UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BASSAM Y. ALGHANIM, Plaintiff, v. KUTAYBA Y. ALGHANIM, OMAR K. ALGHANIM, ALGHANIM INDUSTRIES COMPANY W.L.L., YUSUF AHMED ALGHANIM AND SONS W.L.L., and WALEED MOUBARAK, Defendants.	:	09 Civ. 8098 (NRB)

DECLARATION OF AHMED SADEK EL-KOSHERI

I, Ahmed Sadek El-Kosheri, hereby declare as follows:

1. I am a member of the Bar of Egypt, admitted in 1952, and a Senior Partner in the law firm of El-Kosheri, Rashed & Riad, based in Cairo, Egypt. I hold a Bachelor of Laws (L.L.B.) from Cairo University (1952) as well as higher legal degrees from that institution. (D.E.S. in Islamic Law; 1954; D.E.S. in Private Law, 1955; D.E.S. in Public Law, 1956). I also hold higher degrees (*diplôme d'etudes supérieures*) from the University of Paris (D.E.S. in Political Science, 1957; D.E.S. in Comparative Law, 1959) and Rennes University (D.E.S. in Philosophy of Law, 1960), and was awarded a doctorate (*Doctorat d'Etat*) in France in 1962.

2. Throughout my career, after serving during six years as Member of the Egyptian Conseil d'Etat, I have held a number of academic positions. In 1958, I became a member of the faculty of Ain Shams University Law School in Cairo, Egypt, remaining a full-time member of its academic staff until 1974. Later, during

1983, I also served at that institution as an Adjunct Professor of International Economic Law. From 1989 to 2003, I was Professor of Law and Vice President, and as of 1997 President of Senghor University in Alexandria, Egypt. Before joining Senghor University I was also a Visiting Professor at Nanterre University - Paris X (1987-88). I have also been a Visiting Professor at Beirut Arab University (1963-64).

3. Throughout my career, I have had extensive experience in dealing with Kuwaiti law, including in the following capacities:

(a) Legal Advisor for the Ministry of Finance and Oil, Kuwait 1968-1969; and

(b) Founding General Counsellor, Arab Fund for Economic & Social Development in Kuwait, 1973-74; and

(c) Counsel for the Government of Kuwait in *Government of the State of Kuwait v. American Independent Oil Company (AMINOIL)*, 21 I.L.M. 976 (1982), a well-known international arbitration that called for the application of both Kuwait law and international law in connection with an oil concession that was nationalized by the Kuwait government.

4. I have served as an arbitrator or judge in numerous international tribunals. I am currently serving as an arbitrator in several pending arbitrations before the International Centre for the Settlement of Investment Disputes ("ICSID"), and have also been an arbitrator in cases before the International Chamber of Commerce ("ICC"), the Permanent Court of Arbitration at the Hague, as well *ad hoc* arbitrations. In 1992, I was appointed as an *ad hoc* judge of the International Court of Justice at The Hague in the two *Cases Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of*

America), cases that remained pending until 2003. Between 1997 and 2000, I was a member of the Member of the Arbitration Tribunal in *Government of the State of Eritrea v. Government of the Republic of Yemen*, an inter-state arbitration conducted before the Permanent Court of Arbitration at The Hague, which decided various issues of territorial sovereignty and maritime delimitation between those two countries.

5. In addition, I have served as a Cultural Counsellor for Egypt in Washington D.C., (1971-72), Cultural Counsellor for Egypt in Paris, (1970-71), Of Counsel, Baker & Mackenzie, Chicago, Illinois (1975), Secretary General, Islamic Development Bank, Jeddah, Saudi Arabia, (1978), a Member of the Supreme Legislation Committee of Egypt (1996 to 2000), a Judge of the Administrative Tribunal of the African Development Bank (1997 to 2003), Vice Chairman of the ICC International Court of Arbitration (1998 to 2009), and one of the Five Members of the "Redesign Panel " created by the UN General Assembly to reform the UN Judicial Internal Justice System (2006). I am a member of The Bar Association of Egypt, the International Council of Commercial Arbitration (ICCA), the *Institut De Droit International (since 1987)*, the Egyptian Society of International Law and a former member of the Scientific Council of the ICC Institute for International Business Law and Practice (1984-2004).

