

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BASSAM Y. ALGHANIM,	:	
Plaintiff,	:	Case No. 09-CIV-8098 (NRB)
v.	:	
KUTAYBA Y. ALGHANIM et al.,	:	
Defendants.	:	
	:	

**REPLY DECLARATION OF DR. AHMAD AL-SAMDAN IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

I, Dr. Ahmad Al-Samdan, do hereby affirm and declare under the penalty of perjury as follows:

1. I have reviewed the Declaration of Ahmed Sadek El-Kosheri dated December 17, 2009 ("El-Kosheri Declaration") and supporting exhibits, the Declaration of Reema I. Ali dated December 17, 2009 ("Ali Declaration") and supporting exhibits and excerpts of the Memorandum of Law in Opposition to Defendants' Motion to Dismiss and/or Stay the Action Pending Arbitration that pertain to questions of Kuwaiti law. I am submitting this declaration ("Samdan Reply Declaration") in order to supplement my November 19, 2009 declaration submitted in support of Defendants Kutayba Y. Alghanim and Omar K. Alghanim's motion to dismiss the first amended complaint and to respond to the opinions of Ms. Ali and Dr. El-Kosheri on certain matters of Kuwaiti law. In preparing this response, I have also reviewed the Declaration of Bassam Y. Alghanim dated December 17, 2009 and the Declaration of Meshari Al Osaimi dated December 17, 2009, as well as the Declaration of Omar Al-Essa dated January 7, 2009 ("Al-Essa Declaration").

2. Specifically, I have been asked to provide my expert opinion on:

(1) Whether the claims alleged in Plaintiff's first amended complaint ("Alleged Claims") are required under Kuwaiti law to be arbitrated pursuant to the arbitration agreements binding Plaintiff and defendant Kutayba. In this respect, I have been asked to consider:

- (a) whether, as a matter of Kuwaiti law, the Alleged Claims are capable of conciliation ("Solh");
- (b) whether, as a matter of Kuwaiti law, torts are arbitrable and further, whether parties may agree to arbitrate such matters before the

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commission of a tort; and

- (c) whether a Kuwaiti judge or arbitrator may adjudicate on matters of United States law.
- (2) Whether the Alleged Claims against the other defendants (the "Remaining Defendants"), who did not sign the Memorandum of Understanding dated March 27, 2008 ("MOU") or the agreement dated March 12, 2008 (collectively, the "Agreements") entered into by Plaintiff and defendant Kutayba (together, the "Brothers") would be referred to arbitration under Kuwaiti law.

General

3. The following opinion contains my independent, objective and unbiased views on the issues at hand. I have not entered into any arrangement whereby the amount or payment of my fees in any way depends upon the substance of my opinion or the outcome of the litigation.
4. My opinion will focus on Kuwaiti law. It reflects my views concerning the position of Kuwaiti law with respect to the issues being analyzed therein to the best of my knowledge.
5. I am submitting this declaration in English. However, English is not my first language. Therefore, if called upon to testify, I would request an interpreter so that I may provide my oral testimony in Arabic.
6. A copy of my updated C.V. is enclosed to this declaration.

Summary of My Opinion

7. Based on the facts that have been presented to me and the application of Kuwaiti law, it is my opinion that:
 - (1) The Alleged Claims against defendant Kutayba are arbitrable under Kuwaiti law and are required to be arbitrated pursuant to the Agreements;
 - (2) The Alleged Claims against the non-signatories to the Agreements would be referred to arbitration under Kuwaiti law.
8. I refer to my declaration dated November 19, 2009 ("First Samdan Declaration") and my conclusions that:
 - (1) The application of Kuwaiti choice-of-law rules would lead to the conclusion that Kuwaiti law applies to the Agreements;
 - (2) The arbitration clauses contained in the Agreements constitute valid and enforceable agreements to arbitrate; and
 - (3) The Kuwaiti courts would consider that the substance of the Alleged Claims are matters that relate to the Agreements between him and defendant Kutayba, under which the parties agreed to settle any disputes arising in the future

between the two parties related to the subject matter of the Agreements by arbitration, and the dispute would therefore be referred to arbitration.

