the date of the share custody invoices in respect of the latter). Mr Çiğgin’s explanation as to how the smaller denomination share certificates were accurately counted in such a short time was not persuasive for the following reasons.
- (a) Although Mr Çiğgin testified that the counting of the small denomination share certificates could have been done in a short

time because the packages had information about the share certificates contained within, he testified that his own inspection on 15 May 2003 (which did not involve the counting of share certificates), required some seven or eight hours.

- (b) Since the share certificates that were said to have remained in the Rumeli and Doğu Buildings were those with small denominations (and hence were more voluminous and bulky), it would have taken a significantly longer time to count those share certificates.
- (c) The Claimant has not otherwise given any satisfactory explanation as to how the voluminous small denomination share certificates were counted in a short period of time (one day) between 15 May and 16 May 2003.

In addition, the Tribunal observes that the Claimant has provided only photocopies of the share custody invoices, but not the originals for forensic examination; as a result, the Parties' document forensic experts were not able to confirm the authenticity of the share custody invoices (see paragraph 356.5 above). For all the foregoing reasons, the Tribunal is not persuaded that the share custody invoices purporting to reflect Libananco's ownership of 13.9 per cent of the issued shares in Kepez and 15.82 per cent of the issued shares in ÇEAŞ as of 16 May 2003 is an accurate and/or authentic document.

504.4 Mr Çiğgin was unable to explain why there was no disclosure by Libananco or any of the directors of ÇEAŞ and Kepez that Libananco had acquired substantial interests in those companies even though such disclosure was required under Turkish law (the obligation to disclose was triggered upon Libananco's acquisition of 10 per cent or more of the total share capital of ÇEAŞ or Kepez). His only evidence is that he probably looked at this law when he was advising Libananco.

- 505. Not only does Mr Çiğgin's evidence fail to paint a complete picture of what was alleged to have occurred on 15 May 2003, it also does not helpfully explain any of the gaps in the Claimant's case. Accordingly, the Tribunal concludes that the Claimant has failed to demonstrate that any inspection of the share certificates Mr Çiğgin may have conducted in the Rumeli and Doğu buildings in İstanbul on 15 May 2003 was on behalf of Libananco or that it accomplished *teslim* in respect of those share certificates.
- 506. Whilst Libananco's Minutes of the Management Committee Meeting dated 18 April 2003 (Exhibit H-52) purported to demonstrate a concern by Libananco that the security of the share certificates be checked (which in turn implied prior possession by Libananco of those share certificates), it was not the Claimant's case that *teslim* in respect of the share certificates in İstanbul took place at any point in time before 15 May 2003. Indeed, the Claimant did not submit any evidence to show that actual inspections (as opposed to the mere giving of instructions to Mr Çiğgin to inspect) of the share certificates in İstanbul occurred prior to 15 May 2003, whether for the purpose of achieving *teslim* or

otherwise. Accordingly, and for the avoidance of doubt, the Tribunal makes no finding as to whether any inspection (for whatever purpose) of the share certificates in İstanbul took place prior to 15 May 2003.

507. In any event, the Claimant's evidence (in the form of Exhibit H-52 and oral testimony from Mr Çiğgin) to the effect that Mr Çiğgin was to conduct repeated and regular inspections is inconsistent with the objective of accomplishing *teslim* since: (i) the latter is a one-time process and (ii) a mere inspection does not (without more) constitute a transfer of possession (which is the essence of *teslim*). Accordingly, it would be of no assistance to the Claimant's case even if it had been able to show that either an inspection or regular inspections took place prior to 15 May 2003.

**c) Hakan Uzan's alleged inspection of the share certificates in the garage in İkitelli, İstanbul**

508. The possibility that there was yet another act of *teslim* (i.e. in addition to those allegedly accomplished in the Rumeli and Doğu Buildings in İstanbul and via telephone in respect of the share certificates located in Switzerland) was mentioned for the very first time by Hakan Uzan on 23 March 2010 during his cross-examination. Hakan Uzan testified that his father Kemal Uzan called him to inform him to go to a garage in İkitelli, İstanbul on 15 May 2003, where he (i.e. Hakan Uzan) accepted delivery of large denomination ÇEAŞ and Kepez share certificates.
509. Hakan Uzan had no convincing explanation why this alleged third act of *teslim*, previously unmentioned, did not appear in any of the Claimant's Witness Statements or other documents.
510. What is most puzzling about the alleged garage *teslim* is that Hakan Uzan said that the share certificates which he allegedly inspected were only moved to the garage in İkitelli *after* Mr Çiğgin inspected *those very same share certificates* in the Rumeli and Doğu Buildings. Accordingly, the share certificates Hakan Uzan allegedly inspected in İkitelli would have been the same as those Mr Çiğgin had allegedly inspected earlier in the day.
511. This makes no sense. If *teslim* had been accomplished by Mr Çiğgin's inspection in the Rumeli and Doğu Buildings, then Hakan Uzan's inspection of the same share certificates in İkitelli would have been redundant. The Claimant's case is contradictory.
512. There is also no documentary evidence of this alleged third act of *teslim*. In fact, there is no other evidence at all on this point except for the belated and uncorroborated oral testimony of Hakan Uzan.
513. The Tribunal accordingly finds that it is unlikely that the alleged delivery by Kemal Uzan and corresponding inspection and acceptance by Hakan Uzan in the garage in İkitelli ever took place. All of the evidence points in the opposite direction. Hakan Uzan's late introduction of this evidence into the record, in fact, undermines the Claimant's case further. Accordingly, the Tribunal finds that the

Claimant has failed to prove that the events alleged by Hakan Uzan to have taken place in the garage in İkitelli on 15 May 2003 in fact occurred.

**d) Conclusion on the issue of whether *teslim* in relation to the share certificates located in İstanbul was accomplished**

514. The alleged delivery of share certificates in the Rumeli and Doğu Buildings and in the İkitelli Garage was attested to only by Mr Çiğgin and Hakan Uzan. The Tribunal did not find their evidence persuasive. Despite the crucial importance of the process of *teslim*, the Claimant was not able to produce the slightest documentary evidence to support its argument, and indeed its witnesses have admitted that the entire process was undocumented.
515. Further, the documentary evidence (see paragraph 100.1 above) introduced by the Claimant to support the initial version of its case (i.e. that the shares were acquired progressively from October 2002 to May 2003 by way of a series of separate transactions) is completely contrary to the present version of its case (i.e. that the shares were acquired by Libananco only in April and May 2003 pursuant to three acts of *teslim*). Again, the Claimant has provided no satisfactory explanation for this significant change of position.
516. The Tribunal summarises its findings in relation to the two acts of *teslim* which were allegedly achieved in İstanbul on 15 May 2003 as follows.
- 516.1 The Claimant has failed to show that the immediate possessor of the share certificates located in the Rumeli and Doğu Buildings had the authority and hence the right to deliver the latter to Libananco (see paragraph 499 above).
- 516.2 The Claimant has failed to show that any inspection of the share certificates Mr Çiğgin may have conducted in the Rumeli and Doğu buildings in İstanbul on 15 May 2003 was on behalf of Libananco or that it accomplished *teslim* in respect of those share certificates (see paragraph 505 above).
- 516.3 The Claimant has failed to show that the alleged delivery of the share certificates in the garage in İkitelli by Kemal Uzan and the corresponding inspection and acceptance of the same by Hakan Uzan in fact occurred (see paragraph 513 above).
517. The Tribunal returns to the requirements under Turkish law for a legal transfer of possession necessary to accomplish *teslim*. In that regard, the Tribunal refers to paragraphs 398.5 above. On the basis of its review of the evidence, the Tribunal reaches the following conclusions in relation to the share certificates located in: (i) the Rumeli and Doğu Buildings and (ii) the garage in İkitelli.
- 517.1 In relation to (i), there could have been no transfer of possession by an agent. By reason of the Tribunal's finding in paragraph 516.1 above, the Claimant has failed to show that any alleged agent of the transferors was authorised to deliver the share certificates to Libananco. In relation to (ii),



there is no evidence that Hakan Uzan was authorised to act (as an agent) on behalf of Libananco, and that Kemal Uzan was authorised to so act on behalf of all the sellers.