6. I have published numerous articles concerning civil and commercial law and procedure within the Arab world, including in particular on the issue of arbitration within the Arab world. In the course of my professional and academic career (and also as arbitrator), I frequently am called upon to analyze and opine upon issues of arbitration within Arab legal systems, including in Kuwait. In this respect, it should be

noted that the laws of the Gulf States draw heavily upon Egyptian law and that Egyptian case law and scholarly authority are highly influential within the Gulf jurisdictions.

7. My full curriculum vitae, which includes a select biography of my published works, appears as **Exhibit 1** hereto.

8. I have been retained by counsel for plaintiff as an expert witness to opine on certain issues of Kuwaiti law which, I understand, pertain to the issues of whether the issues in this case are subject to arbitration in Kuwait.

9. To that end, I have reviewed (1) the First Amended Complaint by plaintiff Bassam Y. Alghanim ("BYA"); (2) the Notice of Motion filed by defendants Kutayba Y. Alghanim ("KYA") and Omar K. Alghanim ("OKA") to dismiss or stay this action pending arbitration and accompanying papers, including: (a) the declaration of Omar El-Essa ("El-Essa Decl.") and exhibits thereto; (b) the declaration of Dr. Nasser Ghunaim Al Zaid ("Al Zaid Decl.") and exhibits thereto; (b) the declaration of Dr. Ahmad Al-Samdan ("Al-Samdan Decl.") and exhibits thereto; (3) the Notice of Motion filed by defendant Waleed Moubarak ("WAM") and supporting declaration of Tai H. Park ("Park Decl."); and (4) certain further sources of Kuwaiti law as referenced herein.

10. In this declaration I make reference to, among other things, an Agreement dated March 12, 2008 ("March 12 Agreement"; Essa Decl. Ex. B), as well as a March 27, 2008 "Memorandum of Understanding" subsequently signed by BYA and KYA (the "MOU"). I note that KYA argues that paragraph 7 of the March 12 Agreement and paragraph 15 of the MOU constitute valid and enforceable arbitration clauses.

11. In summary, I am of the opinion that:

(i) The First Five and Tenth grounds for causes of action submitted to the New York Court in the present case are non-arbitrable under the Kuwaiti Law and could not be subjected to arbitration under any circumstances.

(ii) With regard to all ten grounds for causes of action in the present case, no Kuwait Judge or *a fortiori* a Kuwaiti arbitrator has jurisdiction to adjudicate the Common Law Torts claimed in this case to have been committed in the USA (and other places outside Kuwait).

(iii) It could not be reasonably envisaged at the time of concluding an arbitration agreement to operate *ratione materiae* a division of common belongings between two brothers that such subject-matter could possibly extend to include crimes and tort activities committed subsequently in the USA.

(iv) OKA and WAN, as non-signatories to the Arbitration Agreement between BYA and KYA, could not be involved as parties in said Arbitration, and *a priori* neither one of them can request BYA to submit to Arbitration in Kuwait any of the claims filed against them in the pending New York Lawsuit.

(v) No arbitrator sitting in Kuwait under Kuwaiti Law could have power to hear and determine BYA's claims made in the New York pending Lawsuit against KYA, OKA and WAM.

(vi) Finally, I consider untenable the allegation that the claims before the New York Court in the present case relate to agreements agreed to be settled by arbitration in Kuwait under Kuwaiti Law and fall within the jurisdiction *ratione materiae* and *ratione persona* of the Kuwaiti arbitrator.

12. I arrived to the above-stated conclusions after careful analysis of the documents reviewed and based on the following premises:

1. The provisions pertaining to Arbitration and contained in paragraph (7) of the "Agreement" between BYA and KYA dated March 12, 2008 ("March 12 Agreement") and paragraph (15) of a March 27, 2008 "Memorandum of Understanding" signed by BYA and KYA (the "MOU") are fully taken into consideration.
2. We assume, for purposes of our analysis, that those resolution provisions constitute a binding arbitration agreement under Kuwaiti Law.
3. We assume, for purposes of our analysis, that neither OKA nor WAM has signed either the March 12 Agreement or the MOU.

