

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ADEL A HAMADI AL TAMIMI V. SULTANATE OF OMAN
(ICSID CASE No. ARB/11/33)

PROCEDURAL ORDER No. 2
CONCERNING
THE CLAIMANT'S APPLICATION
FOR ACCESS TO CONDUCT A SITE INSPECTION

Members of the Tribunal

Professor David A. R. Williams QC, President of the Tribunal
Judge Charles N. Brower, Arbitrator
Mr. J. Christopher Thomas QC, Arbitrator

Secretary of the Tribunal

Ms. Frauke Nitschke

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1. By letter to the Tribunal dated 25 September 2012, the Claimant applied for an order directing the Respondent to grant the Claimant's industry and damages experts' immediate access to the site of the former quarry that is the subject of this arbitration for the purposes of conducting a site inspection ("**Application**").
2. By separate email to the Tribunal of 26 September 2012, the Claimant indicated that his counsel and expert team wished to visit the quarry site on Sunday, 30 September or Monday, 1 October 2012 and therefore requested that the Tribunal rule on the Application as a matter of urgency.
3. In accordance with the Tribunal's directions, the Respondent subsequently filed a response by letter to the Tribunal dated 27 September 2012 ("**Response**"), and the Claimant filed a reply by letter to the Tribunal dated 28 September 2012 ("**Reply**").
4. The Tribunal has conferred and sets out below its ruling on the Claimant's Application.

Claimant's Application

5. The Claimant indicated that the proposed site visit would involve a brief visit by four individuals, during which the Claimant's experts would not remove anything from the site, or alter the site in any way. The Claimant submitted that his counsel and experts would need to visit the former quarry site as soon as possible and in any event before 10 October 2012 in order to be able to contribute meaningfully to the presentation of the Claimant's case.
6. It was said that the visit was necessary *inter alia* in order to evaluate the photographic evidence that has been provided to the Claimant's experts by the Respondent. In addition, the Claimant submitted that the Claimant's experts' testimony in relation to the permits the Respondent was allegedly obliged to provide to the Claimant would be assisted by the site visit.

Respondent's Response

7. The Respondent objected to the Claimant's request on the basis that the Claimant had failed to articulate a clear or compelling need for the site visit, and had raised the request in an unfair and prejudicial manner.
8. As to the need for the site visit, the Respondent submitted that:

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- a) The Claimant already possessed photographic evidence of the site and, in any event, it did not appear that the Claimant was intending to involve a professional photographer in the site inspection.
- b) The Claimant already possessed sufficient information to mount a damages claim, as evidenced by previous statements to that effect by the Claimant. Moreover, it could be inferred that the Claimant would already be in possession of full information as a result of the Claimant's pre-investment due diligence.
- c) In any event, the Claimant's damages claim would need to be based on information in existence at the time the decision to invest was made, and not information obtained after the fact by means of a site inspection.
- d) The issue of permits was one of Omani law, rather than one that would be assisted through a site inspection. Furthermore, none of the proposed attendees were Omani law experts.

9. As to the manner in which the request was raised, the Respondent noted that the Claimant had known of the existing procedural timetable for a considerable amount of time. Despite this knowledge, the Claimant elected to leave it until 19 September 2012 to first raise the request for permission to conduct a site inspection. Thereafter, having filed the Application with the Tribunal on 25 September 2012 seeking a site inspection before 10 October 2012, the Claimant sent a further email a few hours later indicating his desire for the site inspection to take place within the next few days.

10. Finally, the Respondent noted that, from its perspective, the request was burdensome since it would require Omani officials to attend the site, a four-hour drive from Muscat, together with the Claimant's counsel and experts. The main contact in the Ministry of Commerce and industry responsible for the conduct of this case was said to be travelling outside of Oman until 8 October 2012, and consequently a visit could not be schedule prior to 9 October in any event.

Claimant's Reply

11. In its Reply, the Claimant submitted that the Respondent had overreacted to a routine and non-burdensome request. The Claimant contended that it was unclear what Omani laws could be violated by the experts walking and driving around a non-active limestone quarry.

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Moreover, the Claimant pointed out that, to the extent that the Respondent wished to have representatives accompany the Claimant's experts, that was the Respondent's choice and it had numerous personnel from which to choose. The Claimant also denied that it had previously been stated in the context of settlement negotiations that the Claimant had already conducted a site visit and had more than enough information to mount a damages claim.

12. As to the need for the site visit, the Claimant clarifies that the photographic evidence that it did possess was not produced in the context of preparing for this arbitration, and that it was desirable for the Claimant's experts to be able to assess the adequacy of that photographic evidence in light of a complete inspection of the site. In particular, the Claimant pointed out that it was intended that the photographic record be assessed to ensure that all relevant features of the quarry site had been properly documented, including the location of, for example, the access road to the quarry site, the washing plant, the scale houses, and the screening sites.

13. With respect to the information needed for the damages case, the Claimant noted that the information prepared in advance of the investment would not necessarily marry up entirely with the information that would be needed by an industry expert in preparing a damages case to the Tribunal. It was also pointed out that the site had apparently not been altered in the three years since the Claimant's involvement with the quarry ended. As to the permitting issues, the Claimant clarified that the intention was to survey the site against the coordinates given in various official permits over the course of the project.

14. Finally, with respect to the timing of the visit, the Claimant contended that, for unforeseen reasons, it had become imperative that the site visit take place on Sunday, 30 September or Monday, 1 October for cost and logistical reasons. The Claimant suggested that it might be possible for someone other than the main contact identified by the Respondent to accompany the Claimant's experts on the site visit.

Tribunal's Ruling

15. Having carefully considered both parties' positions, the Tribunal finds that the Claimant's request to conduct a site visit is, in general terms, justified and should be allowed. In particular, the Tribunal accepts the need for a site visit for the reasons given by the Claimant.

16. However, the Tribunal also considers that the fact that the Claimant's request was only raised at the eleventh hour has not been adequately explained, especially given that the timetable for the arbitration has been known to the Claimant for a considerable period of time. In such circumstances, the Tribunal is unable to accede to the Claimant's request for an

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immediate site inspection. To the extent that this leads to “cost and logistical issues”, that is a matter for the Claimant.

17. Accordingly, the Tribunal makes the following directions:

- a) The parties shall confer with a view to agreeing a time and protocol for a site visit by the Claimant’s experts and counsel, which visit shall take place as soon as possible after 8 October 2012.
- b) The Claimant shall specify clearly the amount of time needed to conduct the site visit, and the identity of those who are to take part on the Claimant’s behalf.
- c) Any photographic or other evidence procured as a result of the site visit shall only be used for these proceedings, and shall not be used for any other purpose.
- d) Leave is reserved to apply in respect of any aspect of the above directions.

[signed]

David Williams QC
(For and on behalf of the Tribunal)

Date: 28 September 2012