517.2 In relation to both (i) and (ii), there was no assignment of the right to possession since there is no evidence that the transferors of the share certificates assigned their rights to claim for return of possession of the shares certificates to Libananco. There is also no evidence that the transferors instructed the immediate possessor to hold the share certificates for Libananco going forward – in the case of (i), the immediate possessor was an alleged third party whom was in any event not indentified by the Claimant; in the case of (ii) Kemal Uzan was allegedly the immediate possessor of the share certificates but there was no evidence that he was so instructed by the alleged transferors.

517.3 In relation to both (i) and (ii), the question of *constitutum possessorium* does not arise since no evidence has been adduced to show that there was an agreement between the transferors and Libananco that the former would continue to hold the share certificates on behalf of Libananco even after the transfer of ownership was accomplished.

517.4 In relation to both (i) and (ii), the question of delivery by shorthand likewise does not arise since the Claimant has not alleged that Libananco was in possession of the share certificates prior to its alleged acquisition of ownership (nor is there any reliable evidence on the record which might support such a factual finding). In any case, no evidence has been adduced to show that such an agreement was made between the transferors and Libananco (nor does any submission to that effect form part of the Claimant's case).

518. For all the foregoing reasons, the Claimant has failed to show that *teslim* was accomplished on 15 May 2003 in respect of the share certificates in the Rumeli and Doğu Buildings and the garage in İkitelli. For the avoidance of doubt, the Tribunal further considers that, even if the Claimant had been able to prove that Mr Çiğgin inspected the share certificates on 15 May 2003 in the Rumeli and Doğu Buildings (which it has not), such inspection (without more) would have been insufficient to accomplish *teslim* for the reason given in paragraph 517.1 above.

**13. Were the share certificates in Switzerland properly delivered to Libananco so as to effect a transfer of ownership before 12 June 2003?**

519. This act of *teslim* alleged by the Claimant is a telephone call between Hakan Uzan and Mr Türkkkan which took place in April 2003. The gist of the conversation was that Hakan Uzan agreed that the share certificates of ÇEAŞ and/or Kepez kept in a rented property in Switzerland would now be held in custody for Libananco.

520. The Tribunal found the evidence given by the Claimant's witnesses here to be unsatisfactory.

520.1 Hakan Uzan admitted that his telephone call to Mr Türkkan was not recorded or documented in any way.

520.2 Mr Türkkan was not provided with any inventory or any other means by which he could have identified the share certificates that were supposedly being held for Libananco in Switzerland, and Hakan Uzan took no steps to evidence the share certificates in respect of which *teslim* had allegedly been accomplished in favour of Libananco.

521. Consequently, neither Hakan Uzan nor Mr Türkkan were able to identify which of the share certificates in Switzerland were (subsequent to the telephone call) allegedly held on behalf of Libananco. Hakan Uzan admitted that there was no way to physically determine which of the share certificates located in Switzerland were supposedly owned by Libananco and which were not. Logically, *teslim* could not have taken place unless the property alleged to have been delivered was certain and capable of identification.

522. However, an even more serious weakness in the Claimant's case was Mr Türkkan's evidence to the effect that *teslim* had not in fact occurred in relation to the share certificates in Switzerland. Rather, he testified that *teslim* was planned, but did not ultimately occur owing to the termination of ÇEAŞ' and Kepez's Concession Agreements (see paragraph 269.4 above).

523. Consequently, the Tribunal finds that *teslim* could not have occurred and did not in fact occur in respect of the share certificates located in Switzerland. Any attempted delivery (of which there is little or no evidence in the first place) would not have been effective since it was impossible to ascertain which share certificates were to be delivered.

#### **14. The share certificates produced by the Claimant for inspection in Vienna in 2009**

524. The Tribunal acknowledges, for the avoidance of doubt, that many of the high denomination ÇEAŞ and Kepez share certificates are presently in Libananco's possession and were delivered either by Libananco or other persons for inspection in Vienna in 2009 (see paragraph 35 above). The Claimant submitted that these share certificates were most likely to have been removed from the Rumeli and Doğu Buildings before July 2003, when the SDIF first assumed control over security in the Rumeli and Doğu Buildings. If this was not the case, the high denomination share certificates would have been seized at that time by the SDIF, and the Claimant would not have been able to produce them for inspection in Vienna. The inference, according to the Claimant, is therefore that the high denomination share certificates were removed from the Rumeli and Doğu Buildings before July 2003. The Claimant submitted that this meant that it was likely that it acquired possession (and hence ownership) of those share certificates before July 2003 (see paragraph 146 above).

525. However, these facts (even if true) are of no assistance to the Claimant.

525.1 First, even if the high denomination share certificates in question were removed from the Rumeli and Doğu Buildings before July 2003, this does not show in any conclusive manner that Libananco in fact acquired possession (or ownership) of those share certificates at that time. The Tribunal considers that the logical connection between the two events is tenuous at best.

525.2 Second, Libananco's *present* possession of the share certificates in question is irrelevant as the question before the Tribunal is whether the Claimant has met its case that *teslim* in respect of those share certificates occurred at the material time (i.e. before 12 June 2003). In other words, the key issue is *when* and *how* Libananco obtained possession of the share certificates in question.

525.3 In that regard, the Claimant's case is that *teslim* occurred on two days: first on a certain (unidentified) day in April 2003, and on 15 May 2003. As determined by the Tribunal above, the Claimant has failed to establish the occurrence of *teslim* on those days. Libananco's ownership of the share certificates in question at any other point in time is therefore not material. It follows that the Claimant's production of approximately 50,000 ÇEAŞ and Kepez share certificates in Vienna for inspection in 2008 says nothing about whether Libananco owned those share certificates before 12 June 2003. The Tribunal accordingly accepts the Respondent's submission that the Claimant's possession of the share certificates in November 2008 does not prove or otherwise evidence Libananco's acquisition of those share certificates before 12 June 2003.

526. The Respondent further submitted as follows.

526.1 In December 2004, the Board of Directors of ÇEAŞ and Kepez resolved to exchange their old share certificates for new ones denominated in the new Turkish currency. The companies announced, in the Turkish newspaper *Cumhuriyet* on 9 January 2005 (Exhibits R-502 and R-503) that, on 24 December 2004, their boards had resolved to cancel all existing share certificates and to issue new certificates denominated in the new Turkish Lira, the legal currency introduced in Turkey with effect from 1 January 2005. This new currency removed 000 000 (six zeros) from the then existing Turkish Lira.