The Alleged Claims Are Capable of 'Solh'

9. Article 173 of the Civil and Commercial Procedure Code No. 28 of 1980 states that: "Arbitration may not be held in the matters where a compromising conciliation may not be reached." (First Samdan Decl., Ex. E.) As such, I agree with my esteemed colleague Ms. Ali that the "subject matter of the arbitration, that is the dispute itself, must in all cases be a matter where "Solh' [amicable settlement] . . . is permissible under Kuwait law." (Ali Decl. ¶ 11.) I am of the opinion that the dispute between the Brothers in the present case is capable of Solh.
10. Under the Civil Code, the subject matter of a dispute must fulfill two main requirements in order to be capable of Solh. First, a dispute must be "in existence, achievable, certain or ascertainable." (Ali Decl., Ex. E, Azmi Abdel Fattah Attiya, KUWAITI ARBITRATION LAW, Section 1, Heading 5 (1st ed. Kuwait University Press, 1990); see also Samdan Reply Decl., Ex. O, Art. 552 of the Civil Code ("Reconciliation [or Solh] is an agreement by virtue of which two parties settle an existing dispute or prevent a possible future dispute. . . .").) Second, a dispute must not pertain to matters of Public Order. (See Ali Decl., Ex. D, Civil Code, Art. 554). The Alleged Claims satisfy both requirements.

"Existing or Possible" Requirement

11. Article 552 of the Civil Code provides that the subject matter of Solh must apply to existing or possible disputes. (See Samdan Reply Decl., Ex. O). Accordingly, where a dispute is not already in existence, the potential future dispute to be arbitrated must be "possible," that is, within the legal framework and capable of resolution between private parties.
12. This requirement can be put into context by Article 173 of the Civil and Commercial Procedure Code, which provides that "[a]greement may be made on arbitration in a specific dispute and on arbitration in all disputes arising from the implementation of a certain contract." (First Samdan Decl., Ex. E.) This provision expressly allows existing or future agreements to be arbitrated, and disputes arising from the implementation of a certain contract are therefore considered to be "achievable, certain or ascertainable". (See First Samdan Decl., Ex. F, Court of Cassation Decision No. 6/1974, June 17, 1974 ("[a]greement to arbitration is a contract under which parties thereto agree to refer the disputes arising between them in the past, present or future. . . .").)

Subject Matter Does Not Pertain to Public Order

13. Article 554 of the Civil Code states that: "Solh is not permissible in matters pertaining to Public Order. It is however permissible with regard to the financial rights arising therefrom." (Samdan Reply Decl., Ex. O.) There is no clear definition of Public Order, and whether a particular subject matter relates to Public Order will be decided by the court on a case-by-case basis. (See Ali Decl., Ex. E, Azmi Abdel Fattah Attiya, KUWAITI ARBITRATION LAW, Section 2 Heading 1.) The general framework that is provided for determining whether a subject matter pertains to Public Order,

however, is whether the issue is reserved to be handled by the State Judiciary. (*Id.*) Accordingly, matters which pertain to Public Order include issues of personal status (such as matters relating to child custody or guardianship, annulment of marriage or divorce and lineage), criminal matters, questions of constitutionality and the validity of an administrative decision. (*See* explanation of public policy exception discussed in First Samdan Declaration paragraph 34; *see also* First Samdan Decl., Ex. I, Fathi Wali, *ARBITRATION LAW IN THEORY AND PRACTICE*, p. 123-124 (1st ed. Manshaat Al-Maaref Press, 2007).) Moreover, as I noted in my previous declaration, “[c]ivil or commercial matters that involve a pecuniary dispute fall under [the category of matters that are allowed to be arbitrated by law].” (First Samdan Decl. ¶ 34; *see also* Ali Decl. Ex. E, Azmi Abdel Fattah Attiya, *KUWAITI ARBITRATION LAW*, Section 1 at 3 (“Arbitration is permitted in all the civil and commercial matters.”).)

14. My esteemed colleagues Dr. El-Kosheri and Ms. Ali set forth two reasons for which the Alleged Claims pertain to matters of Public Order and are thus incapable of Solh. I discuss these two reasons and explain why I believe this is a misapplication of the law to the facts before this Court.