13. In the light of the above-stated facts and assumptions, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, in their capacity as Attorneys for BYA in the said New York Lawsuit, requested the undersigned to provide a considered Legal Opinion on the following three issues:

(A) Whether, as a matter of Kuwaiti Law, the claims BYA has made in the New York Lawsuit fall within the scope of those dispute resolution provisions contained in the March 12 Agreement and the MOU.

(B) Whether, as a matter of Kuwaiti Law, would BYA be obligated to submit the claims he has made in the New York Lawsuit against OKA and WAM to arbitration, pursuant to those dispute resolution provisions.

(C) Whether, under Kuwaiti Law, an arbitrator would have power to hear and determine the claims BYA has made in the New York Lawsuit against KYA, OKA and WAM.

In this report, I conclude that the answer to all three questions is "No."

(I) With regard to the scope of the contractual provisions pertaining to arbitration in Kuwait:

14. In order to properly determine the *ratione materiae* scope of the said arbitration clause, we have primarily to start by a comprehensive analysis of what is the true nature and characterization of the claims presently submitted to the New York Court.

There can be not doubt, in my opinion, according to the clear language of the Amended Complaint filed by BYA, that he claims being a victim of acts committed mainly in the USA and which fall under one of the following causes of actions:

First: Violation of the Stored Communication Act, 18 U.S. C § 2701, et seq. providing – *inter alia* – for criminal penalties and civil damages for such violations

Second: Violation of the Computer Fraud and Abuse Act, 18 U.S. C § 1030, providing – *inter alia* – for criminal penalties and civil damages for such violations;

Third: Violation of the Wiretap Act, 18 U.S. C § 2510, providing – *inter alia* – for criminal penalties and civil damages for such violations;

Fourth: Violation of RICO, 18 U.S. C § 1962 (c), providing – *inter alia* – for criminal penalties and civil damages for such violations;

Fifth: Violation of RICO, 18 U.S. C § 1962 (d), providing – *inter alia* – for criminal penalties and civil damages for such violations;

Sixth: Conversion, which is a common law tort cause of action for the wrongful disposition of a right to property that the plaintiff owns or has the right to posses;

Seventh: Aiding and Abetting Conversion, which is a common law tort cause of action against persons whom knowingly substantially assist a conversion of property;

Eighth: Violation of the Right to Privacy under California Law, which is a common law tort cause of action for an improper intrusion into Plaintiff's private places, conversations or matters in a manner highly offensive to a reasonable person;

Ninth: Aiding and Abetting Violation of the Right to Privacy under California Law, which is a common law tort cause of action against persons whom knowingly substantially assist an invasion of privacy; and

Tenth: Violation of the California Computer Data Access and Fraud Act, Cal. Penal Code § 502, which is a state criminal statute, providing – *inter alia* – for criminal penalties and civil damages for such violations.

15. Accordingly, as a matter of reasonable characterization, the New York Lawsuit under consideration has to be construed as a case involving substantially and predominantly criminal activities committed in the USA, which have to be treated as such.

16. This compelling conclusion leads to a basic issue alluded to at paragraph 29 (p.7) of Dr. Ahmed Al SAMDAN's Declaration, when he stated: "For example, criminal matters are not allowed to be arbitrated".

17. The real focus in the present case has precisely to address the issue of non-arbitrability in respect of criminal claims, under a fundamental general rule inherent to the arbitration process as conceived by the various legal domestic systems, which is unanimously recognized under the Kuwaiti Law and shared by other Arab countries, mainly the Egyptian Law which the two eminent lawyers, who provided Legal Opinions for the Defendants (Dr. Al Zaid and Dr. Al-Samdan) frequently referred to as the historical source of the Kuwaiti Legislative Acts.

18. In essence, what is missing throughout the Defendants submissions, in view of a comprehensive statement of the Kuwaiti Law as relevant to the present case, relates to the investigation of what impact Article (173) of the Kuwaiti Civil and Commercial Procedural Code No. 38 of 1980 has on the present case.