526.2 On 27 January 2005, ÇEAŞ and Kepez advised the Turkish Capital Markets Board that the majority of their shareholders had already exchanged their old share certificates for new ones (Exhibits R-504 and R-505).

526.3 In submissions to the Adana and Antalya courts, ÇEAŞ and Kepez repeated that "*a large portion*" of their shareholders had exchanged old certificates for new ones, and that the old certificates were "*destroyed after being exchanged with new ones*" (Exhibits R-506 and R-526).

526.4 Thus, as confirmed by ÇEAŞ and Kepez themselves, most of their shareholders had exchanged their old share certificates in 2005, and the old share certificates were cancelled and destroyed after they were turned in by those shareholders. Yet in 2008, Libananco produced old share certificates (the Depository Bank Report showed that all of the share certificates produced by the Claimant in Vienna were denominated in old Turkish Lira, i.e. pre-currency reform) representing approximately 35 per cent of the share capital of ÇEAŞ and 45 per cent of the share capital of Kepez.

526.5 The Respondent submitted that the Claimant did not explain how it managed to produce substantial quantities of old (i.e. pre-currency reform) ÇEAŞ and Kepez share certificates for inspection in Vienna in 2008 when a majority of their shareholders had already exchanged the old share certificates for new ones (i.e. post-currency reform) in 2005.

527. The Claimant did not explain its position on this issue.
528. The Respondent's submission, based on its arguments above, appears to be that the old share certificates could have been exchanged by Libananco in 2005 if Libananco had indeed owned share certificates in ÇEAŞ and Kepez from 2003 onwards. It is observed that the facts recited by the Respondent in paragraph 526 above, even if shown to be accurate, do not conclusively prove that Libananco had not acquired the share certificates in ÇEAŞ and Kepez before 12 June 2003. The Tribunal therefore finds that those facts (assuming, but without deciding, their accuracy) are merely suggestive that Libananco *may* not have owned the share certificates in question before 12 June 2003.
529. Accordingly, in the light of the Tribunal's findings in paragraphs 518 and 523 above, the Tribunal finds that the Claimant has not demonstrated that possession and/or ownership of the ÇEAŞ and Kepez share certificates which it produced in Vienna in 2008 was/were transferred to it at a time and in a manner which entitles it to bring a claim in the present proceedings.

### **15. Conclusion on whether Libananco acquired ownership of shares in ÇEAŞ and Kepez before 12 June 2003**

530. Taking all the evidence on this issue as a whole, the Tribunal finds the Claimant's case based on the evidence of its factual witnesses who were available for cross-examination to be highly strained and thus unpersuasive overall.
531. One striking feature of this case, underscored by the nature and magnitude of the transaction and investment in question, is the absence (even in the context of a family investment) of any form of orderly procedure designed to produce an adequate written record and compliance with the legal requirements that had to be met in order to achieve the desired factual result. Indeed, the evidence shows that even basic corporate and legal documents (many of which would be likely to exist if the facts alleged by the Claimant are true) were neither created nor

retained by the persons responsible for managing or otherwise involved in Libananco's corporate affairs.

531.1 Although Hakan Uzan's evidence was that Mr Türkkan was to hold Libananco on trust for certain members of his immediate family, there were no agreements or other documents (either formal or informal) to evidence and record this important arrangement. Hakan Uzan's evidence was that the terms of the trust were never communicated to Mr Türkkan.

531.2 The acts of *teslim* alleged by the Claimant to have occurred in April and May 2003 were completely undocumented, save for Mr Çiğgin's inventory of the share certificates located in the Rumeli and Doğuş Buildings in İstanbul; however, Mr Çiğgin testified that the inventory was later deliberately destroyed by him.

531.3 Although the intra-family transactions were allegedly recorded by agreements recovered as deleted files on Mr Türkkan's floppy disks, this was very weak evidence since the provenance of those files has not been explained in a satisfactory manner by Mr Türkkan (or any other of the Claimant's witnesses). Furthermore, those transactions were conducted in a roundabout manner, for which there was again no convincing explanation.

531.4 The intra-family transactions were allegedly carried out pursuant to the "family divorce", which was itself otherwise also undocumented.<sup>19</sup>

532. The failure of the Claimant's witnesses to comply with the relevant legal requirements (which could easily have been complied with) is suspect since no convincing reason for such non-compliance was forthcoming.

532.1 Libananco's accounts for 2002, 2003 and 2004 were filed only in 2007, although these were required by law to be filed annually. Although Mr Partellas testified that Mr Türkkan had asked him to delay those filings, no good reason was given for the delay. There was also no evidence that the accounts were produced contemporaneously (which would have assisted the Claimant in the circumstances if such evidence had been adduced).

532.2 Cem Uzan by his own admission deposed that there was no public disclosure of Libananco's alleged investment in ÇEAŞ and Kepez until 2005, even though the obligation (under Turkish law) to make such disclosure would have been triggered upon Libananco's acquisition of interests in ÇEAŞ and Kepez.

533. There are many evidential gaps in the Claimant's case, as well as serious discrepancies for which no satisfactory explanation has been given.

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<sup>19</sup> Save for the STAs, which the Claimant later alleged constituted agreements of intent to transfer. The Tribunal did not find this to be persuasive evidence to support the existence of the alleged "family divorce" given the Claimant's significant and unexplained change of position in relation to the role and function of the STAs.

533.1 There was no proof that the Instrument of Transfer was signed in April 2002 as alleged by the Claimant's witness Mr Sarris. No convincing reason was given as to why Mr Türkkan could not have signed the Instrument of Transfer in April 2002 given that he was allegedly in Cyprus in early April 2002.

533.2 Based on all the available evidence, the Claimant failed to prove that Mr Türkkan travelled to Cyprus in April 2002 to undertake work in connection with Libananco.

533.3 Exhibit R-821, which the Tribunal found to be representative of the individual shareholding of members of the Uzan family in ÇEAŞ and Kepez as at 20 May 2003 (and also the period leading up to 12 June 2003), indicated that members of the Uzan family (and not Libananco) owned majority interests in both ÇEAŞ and Kepez.

534. A further weakness in the Claimant's case is that there is a substantial body of un rebutted evidence that brings into question the dates of creation and/or accuracy of the key documents on which the Claimant has relied to establish the jurisdiction of the Tribunal. For the reasons given above (at paragraphs 483 and 491 respectively), the Tribunal is unable to accept that the STAs and Libananco's minutes establish (either in part or in whole) the Claimant's case that Libananco acquired ownership of the shares in question before 12 May 2003.

535. Last but not least, the Tribunal found the Claimant's significant and unexplained change of position in relation to the role and function of the STAs troubling.

536. For all the foregoing reasons, the Tribunal considers that the Claimant has failed to meet its burden of proof when all the evidence is viewed as a whole. Although some of the evidence submitted by the Claimant tends to support certain aspects of its case, the Tribunal finds that, in the light of the various inconsistencies, conflicts and changes in the Claimant's account of the events that occurred, its final description and account of how it came to own shares in ÇEAŞ and Kepez is not persuasive. The Claimant has therefore not discharged its burden to show positively that it had acquired, by 12 June 2003, ownership of any of the large quantity of shares in issue in the manner alleged, or at all. Accordingly, the Tribunal finds that the Claimant has not proved that it owned the shares in ÇEAŞ and Kepez, which represent the "Investment" in this arbitration, by the critical date of 12 June 2003.