The Civil Nature of the Alleged Claims

15. First, Dr. El-Kosheri and Ms. Ali both state that the Alleged Claims are not capable of Solh because Solh, and consequently arbitration, is not allowed in criminal matters. (*See, e.g.* El-Kosheri Decl. ¶¶ 14-15, 21, 26, 28; Ali Decl. ¶¶ 19, 24, 36.) While I agree with Dr. El-Kosheri’s conclusion that criminal matters pertain to Public Order, proscribing them from the realm of Solh and consequently arbitration, my esteemed colleague’s discussion of criminal matters in relation to the present case is misguided, as the Alleged Claims are civil in nature. Furthermore, the interchangeable use of tort and crime in Ms. Ali’s declaration is not supported in the authorities to which Ms. Ali cites, which relate only to crimes.
16. Here, it is important to distinguish criminal claims from civil ones. Kuwaiti law does not permit arbitration of crimes because criminal cases are the right of the society exercised by the General Prosecution as being the main party to a dispute. (Ali Decl., Ex. E, Azmi Abdel Fattah Attiya, *KUWAITI ARBITRATION LAW*, Section 2, Heading 1.) As Dr. Attiya wrote, however, “if there were a statutory provision mentioned in a law other than the Criminal Law that imposes penalties for the enforceability of its rules, it does not mean that arbitration is prohibited. The public order in arbitration can not be taken by a comprehensive meaning.” (*Id.* at Section 2, Heading 5.a.)
17. It is worth emphasizing that the Plaintiff seeks the payment of damages for the Alleged Claims resulting from the alleged misconduct. Therefore, it would be erroneous to claim, as Dr. El-Kosheri seems to do, that the Alleged Claims fall “within the exclusive jurisdiction of the criminal courts” (El-Kosheri Decl. ¶ 27 (quoting Ex. 8, Fathi Wali, *THE LAW OF ARBITRATION THEORY AND PRACTICE* (1st ed., Al Ma’arif Publishing House, 2007)); *see also* Ali Decl. ¶¶ 24, 36.) I note that Dr. El-Kosheri’s characterization refers specifically to the Alleged Claims based on U.S. federal statutes. Contrary to his assertion, as I understand it, those federal statutes provide for both criminal sanctions and private rights of action and in the present case, the Alleged Claims are civil in nature, not criminal. (*See* Samdan Reply Decl., Ex. P, Shearman & Sterling LLP, Memorandum on the Federal Statutory Claims Asserted in the New York Action.) As such, Dr. El-Kosheri’s assertion that the

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Kuwaiti law “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” mischaracterizes the present case where the Plaintiff is seeking civil damages, not criminal sanctions. (See El-Kosheri Decl. ¶ 28.)

18. A similar distinction exists in Kuwaiti law between a tort, which is considered to be a civil wrong, and a crime. A tort, which raises civil liability, is defined as a wrongful act that causes harm to another person, for which the wrongdoer or the causer of the harm must compensate the injured party. (Samdan Reply Decl., Ex. O, Art. 227.) For an act to be considered a crime, however, there must be a specific law that defines that particular act as a crime. Furthermore, while the principle of a tort action is to compensate victims for their damages, the principle of a criminal action is to convict the offender and to impose a penalty. Only criminal courts have jurisdiction over crimes. Finally, where crimes are not arbitrable as matter of public policy or Public Order, there are no similar restrictions to the arbitrability of torts.

The Applicability of Article 254 of the Civil Code

19. Second, Ms. Ali points to Article 254 of the Civil Code, which provides that “any agreement that is executed prior to the occurrence of a tort and has the effect of exonerating liability arising from the tort partially or totally shall be void”. (See Ali Decl., Ex. D.) This is a correct recitation of the statute, and an agreement made in violation of Article 254 would not be capable of ‘Solh’ because this law pertains to Public Order. (See Ali Decl. ¶ 15.) I do not agree, however, with her conclusion that the arbitration clauses at issue violate this Article. I also note that Ms. Ali does not offer any authority to support her proposition.
20. In order for an arbitration agreement to be held invalid under this Article, the agreement must (i) have been executed prior to the occurrence of a tort; and (ii) have the effect of partially or totally exonerating liability arising from the tort. Although the arbitration clauses were executed prior to the occurrence of a tort, the clauses do not exonerate liability in any way. Rather, the purpose of the arbitration agreement is the exact opposite: the arbitration clauses give the arbitrator the power to adjudicate liability of the Alleged Claims and to award appropriate damages if a party is found liable.
21. In sum, the Alleged Claims: (i) relate to an “existing or possible” dispute between the Brothers; and (ii) do not pertain to matters of Public Order as they are commercial and civil in nature, not criminal. Therefore, the dispute between the Brothers regarding the division of family assets constitutes a matter that is capable of Solh and consequently may be resolved by arbitration.