19. More precisely, we have to shed sufficient light on the non-arbitrability *ratione materiae* of claims raising issues of criminal acts which fall necessarily within the exclusive jurisdiction of the State Courts at the Country where said acts took place, and which *a contrario* could not be subject to arbitration whatever may be the breadth of the arbitration clause invoked.

20. Article (173) of Law no. 38 of 1980, promulgating the New Kuwaiti Civil and Commercial Procedure Code, provides explicitly in its second paragraph for a general rule, according to which no arbitration is legally permissible concerning certain categories of subject-matters that, by virtue of their public policy nature, could not lead to an out-of-court transaction or settlement by a compromise among the concerned parties (commonly known in the Arabic original text as (صلح *Solh*).

21. This concept of subject-matters on which no possible "صلح – *solh*" can take place are necessarily of non-pecuniary character as clearly understood by virtue of Article (554) of the Kuwaiti Civil Code, since the pecuniary aspects related thereto are exempted from that exclusion and can be subject to *solh* transactions.

22. In his leading Book on "**The Kuwaiti Arbitration Law**", first published in 1990 by Kuwait University, Professor Dr. Azmi Abdel Fattah Attiya addresses extensively the scope of the non-arbitrability principle provided for under the said two Articles ((173) of the Procedural Code and (554) of the Civil Code). At page (110), he starts by emphasizing that: "the subject-matter of an arbitration agreement cannot be the determination of whether a given act constitutes a crime or not, but arbitration can take place about the pecuniary rights resulting from a crime such as the civil indemnification". At the end of the following pages (111), he lists the "matters on which arbitration is excluded due to its public policy nature", mentioning, *inter alia*, "the crimes", emphasizing thereafter the reasons for that exclusion and the

"inconvenience for a private person, who is an arbitrator to impose a penal sanction" (p. 113) – **Exhibit 2**).

23. The above-stated combined interpretation of the relevant legislative provisions of the Kuwaiti two Codes of Civil Law and Procedural Law are perfectly in conformity with the Egyptian Model, which served as its historical source.

24. Article (551) of the Civil Code contains the same distinction between the exclusion from *Solh* of the issues related to committing criminal acts and the possibility of concluding a transaction about the pecuniary interests resulting thereof (AL SANHOURY, AL WASSIT, vol. 5, pp.554 – 558- **Exhibit 3**).

25. As for the non-arbitrability under the New Egyptian Arbitration Law, Article (11) supplements Article (551) of the Civil Code by stipulating: "No arbitration can be permitted with regard to matters on which no *Solh* can take place". (Dean Mostafa El Gamal and Dean Okasha Abdel Aal: "**Arbitration in Private International and Domestic Relations**, vol. 1, 1998, p. 155 et seq.). The two eminent Alexandria Law School Professors, elaborate on the reasons why criminal law issues can not be dealt with, except by State Authorities, with reference to a decision rendered on December 2nd, 1980 by the Court of Cassation, according to which: "since the cause of action (in the case envisaged) relates to establishing the existence of the crime as such and determining the person responsible thereof, which are matters pertaining to the public policy and can not be subject to transaction, hence, these issues can not be a subject-matter of arbitration" (pp.164-165 – **Exhibit 4**).

26. Two subsequent Decisions rendered by the Egyptian Court of Cassation have reiterated that established jurisprudence, the first dated November 19, 1987 (**Recourse no. 1473 for the 53rd Judicial Year**), explicitly stating: "Arbitration is not permissible with regard to determining the responsibility of the person committing a penal crime, as this has to be considered contrary to Public Order" (**Exhibit 5**, page 970).

A few years later, on May 26, 1996 (**Recourse no. 795 for the 60th Judicial Year**), the Court of Cassation declared: "In conformity with what has been the case-

law of this Court, no arbitration can be permitted concerning the determination of the responsibility of the person who committed a penal crime, otherwise this has to be considered contrary to the Public Order" (**Exhibit 6** – page 865).