## **X. WAS LIBANANCO AN "INVESTOR" WITHIN THE MEANING OF THE ICSID CONVENTION AND THE ECT?**

537. The Tribunal having thus decided that Libananco has failed to prove that it owned, on the critical date, the shares in ÇEAŞ and Kepez that formed the basis of its claims, it is not strictly speaking necessary for the Tribunal to proceed to a formal decision on the remaining three of the Preliminary Jurisdictional Objections. As indicated above (at paragraph 33) the four Preliminary Jurisdictional Objections were selected by the Tribunal for hearing on the basis

that they were discrete, and that each of them was capable of bringing the arbitral proceedings to an end. Once it is established that Libananco cannot be regarded as the owner of the claimed investment at the relevant time, it becomes without object to consider, for example, whether or not Libananco comes within the class of potential investors under either the ICSID Convention or the ECT, since without an “investment” there can be no “Investor”.

538. Nevertheless, out of deference to the care with which all of the Preliminary Jurisdictional Objections have been pleaded by both Parties, and in the hope that it may be of some benefit to those who have to confront these issues in future, the Tribunal adds the following brief comments on certain general issues raised by the third and fourth Preliminary Jurisdictional Objections (i.e. those set out in paragraphs 105.3 and 105.4 above respectively) which are not specific to the particular situation of Libananco. The Tribunal wishes to stress that these comments should not be regarded as having the status of formal decisions by the present Tribunal on these issues.

## **XI. DO LIBANANCO’S CLAIMS SATISFY EXPRESS CONDITIONS OF TURKEY’S CONSENT TO ARBITRATE?**

539. The essence of the third Preliminary Jurisdictional Objection (set out in paragraph 105.3 above) is that the Turkey’s consent to arbitration is lacking because Turkey is one of the Contracting Parties listed in Annex ID to the ECT as falling within paragraph (3)(b) of Article 26 of the Treaty. To be more precise, whereas paragraph (2) of Article 26 opens to an Investor of a Contracting Party three avenues for the settlement of disputes with another Contracting Party, and paragraph (3)(a) confers in that context an unconditional consent by each Contracting Party to the submission of such disputes to arbitration or conciliation, paragraph (3)(b), by contrast, limits that unconditional consent by excluding from its scope disputes which the Investor has previously submitted to the national courts or tribunals of the Contracting Party.<sup>20</sup> The limitation is brought about by sub-paragraph (i) and applies in respect of the Contracting Parties listed in Annex ID. The provision is then completed by sub-paragraph (ii), under which “[f]or the sake of transparency” each Contracting Party listed in Annex ID “shall provide a written statement of its policies, practices and conditions in this regard”. The statement is to be provided to the Secretariat no later than the date of the deposit of the instrument of ratification, acceptance, approval or accession by the Contracting Party concerned.
540. There is no need for the Tribunal to dwell on the disagreement between the Parties as to whether – in general – compromissory clauses should be interpreted restrictively or not, since it shares the view taken by the tribunal in *RosInvestCo UK Ltd v The Russian Federation (Award on Jurisdiction)* (Arbitration Institute of the Stockholm Chamber of Commerce, Case no: Arbitration V 079 / 2005) that:

*“... the correct approach is to interpret the BIT even-handedly and objectively, on its terms, under the rules laid down in the Vienna*

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<sup>20</sup> Or to any other applicable dispute settlement procedure previously agreed.

*Convention, and without any presumption either in favour of or against the Tribunal's own jurisdiction".*

541. The Respondent's argument is based on its submission that all of the Claimant's claims in this arbitration stem from the basic allegation that the Respondent's termination of the Concession Agreements was not authorised under the terms of those agreements or applicable Turkish law. This, it is said, was the very issue at the heart of the litigation pursued by ÇEAŞ, Kepez, Cem Uzan (and others) before the Turkish courts. However, Turkey's acceptance of the ECT was conditioned by its inclusion in Annex ID on the basis that the Turkish Constitution prevents the recognition of arbitral awards resulting from the re-litigation of issues already decided by Turkish Courts, and this was understood and accepted by the other Contracting States from Turkey's statement of policy to the Energy Charter Secretariat in 1999 which fulfilled the requirements of Article 26(3)(b)(ii).
542. The Claimant challenges this qualification of the Turkish notification to the Energy Charter Secretariat, on the grounds both that the notification represents merely a factual account of the domestic ratification process and that it was not submitted to the Secretariat in due time, and accordingly failed to meet either of the two requirements embodied in Article 26(3)(b)(ii). The Claimant further claims that the notification refers explicitly to *res judicata*, so that on its own terms it is without legal effect unless all of the conditions for the application of the *res judicata* principle are met, specifically an identity of parties, of subject matter and of relief sought, none of which is fulfilled in the circumstances of the present arbitration.
543. The text of Article 26 of the ECT reads as follows:
- “(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*
  - (2) If such disputes can not be settled according to the provisions of paragraph (1) within the period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
    - (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;*
    - (b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
    - (c) in accordance with the following paragraphs of this Article.*
  - (3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives unconditional consent to the submission of a*



*dispute to international arbitration or conciliation in accordance with the provisions of this Article.*

*(b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph 2(a) or (b).*

*(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.*

*(c) ...”*

544. The letter on which the Respondent relies in this context is an extensive one, the relevant part being in the following terms:

*“[under the Turkish Act of Civil Procedures (Article 237 of Law No. 1086)] if a court of law of the Republic of Turkey has adopted a decision on an issue, it has the force of final judgment on the principle of res judicata pro veritate habetur (no double jeopardy –to avoid that two judgments are issued to settle the same dispute).*

*Accordingly, it would not be possible for the national courts in Turkey to recognise and enforce the awards of arbitration by the virtue of the provision of the Law No. 2675 (Article 45(b)) on “Act on Procedure Related to Private International Law”, which regulates the recognition and enforcement of foreign arbitration awards in parallel with the provisions of the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) which was ratified by Turkey in 1988 by the Law No. 3731”.*

545. The disagreements between the Parties in this respect accordingly give rise (amongst others) to the following two issues.

(a) Does Article 26(3)(b) of the ECT create a form of entitlement on the part of Contracting States to the ECT to avail themselves of its terms, but an entitlement which is conditional on the making of a sub-paragraph (ii) notification in proper form?

(b) Should a sub-paragraph (ii) notification be regarded in law as similar or equivalent to a reservation, so that the scope and effect of its limitation of consent would depend on the content of the particular notification?