Torts Are Arbitrable under Kuwaiti Law

22. My esteemed colleagues raise several important issues with respect to the arbitrability of tort claims. First, whether an agreement to arbitrate a tort claim must be concluded only after the tort has been committed. Second, whether liability arising from tort claims is prohibited from being arbitrated. My answer to both issues is ‘no’.

Agreement to Arbitrate a Tort Claim Before Commission of the Tort

23. As discussed above in paragraph 12, an agreement to arbitrate a claim may be reached either before or after the dispute has arisen. This analysis is the same regardless of whether a claim is based in tort or in contract, which are both civil matters that are capable of being resolved by arbitration. (See Ali Decl. Ex. E, Azmi Abdel Fattah Attiya, KUWAITI ARBITRATION LAW, Section 1, Heading 6 (“Arbitration is permitted in all the civil and commercial matters.”).)
24. As Ms. Ali rightly points out, Kuwaiti law distinguishes between an “arbitration agreement” and an “arbitration clause.” (See Ali Decl. ¶¶ 9-10.) An arbitration agreement refers to a specific existing dispute whereas an arbitration clause is an agreement that is reached prior to the existence of a dispute with respect to future potential disputes. (Ali Decl., Ex. E, Azmi Abdel Fattah Attiya, KUWAITI ARBITRATION LAW, Section 1, Heading 2 (“It shall be a condition that the arbitration agreement is concluded after the commencement of a dispute. Thus, [the arbitration agreement] differs from the arbitration clause which is concluded before a dispute arises.”) (emphasis added).) Furthermore, where the parties have an arbitration clause, there is no requirement that they enter into an arbitration agreement after the dispute arises. (*Id.* at Section 1, Heading 4(c) (“As long as the specified arbitrators and the subject matter of this dispute are determined [...] there shall be no obstacle to prevent the [Arbitration Tribunal] from performing its job. There is no need to re-agree on arbitration after the dispute arises in the form of arbitration agreement.”).) Finally, the Court of Cassation has held that an “[a]greement to arbitration is a contract under which parties thereto agree to refer the disputes arising between them in the past, present or future, to an individual or several individuals who will settle such disputes instead of the competent courts.” (First Samdan Decl., Ex. F., Court of Cassation Decision No. 6/1974, June 17, 1974.)
25. Therefore, as I mentioned in my previous declaration, the parties to arbitration may “agree to resolve either a specific existing dispute or any potential dispute arising out of an agreement or a specific subject matter.” (First Samdan Decl. ¶ 27 (emphasis added).)
26. Here, the Agreements each contained an arbitration clause that specified arbitration as the resolution mechanism for “any disputes” related to the subject matter of the Agreements. Furthermore, the Alleged Claims arose from the “subject matter” of the Agreements as evidenced by Plaintiff’s allegation in the Complaint that the Alleged Claims are directly related to the ongoing dispute between Plaintiff and defendant Kutayba over the division of their assets. (See, e.g., First Samdan Decl. ¶¶ 45-47.)
27. I note that although the conduct underpinning the Alleged Claims allegedly occurred after the conclusion of the MOU, this does not preclude such claims from being arbitrated pursuant to the arbitration clause contained in the MOU, as they are “related to” its “subject matter.” Therefore, despite my esteemed colleague Ms. Ali’s assertion that “the parties have no legal relationship relating to a financial interest arising from the tort or the crime that can be the subject matter of arbitration agreement,” (Ali Decl. ¶ 10), the Alleged Claims fall within the scope of the Agreements between the Plaintiff and the defendant Kutayba. (See First Samdan Decl. ¶¶ 45-49.)