27. The Doctrinal Authorities are unanimous in approving the Court of Cassation's established case-law in this respect. In his Book: "**Arbitration in Private International Relations**", (2006), Dr. Ashraf Al Rifai considers evident that

> "the Arbitrator can not have competence to impose penal sanctions and that Arbitration is not permissible regarding the determination of the offender's criminal liability, since Arbitration can not be permitted concerning the applicability of the Penal Law texts.
>
> Accordingly, Arbitration is excluded in dealing with the existence or non-existence of a crime, in establishing its attributability to the alleged author thereof and with regard to the determination of what criminal sanction has to be imposed"

(p.323 – **Exhibit 7**).

Dean Fathi Wali, in his authoritative Book "**Arbitration Law – In Theory and Practice"** (2007) declares: "An agreement to arbitrate is not valid regarding any issue falling within the exclusive jurisdiction of criminal courts, whether in relation to the existence of the incriminated act, its characterization or in determining who is responsible for a given crime" (p. 124 – **Exhibit 8**).

Judge Ahmed Abdel Sadek in his Book "**The General Treatise on Arbitration – Egyptian, Arab and International**" (2008), emphasizes with regard to non-arbitrability that: "The issues encompassing the crime itself aiming to determine the person responsible thereof, are matters related to Public Order, which can not be subject to transaction (*Solh*), and hence, can not legally be submitted to Arbitration" (pp. 179-180). He later reports a case of adjudicating a criminal issue pertaining to determining who committed the crime, and comments that "the arbitral award ruled on an issue related to Public Order not possibly subject to transaction (*Solh*), and consequently can not validly be subject to arbitration" (*Ibid*, p.195-196 – **Exhibit 9**).

28. For all the above-stated reasons, I am of the opinion that primarily all the First Five as well as the Tenth grounds for causes of action submitted to the New York Court in case No. 09 – CIV – 2098 (NRB) could not definitively be subjected to

arbitration according to the Kuwaiti Legal System, which like all other Arab Legal Systems, does not permit arbitration with regard to adjudicating whether a criminal offense took place, determining who are the offenders to be sentenced if proven guilty and what criminal sanctions should be imposed on them.

29. As for the civil sanctions and monetary penalties resulting as a consequence of said grounds for causes of action, they can not be possibly separated from the process of judicial adjudication by the Competent State Court as to principal activity of a criminal nature, and, consequently, it could not logically and legally be conceivable that an arbitrator sitting in Kuwait could wait to be informed about the result of the criminal trial that took place in New York for crimes committed outside of Kuwait to ascertain what monetary consequences of said criminal actions could possibly have on his exclusive mission of dividing the assets inherited between BYA and his brother KYA.

30. Given the clear position concerning the First Five and Tenth grounds for Causes of action in the pending New York Judicial Case, additional legal analysis is required with regard to the remaining grounds for Cause of Action raised before the New York Court in the pending case, which relate to specific Common Law Torts.

31. In this respect, the basic distinction between "contractual relationships" and "torts" has to be given the almost consideration, particularly on two levels as indicated herein-after.

32. **First:** As a general rule of private international Law, the applicable conflict-of-laws rule for torts, in contrast to contracts, is the mandatory applicability of the law of the Country where the wrongdoing (i.e. the illegal activity) took place *(lex loci delicti)*.

Consequently, neither a Kuwaiti Judge, nor *a fortiori* a Kuwaiti arbitrator, can exercise jurisdiction to adjudicate an issue pertaining to a "Common Law Tort" based on conduct that is alleged to have been committed in the United States in violation of a Federal or State statute.

Accordingly, there can be no justification whatever to allege that the arbitrator assigned contractually the task of dividing the joint holdings between the two Kuwaiti brothers can possibly extend his authority to include the Common Law tort causes of actions brought in this case under U.S. laws, under whatever pretexts that may be invoked by the other brother or whoever other persons who acted on his behalf or under his instructions.

33. **Second:** According to an established principle common to all domestic legal systems in the Arab countries, an arbitration agreement is necessarily limited *ratione materiae* to the subject-matters entrusted to the arbitrator(s) by the mutual consent of the parties thereof and cannot be extended to matters which are not necessarily linked thereto, particularly those aspects related to delictual responsibility (Dr. Fathi Wali, op.cit., **Exhibit 8** at p.131-132).