546. The Tribunal is not convinced, on the argument before it, that either of these two propositions is necessarily sound, as a matter of the interpretation of the ECT. It seems to the Tribunal reasonably clear that the purpose of paragraph 3(b) in Article 26 was to accept, and to incorporate into the terms of the negotiation of

the ECT, that certain Negotiating States would, on becoming Party to the ECT, give only a limited consent to arbitration by comparison with the unconditional consent given by the other Contracting States. And the scope of the limitation is defined in the Article itself as excluding from that consent disputes falling within a certain descriptive category, i.e. disputes that had previously been submitted to its own courts or administrative tribunals, or to some other pre-agreed dispute settlement procedure. It therefore seems to the Tribunal plain, simply on the way in which Article 26(3) is drafted, both that the limited consent is foreseen and understood to take effect automatically, on the giving by the State in question of its “consent to be bound”<sup>21</sup> by the Treaty, and (on the other hand) that the States covered by this provision are definitively identified, once and for all, by Annex ID itself as established at the time the ECT was concluded and opened for signature. It would then follow that the limiting effect cannot be conditional on the statement required by sub-paragraph (ii), either as to the fact of the limitation, or as to its extent; and that is indeed reinforced by the wording of sub-paragraph (ii) itself, with its express indication that the requirement is merely “for the sake of transparency”. It seems rather to be the case that listing under Annex ID has the automatic effect of registering that the original consent of the Negotiating State in question is limited as precisely described in Article 26(3)(b), sub-paragraph (i). One may contrast with this the system set up by Article 45, which also allows individual Contracting Parties to limit their consent (in this case to provisional application of the ECT), but is clearly so constructed as to make the limitation of consent dependent on the making of the declaration provided for in its paragraph (2). As the tribunal in *Yukos v. Russian Federation*, Interim Award of 30 November 2009 on Jurisdiction and Admissibility (“*Yukos*”), pointed out, the subjective operation of Article 45, paragraph (2), stands in direct opposition to the objective operation of paragraph (1).<sup>22</sup> On that analysis it may be right that what we have in sub-paragraph (ii) of Article 26(3)(b) is a collateral obligation, one coupled with a specific time limit, but nothing more than that, so that whatever legal consequences might follow from any failure to comply with the collateral obligation, they would not extend to the invalidation of the listing in Annex ID itself with all that flows from that. Faced with the clear prescription that the States “listed in” Annex ID do not give their unconditional consent to (among other things) arbitration, it would not appear to be open to a Tribunal to go behind that listing in order to assemble some form of “constructive consent”, so as to circumvent the fundamental rule that arbitration of any kind<sup>23</sup> is rooted in consent to arbitrate.

547. For all those reasons, and particularly so in view of the outright prohibition on reservations contained in Article 46 of the ECT, the Tribunal does not see what warrant there would be for treating the system set up by Article 26(3) in the same way as if it were a purpose-built regime for permitted reservations to the ECT, nor therefore for applying to Article 26(3) the detailed rules pertaining to reservations under the Vienna Convention on the Law of Treaties (“VCLT”) or general international law. That said, the Tribunal is also conscious of the fact that the application of some aspects of Article 26(3) is not without its problems,

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<sup>21</sup> *Ibid.*, Articles 11 *et seq.*

<sup>22</sup> *Yukos*, paragraphs 282 ff.

<sup>23</sup> i.e. not only arbitration between an investor and a State.

notably (in the present context) what value should be attached to the juxtaposition of “unconditional” [consent] with “its ... conditions” (where “its” refers to the particular Contracting State listed in Annex ID). The drafting is ambiguous as to whether, in not giving their “unconditional consent” the States listed in Annex ID do not give consent at all (for the situations mentioned in Article 26(3)), or whether they do in fact give a consent, but a “conditional” one, with the particular “condition” remaining to be determined on another occasion. It is conceivable that the form of drafting used was intended to leave open the possibility for individual Annex ID States to use their declarations under Article 26(3)(b)(ii) for the purpose of converting their position into one of “conditional” consent to arbitration etc., in which case the terms of the particular declaration would become of critical importance in defining what consent had or had not been given by the Contracting Party in question. That would appear, implicitly, to have been the assumption made by the *Yukos* tribunal.<sup>24</sup> But the point was not fully argued either before the *Yukos* tribunal or before the present Tribunal, and the Tribunal sees no need to express any view on it.

548. Given the foregoing, there would, in the Tribunal’s view, be no purpose in discussing further the competing arguments of the Parties in respect of the doctrine of *res judicata*, on the basis of its having been mentioned in the Respondent’s statement under Article 26(3)(b)(ii). There remains, however, a question as to how far the references in the text of Article 26(3)(b)(ii) to “the Investor” and “the dispute” themselves require some form of identity between the claims in, say, domestic legal proceedings and in a potential arbitration. The issue is not (as indicated) one which the Tribunal has to decide. The Tribunal is in some doubt, however, as to whether the provisions of a multilateral Treaty of this kind should be construed with the same strict rigour that might be appropriate for the application of a national procedural rule, e.g. of *res judicata*. The justification for a more flexible interpretative approach, informed by the purpose the treaty rule is intended to serve, would be not simply the different nature of the legal instruments involved, but also the difference in the prospective effects: the application of a domestic rule of *res judicata* is there to prevent the re-litigation of an issue that has already been authoritatively determined; a treaty rule may serve the different purpose of preventing forum-shopping.<sup>25</sup> An approach as strict as the one the Claimant contends for here would make the operation of Article 26(3)(b) entirely dependent (so far as its relationship with domestic legal proceedings was concerned) on whether the national law in question permitted the litigation of a *treaty dispute as such* in the local courts or tribunals. But to make the issue turn in that way on the *form* in which the local legal action had been brought, rather than on the *real substance* of the underlying rights at issue would clearly run the risk of subverting what may have been the intention behind the treaty provision. The alternative would be to treat Article 26(3)(b) as a classic fork-in-the-road provision, of a kind commonly encountered in the field of investment arbitration, and that would in turn imply a much stricter approach to the identity of claims. Were the issue to

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<sup>24</sup> And appears indeed to be the basis on which both Parties proceeded before it.

<sup>25</sup> The Tribunal notes that the tribunal in *Petrobart Ltd. v. Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce No. 126/2003, Award, 29 March 2005 (“*Petrobart*”), appears to have regarded Article 26(3)(b) as a special treaty rule different from the general principle of *res judicata*, whereas the tribunal in *Yukos* appears to have made a different assumption.

arise for determination in a future case, it would require the tribunal in such a case to rank the relative weight of two treaty provisions of apparently coordinate status, sub-paragraphs (a) and (b) of Article 26(3): the one entailing an unconditional giving of consent, and the other an unmistakable non-consent, linked by the “subject to” formulation in sub-paragraph (a).

## **XII. IS LIBANANCO ENTITLED TO THE BENEFITS OF ARTICLE 17 OF THE ECT?**

549. The Tribunal passes now briefly to the fourth Preliminary Jurisdictional Objection (set out in paragraph 105.4 above), under which the Respondent claims that it has in any event the right to deny Libananco the benefits of the ECT, in application of its Article 17.

550. Article 17 of the ECT is a denial of benefits clause, under which each Contracting Party “reserves the right” to deny the advantages of Part III of the Treaty in, among other things, the following two cases:

- (a) if the Investor is a legal entity owned or controlled by citizens or nationals of a third state and if the entity has no substantial business activities in the Area of the Contracting Party in which it is organised (Article 17(1)); “Area” in this context is a term of art, defined in Article 1(10), and includes the land and maritime territory of a Contracting Party; and
- (b) if the Investment is an Investment of an Investor of a third state with or as to which (among other things) the denying Contracting Party does not maintain a diplomatic relationship (Article 17(2)).<sup>26</sup>

The use of the phrase “reserves the right” raises difficulties that have troubled other tribunals,<sup>27</sup> specifically what (if anything) the Contracting State must do in order to exercise its reserved right; when it may (or must) do so; and whether the effect is retrospective, or prospective only. The Tribunal has nothing of its own to add to the debate on that subject.

551. There was no dispute in the present case as to whether Libananco was formed as a Cypriot company and as to who held the rights of ownership or control over Libananco<sup>28</sup> at the time the Claimant’s Request for Arbitration was filed. There was also no dispute as to the state of the diplomatic relationship between Turkey and Cyprus. Nor was there any serious difference between the Parties as to the nature of Libananco’s business activities in Cyprus. The issue that has occupied the major part of the argument between the Parties is what meaning should be attributed to “third state,” and whether the term has the same meaning in both

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<sup>26</sup> A difference between the drafting of the two provisions is that the first of them is cast in objective terms, whereas the second is in terms expressly imposing on the denying Contracting Party the burden of establishing the factual predicate; see further below.

<sup>27</sup> Cf. *Plama Consortium Limited v. Republic of Bulgaria Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, and *Petrobart*.

<sup>28</sup> Although there has been some debate between the Parties (not material for present purposes) as to whether Cem Uzan, Hakan Uzan, or Mr Türkkan had or had not become Jordanian nationals.

Article 17 and Article 7 of the ECT. The Tribunal had the benefit in this regard of the testimony of Mr Craig Bamberger, who, as chief legal counsel to the International Energy Agency, was closely associated with all aspects of the drafting of the ECT during its negotiation, and who kept a detailed personal record on which his Witness Statement had been based. Mr Bamberger was not called for cross-examination, nor was his written testimony challenged. The Tribunal therefore treats it as an accurate account of what took place during the negotiations, which may be drawn on, as necessary, in interpreting and applying the relevant provisions of the ECT.

552. Apart from a comprehensive account of the several national proposals that were in due course amalgamated into what became the denial of benefits provisions in Article 17, the following were the principal points to emerge from Mr Bamberger's evidence.

- (a) The term "third state" appears in numerous Articles of the ECT, viz. Articles 1(7)(b), 7(10)(a)(i), 9(1), 10(3), 10(7), 12(1), and in Article 17 itself.
- (b) As the negotiations entered their final phase, the uniform usage in all of these provisions (other than Article 7) was the phrase "state that is not a Contracting Party".
- (c) This phrase was then replaced, at the very final stages, by the term "third state," but this was a purely technical drafting operation undertaken by the Secretariat on the recommendation of the Legal Sub-Group, and was not intended to bring about any change of meaning.
- (d) Article 7 of the ECT was negotiated separately from Article 17, and under the aegis of a different Conference committee. No specific process was set in train, in the rushed final days of the Conference, to ensure an overall concordance of texts, or in particular to compare or reconcile the usage in Article 7 with that in other provisions, or *vice versa*.<sup>29</sup>

553. Against that background, the Tribunal does not believe that the interpretation of the disputed term raises anywhere near the difficulties that emerged in the conflicting argumentation of the Parties. The Tribunal recalls that, in the application of the principles of interpretation laid down in the VCLT, the starting point for interpretation is the ordinary meaning to be given to the terms of the treaty (in their context and in the light of the treaty's object and purpose), but that a special meaning shall be given to a term "*if it is established that the parties so intended*".<sup>30</sup> No evidence has been led to suggest any such intention in respect of the use of the term "third state" in Article 17, or indeed in the other Articles listed above – with the possible exception of Article 7. The interpretative process begins, accordingly, with the ordinary meaning of the

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<sup>29</sup> Suggestive of the rushed circumstances is the fact that in one place in the definitions Article itself, Article 1(7)(b), the term "third state" appears in quotation marks, implying that there may have been some thought of including a definition of that term as well.

<sup>30</sup> VCLT Article 31(4).

term. The Tribunal is satisfied that ‘third state’ has a well recognised ordinary meaning in treaty law. As appears from Section 4 of the VCLT (entitled “*TREATIES AND THIRD STATES*”), the expression means simply “*state not party to the treaty in question*”, which is indeed the only way in which one can give meaning to the “*General rule regarding third States*” enunciated in Article 34 of the VCLT, or to the particular rules laid down in Articles 35-37, or to the saving clause contained in Article 38.<sup>31</sup> This reading corresponds exactly to what (according to the evidence of Mr Bamberger) transpired in the closing stages of the Conference on the ECT, when the crystal-clear phrase “*state that is not a Contracting Party*” was replaced by “third state”. Had the change not been made, there would have been no room for argument on the question. But the Tribunal is not persuaded that the blanket drafting change in all of the Articles in which the longer version occurred was intended to – or had the effect of – changing the sense of these provisions as a matter of “ordinary meaning”. If any confirmation of this were needed, it can be found by looking at the uses of this term in the ECT “in their context”, as the VCLT requires. Without performing this analysis in detail, the Tribunal can content itself with observing that, in all of the cases listed above (with the exception of Articles 7 and 17), the reference to a “third state” is juxtaposed immediately alongside a reference to “a Contracting Party” or “the Contracting Parties”, in such a way as to leave no room for doubt that the two situations were meant to indicate mutually exclusive alternatives. The Tribunal regards that as powerful confirmation that the term “third state” is used in the ECT in its normal sense. The wording of Article 17 on its own may offer, by contrast, no strong contextual evidence of the same kind, but in its place we have Mr Bamberger’s account that the Article had been worded “state that is not a Contracting Party” until the final stages, when the wording was altered together with the same phrase in other articles.

554. Does it make any difference to this clear picture that Article 7 explicitly provides that a “third state” can be a Contracting Party? In the Tribunal’s view, it does not. This view does not depend in its entirety on Mr Bamberger’s evidence referred to in paragraph 552(d) above, although the Tribunal observes that Mr Bamberger’s evidence would be directly relevant if there were to exist any ambiguity that might be resolved by reference to the preparatory work.<sup>32</sup> But in truth there is no ambiguity in Article 7 itself, the terms of which admit only one possibility, namely that in this Article a “third state” can be a Contracting State, because that is what the definition in paragraph (10)(a)(i) says expressly. Once again, moreover, it is the context that explains the usage, since in this particular case, where the subject of the treaty provision is *transit*, there is by definition a first state (the state of origin) and a second state (the state whose territory is being transited), so that the state of destination becomes, in an ordinary linguistic sense, a “third” state – but in circumstances in which it would make no sense to apply the treaty to the carriage *unless* the “third” state were itself a Contracting Party. However the clinching argument is in any case, as the Tribunal sees matters, the explicit indication in the *chapeau* to Article 7(10) that

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<sup>31</sup> The term itself, “third state”, no doubt had its origin against the background of the classic bilateral treaty, in which there were two (only) Contracting States, so that any non-Contracting State was by that fact alone a “third” State. But it seems plain that the International Law Commission had not the slightest difficulty in generalising the usage, by analogy, to treaties of all kinds.

<sup>32</sup> Article 32(a) of the VCLT.

the two definitions which follow are “[f]or the purposes of *this Article*”<sup>33</sup>, which automatically excludes the export of either of those two definitions to other Articles, Article 17 included.