34. Hence, we are of the opinion that, at the time when the 12th of March 2008 Agreement was concluded or on the 27th of March 2008 when MOU was signed between BYA and KYA, nobody could have reasonably envisaged that the task assigned to His Highness Nasser Mohamed A.T Al Sabah, the Prime Minister of Kuwait, to act as sole arbitrator to adjudicate the dispute related to the division of common property between the two brothers, could extend to include crimes and illegal tort activities later committed in the United States or other foreign countries against BYA and claimed to be instigated against him by his brother KYA and those around him.

II- With regard to Involving non-signatory persons of the March 2008 Arbitration Agreement (OKA and WAM) in said Arbitration:

35. It is an uncontested fact that neither Omar, the son of KYA (referred to as OKA), nor Waleed A. Moubarak, (referred to as WAM), signed either of the 12th of March 2008 Agreement or the 27th of March 2008 MOU. Both individuals neither acquired any right or assumed any obligations thereunder.

36. Hence, as a matter of Kuwait law, which views such matters strictly, they are third-parties with regard to any Arbitration Agreement concluded under Kuwaiti Law

requiring arbitration to take place there before a sole eminent Kuwaiti high-ranking person.

37. Professor Dr. Azmi Abdel Fattah Attiya, in his Book on "**Kuwaiti Arbitration Law**" (referred to *op.cit.*, **Exhibit 2**), arrives at two undisputed conclusions:

A- "In case of dispute between a given party obliged in the arbitration agreement on the one hand, and the other contracting party together with another person considered as third party to the arbitration agreement on the other hand, arbitration has to take place with regard to the party under obligation thereto, but the third party has to go to the State Courts. However, if the cause of action and subject-matter are the same, the action has to be brought concerning the entire dispute in front if the ordinary Courts general competence" (p. 140).

B- "The Agreement (i.e. the Arbitration Agreement) can not be invoked against a third-party who was not a contracting party, and this is in confronting with the general rules (p. 144).

38. Consequently, the undersigned is of the opinion that neither OKA or WAM could legally claim that either of them can request obliging BYA to submit to Arbitration in Kuwait any of the claims filed against them in the pending New York Lawsuit.

III With regard to the question of whether an arbitrator sitting in Kuwait under Kuwaiti Law could have power to hear and determine BYA's claims made in New York Lawsuit against KYA, OKA and WAM:

39. In addition to all the relevant considerations developed herein-above about the non-arbitrability of claims involving criminal activities subject to Penal Laws, the lack of jurisdiction to adjudicate either by Kuwaiti Judges or Arbitrators any delictual activities committed outside Kuwait and constituting Common Law Torts under U.S. Law, as well as the exclusion of any possible recourse to arbitration for matters falling outside the competence *ratione materiae* envisaged by the Contracting Parties or involving *rationi persona* third parties, a complementary important legal argument has to be emphasized.

40. This relates to the fact that Kuwait, as a modern State aware of the consequences of the technological revolution in the field of communications, has adopted Law No. 9 for the year 2001, regarding the misuse of the telephone communications devices and the wiretapping devices (**Exhibit 10**). The Law provides punishment by imprisoning as a penalty for intentional misuse of telephone communication, as well as for using wiretapping devices (Article 1 and 2).

All crimes committed and the penalties imposed under this Law are constitutionally of territorial application and are necessarily subject to the jurisdiction of the Kuwaiti State Courts.

The legislature has not provided for any sort of extra-territorial application or any possible arbitrability with regard to such crimes.

41. Therefore, by necessary implication and as a matter of reciprocity and comity towards foreign States, it is legally inconceivable that a Kuwaiti arbitrator operating under Kuwaiti Law could consider himself empowered to hear and adjudicate similar illegal acts subject to claims pending in front of a New York Court pertaining to activities conducted on the territory of a foreign state such as the United States, whatever may be the persons involved and the motives behind committing such offences.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Cairo, Egypt on this the 17th day of December 2009.

A. S. El Kosheri

AHMED SADEK EL-KOSHERI