555. The only substantial argument remaining is the one from *effet utile*, on which the Respondent, placed greater and greater reliance as the arbitration proceeded. The essence of the argument is that the purpose and effect of Article 17(2) is to deny benefits (“advantages”, in the treaty text), so that the provision would make no sense unless those benefits were in principle available, from which it must follow (so the argument continues) that “third state” must be capable of including Treaty Parties, since otherwise “*an Investment of an Investor of a third state*” would not enjoy Part III benefits in the first place.
556. The Tribunal does not find this argument convincing. One might begin by pointing out that, under the Respondent’s construction, the picture contains no “third” state at all (in the numerical sense). More substantively, though, both “Investor” and “Investment” are capitalized in the wording of Article 17(2), so indicating that they are used as terms of art defined as in Article 1. And the definition of “Investor” in Article 1(7) is deliberately drawn so as to allow for third state Investors. The clear probability must therefore be that Article 17(2) had in mind a quite different eventuality from the one posited by the Respondent, namely one in which the “Investment” itself is made – in a direct sense – from within the circle of the Contracting Parties, but the ultimate beneficial owner or controller of the “Investment” (the “Investor”) belongs to a “third state” as envisaged in Article 1(7). That would then make sense of the difference in phraseology as between paragraphs (1) and (2)<sup>34</sup>, with its requirement under paragraph (2) that the denying Contracting Party has to “*establish*” the ultimate third state nature of the Investor/Investment in order to be entitled to deny him/it the advantages of Part III of the ECT. This seems to the Tribunal to be the natural reading of Article 17, and it finds in fact some confirmation in the account in Mr Bamberger’s witness statement.

### XIII. COSTS

557. Both Parties have asked that their legal and arbitration costs be borne in full by the other party.
558. The Claimant has quantified its total costs at US\$ 24,381,556. This sum consists of US\$ 18,099,523 by way of legal fees and US\$ 6,282,033 in respect of other expenses. Its advances to ICSID amount to US\$ 627,754. In its Petition for Costs of 1 July 2010, the Claimant contended, among other things, that the Respondent attempted to frustrate the proceedings and acted in bad faith, and that this conduct warrants an award of costs in favour of the Claimant. According to the Claimant, the alleged misconduct includes the Respondent’s attempts to intimidate the Claimant’s counsel, witnesses and experts (e.g. by electronic surveillance), delaying tactics, knowingly false allegations of fraud, default of Tribunal Orders and the withholding of evidence.

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<sup>33</sup> Emphasis added.

<sup>34</sup> Fn. 26 above.

559. The Respondent has quantified its total costs at US\$ 35,702,417.76. This sum likewise consists of US\$ 25,699,521 by way of legal fees and US\$ 10,002,896.76 in respect of other expenses. Its advances to ICSID amount to US\$ 625,000. The Respondent contended that it has reasonably incurred these costs in response to the nature of the claim and the manner in which the Claimant conducted itself over the lengthy period of the proceedings, in particular that it commenced and prosecuted an abusive claim. According to the Respondent, the Claimant repeatedly altered its case theory and narrative, which forced the Respondent to gather evidence from multiple jurisdictions and engage counsel and experts to investigate, evaluate and refute the Claimant's contentions. The Respondent referred, in addition, to the considerable burden of having to translate documents and submissions out of and into Turkish. The Respondent requested for interest on the amount awarded, to accrue at a reasonable commercial rate as from the date of the Award.

560. Under Article 61(2) of the ICSID Convention:

*“the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and charges for the use of the facilities of the Centre shall be paid”.*

The Tribunal considers that Article 61(2) of the ICSID Convention gives it the power to award costs (defined to include legal fees, out of pocket expenses as well as costs of the arbitration) and the discretion to decide at what level to do so. This view has also been expressed by other ICSID tribunals.

561. The costs claims mentioned above were submitted by the Parties in response to an order from the Tribunal dated 2 April 2010. No page limit was prescribed, and each Party's submission on costs was full and detailed in the sense that breakdowns of the total fees and expenses claimed were given, although not of the actual work done represented by the various invoices rendered, nor (in all cases) of the actual expenses incurred.

562. The Tribunal begins by noting that the amounts claimed by each Party as its own costs and expenses are very substantial indeed. This applies to both the claims for legal fees and to those for other expenses. The Tribunal acknowledges of course that a multiplicity of issues of both fact and law has been raised before it, that a significant amount of technical forensic evidence has been deployed by each Party, and that experts in various disciplines have been commissioned on both sides to present written reports to the Tribunal and to testify orally in these proceedings. The Tribunal is nevertheless constrained to observe that what it is presently adjudging in this Award, close to five years after these arbitral proceedings commenced, remains, all the same, no more than a selection of four among the set of Preliminary Objections raised by the Respondent. An explanation of why each Party has incurred its costs and expenses is not the same thing as a justification of their necessity. Many national jurisdictions that follow a practice of awarding costs to the successful party also



make a distinction between the costs actually incurred by a litigating party and those which are assessed by the court as having been reasonably and necessarily incurred for the purposes of the litigation, and base their award of costs on the latter not the former. Without being in any way bound by national practice of this kind, the Tribunal regards the underlying approach as suitable for international arbitration, and intends to follow it in the present case. In this regard, the Tribunal has considered, among other things, the following factors (in no particular order of importance):

- (a) the importance of the matter to the Parties and the value of money or property involved, namely the sum of some US\$ 10.1 billion claimed by the Claimant (which the Tribunal understands to be the largest claim in ICSID arbitration at the time the Request for Arbitration was filed);
- (b) the amount and extent of factual and expert evidence adduced in these proceedings in relation to the issue of whether Libananco acquired ownership of the share certificates in question by 12 June 2003;
- (c) the conduct of the Parties during the proceedings; and
- (d) the circumstances in which the work or parts of it were done (which the Tribunal understands to have taken place across multiple jurisdictions and involving extensive arrangements for travel, translation and investigation made by both Parties).

563. Although many ICSID tribunals have ruled that each party should bear its own costs, others have applied the principle that “costs follow the event”, or else have proceeded to an allocation *pro rata*, i.e. an allocation proportionate to the tribunal’s assessment of the relative merits of all claims made by the parties. The present Tribunal is of the view that a rule under which costs follow the event serves the purposes of compensating the successful party for its necessary legal fees and expenses, of discouraging unmeritorious actions and also of providing a disincentive to over-litigation. It also allows a tribunal sufficient leeway to take due account of specific issues on which the overall losing party has nevertheless succeeded, and to take account as well of the costs implications of procedural motions raised by one or another party. The Tribunal accordingly considers that it is appropriate to apply here the principle that “costs follow the event” and that a costs order should be made in favour of the Respondent, on the basis that the Claimant has not been able to prove its ownership of the investment that forms the essential foundation for these lengthy and hard fought proceedings.

564. However, the Tribunal has also to take into account those issues where it is not appropriate for costs to be awarded in favour of the ultimate prevailing Party, because it was not the winner on that particular issue or “event” or indeed because there was no decision as to who won or lost. In the present case, the Tribunal believes that the following matters are ones where the Respondent should not be awarded its costs and expenses.

- (a) Costs and expenses arising from complaints to the Tribunal by the Claimant relating to the alleged covert surveillance of the Claimant's representatives, Counsel and witnesses, which led to the Tribunal's order of 1 May 2008 after an oral hearing. The reasons for the Tribunal's decision in this regard may be gleaned from its order of 1 May 2008.
- (b) Costs and expenses arising from the Respondent's application for sequestration and forensic inspection of the ÇEAŞ and Kepez share certificates held by Libananco pursuant to the Tribunal's Decision on Preliminary Issues of 23 June 2008 (directing the share certificates in question to be held by an escrow agent and forensically inspected), as well as the costs and expenses relating to the actual inspection. At the end of the day, the evidence adduced arising from this inspection yielded little or no evidence that assisted the Tribunal in its decisions, except to the limited extent that the experts from both Parties were able to reach agreement.
- (c) Costs and expenses arising from a similar application for forensic inspection of the STAs and certain other documents in Washington, D.C. pursuant to an order from the Tribunal dated 3 November 2008 as well as costs and expenses relating to the actual inspection. Again, the ultimate result of the inspections yielded little or no evidence that assisted the Tribunal in its decisions, except to the limited extent that the experts from both Parties were able to reach agreement on certain propositions.
- (d) Costs and expenses in relation to the Preliminary Jurisdictional Objections which are dealt with at paragraphs 537 to 556 above (i.e. the second, third and fourth Preliminary Jurisdictional Objections). For the reasons stated in the earlier parts of this Award, once the Tribunal had decided on the main factual issue, it became unnecessary to decide the remaining Preliminary Jurisdictional Objections but, in view of the substantial submissions made by the Parties, the Tribunal has set out its thoughts on them without making any decision on any of them. While it would not be right to penalise either Party for the costs of these undecided issues, the fact is that there was no winner on any of them, and the Tribunal therefore does not believe it appropriate to award any costs or expenses in regard to them in favour of either Party.

565. Further, the Tribunal is inclined to exercise some restraint in assessing the reasonable amount of costs and expenses that should be awarded to the Respondent pursuant to paragraph 563 above. While the Respondent's wish to assemble a powerful battery of legal and other resources is well understood, given the magnitude of the claim against it, other underlying aspects of the tensions between the Parties (reflected in the way the case was argued on both sides), lend themselves less well to being reflected in a costs order by an ICSID tribunal. Specifically, although the Tribunal is conscious that the claim was for a sum in excess of US\$ 10 billion, the Tribunal is mindful that:

- (a) the claim for costs and expenses is significantly larger than any claim for costs previously made in an ICSID arbitration, as well as significantly

larger than any previous award for costs and expenses made by any previous ICSID tribunal;

(b) the Award in this case is on a jurisdictional issue (albeit hotly contested as to facts and law) and a selection of other preliminary issues; and

(c) there needs to be some proportionality in the award (as opposed to the expenditure) of legal costs and expenses. A party with a deep pocket may have its own justification for heavy spending, but it cannot expect to be reimbursed for all its expenditure as a matter of course simply because it is ultimately the prevailing party.

566. The Tribunal is also not in the position of a national court which can undertake a detailed assessment on an item by item basis of a party's claim for legal costs and expenses. Following contemporary international arbitration practice, the Tribunal takes a "broad-brush" approach to the task of determining a reasonable figure to award for such legal costs and expenses.

567. For these reasons, the Tribunal considers that it is appropriate to order the Claimant to pay the Respondent the sum of US\$ 15,000,000 in respect of legal fees and out of pocket expenses, representing what in the Tribunal's view amounts to an appropriate figure to award, having regard to the principles and reasons set out above, and to all the circumstances of this case.

568. The above excludes the question of the costs of the arbitration (i.e. the fees and expenses of the Members of the Tribunal and of the ICSID Secretariat), which amount to approximately US\$ 1,205,000. As a result, each Party's share of the costs of arbitration amounts to approximately US\$ 602,500. The decision of the Tribunal is that such costs should follow the ultimate event, and must be paid in full by the Claimant.

569. Accordingly, the Tribunal orders the Claimant to pay the Respondent the sum of US\$ 602,500 representing the estimated expended portion of the Respondent's advance on the costs of the arbitration,<sup>35</sup> as well as a proportion of the Respondent's legal fees and out of pocket expenses in the sum of US\$ 15,000,000. The above amounts will bear interest on the outstanding amount thereafter at the rate of three-month LIBOR plus one per cent per annum, such interest to run from the 31<sup>st</sup> day after the date of despatch of this Award on the unpaid portion of the amounts due on this Award.

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<sup>35</sup> The ICSID Secretariat will in due course provide the Parties with a financial statement of the case account and the Parties will be reimbursed the remaining balance proportionally to the amount which was paid by each Party.

#### **XIV. OPERATIVE SECTION**

570. On the basis of the foregoing, the Tribunal decides as follows.

570.1 The Tribunal has no jurisdiction over the present case as Libananco has not proved that it owned shares in ÇEAŞ and Kepez before 12 June 2003.

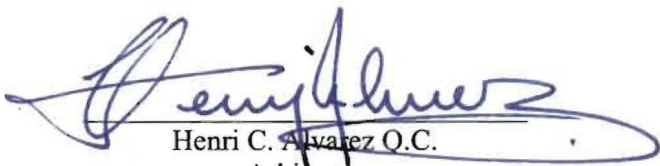
570.2 All the Claimant's claims in this arbitration are dismissed.

570.3 The Claimant is ordered to pay the Respondent US\$ 602,500 in reimbursement of the expended portion of the Respondent's advance on costs as well as US\$ 15,000,000 in respect of the Respondent's legal fees and out of pocket expenses; such amounts to bear interest on the outstanding amount thereafter at the rate of three-month LIBOR plus one per cent per annum, such interest to run from the 31<sup>st</sup> day after the date of despatch of this Award on the unpaid portion of the amounts due on this Award.

570.4 Recalling its Order of 1 May 2008 (pursuant to which the Claimant was ordered, amongst other things, to deliver the original share certificates to the custody of an escrow agent) and having regard to the following matters:

- (a) paragraph 3.2.7 of the Tribunal's Order of 1 May 2008 (pursuant to which the Tribunal retained the discretion to make further orders concerning the custody of the share certificates held in escrow);
- (b) the share certificates were ordered to be produced, pursuant to the specific terms of the Tribunal's order, for the sole purpose of examination by the Parties (by means of their respective forensic experts or otherwise);
- (c) such examination is now complete;
- (d) the Tribunal has dismissed the Claimant's claim on the grounds that the Tribunal has no jurisdiction over the present dispute;
- (e) there being no reason for Libananco's share certificates to be held in escrow any further;

the Tribunal now orders the release of the share certificates from escrow to the Claimant.



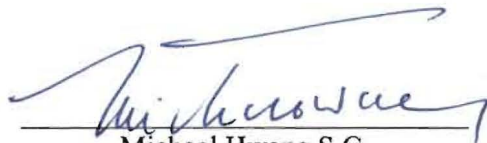
Henri C. Alvarez O.C.  
Arbitrator

Date: 31/08/11



Sir Franklin Berman Q.C.  
Arbitrator

Date: 29-8-11



Michael Hwang S.C.  
President of the Tribunal

Date: 25 August 2011