Determination of Liability in a Tort Claim

28. Another question raised by my eminent colleagues is whether liability relating to a tort (as opposed to the determination of damages) itself may be arbitrated. In this regard, Ms. Ali concludes that parties can agree to arbitrate a tort or a crime only “after a tort or a crime is . . . adjudicated by a court of law with jurisdiction over the matter.” (See Ali Decl. ¶ 9.) Although I agree with Ms. Ali’s analysis that only the pecuniary aspects and not questions of liability are arbitrable with respect to criminal matters, the authorities to which she cites fail to indicate a similar restriction with respect to civil claims (such as the case of the Alleged Claims). I note that the authorities cited by Ms. Ali do not distinguish between the determinations of liability on the one hand and damages on the other in a tort action. As such, I can find no reason why tort claims in their entirety cannot be arbitrated.

The Arbitration Clause Cannot Be Interpreted to Be Limited to Contractual Claims

29. Kuwaiti law allows disputes arising from both contractual relationships and non-contractual relationships to be arbitrated. (See El-Kosheri Decl., Ex. 8, Fathi Wali, *THE LAW OF ARBITRATION THEORY AND PRACTICE*, p. 121.) While the dispute should “pertain to a legal relationship with an ‘economic interest’ [...] [t]he source of the right is not important, whether from contract, illegal act, or some other form of liability.” (See *id.*) Therefore, parties to a contract may agree to arbitrate “all disputes” between them, both contractual and non-contractual, relating to the subject matter of the contract. I note that in their respective declarations, my esteemed colleagues Ms. Ali and Dr. El-Kosheri fail to provide any authority that would support a different conclusion.
30. Ms. Ali seems to argue in her declaration that an arbitration clause must specify the nature of the dispute that may arise between the parties to an arbitration agreement. (See Ali Decl. ¶¶ 23-27.) In addition, Ms. Ali states that the arbitration clause of the MOU only covers “contractual” disputes between the Brothers and asserts, without any support, that under Kuwaiti law, the ordinary meaning of the phrase “related to the subject matter of this agreement,” which appears in Article 15 of the MOU, concerns only matters related to contractual obligations and not potential torts even if related to the subject matter of the agreement. (See *id.* ¶ 23.) I disagree.
31. First, Kuwaiti law does not require an arbitration clause to specify the nature or the type of dispute, but rather the subject matter of any dispute that may arise between the parties:
- [I]f the arbitration agreement is in the form of a clause, the clause need not specify the dispute in question. This is an elementary matter since the arbitration clause is entered into prior to the occurrence of any dispute. However, the arbitration clause like any contract must have a subject matter and this subject matter must be specific and therefore for an arbitration clause to be valid it must specify the subject matter around which the potential dispute could arise. (El-Kosheri Decl., Ex. 8, Fathi Wali, *THE LAW OF ARBITRATION THEORY AND PRACTICE*, p. 131.)
32. Second, the MOU does not expressly limit the scope of the arbitration clause to contractual disputes, but rather simply states that “any dispute arising in the future

between us related to the subject matter of [the MOU] shall be finally decided” by arbitration. An analysis of the facts alleged in the Amended Complaint leads to the conclusion that the Alleged Claims are directly related to the subject matter of the Agreements. (See First Samdan Decl. ¶¶ 45-47.) I note that while parties to a contract may, in the arbitration clause, choose to limit the subject matter of dispute arbitrated (such as disputes arising from the interpretation or execution of the contract), (see El-Kosheri Decl., Ex. 8, Fathi Wali, THE LAW OF ARBITRATION THEORY AND PRACTICE, p. 131), in the present case, the Brothers did not stipulate any such limitations in the Agreements. Furthermore, although arbitration agreements relating to a tort may be concluded following the commission of the tort, there is no impediment under Kuwaiti law to an agreement to arbitrate future disputes between parties who have an established legal relationship by virtue of the fact that they entered into a contract (including those arising from torts related to the subject matter of that contract).

33. Further, Ms. Ali does not cite any support for her statement that an agreement to arbitrate all disputes that arise from a specific contract “necessarily refers to the disputes arising from performance of contractual obligations of a specific contract.” (Ali Decl. ¶ 10.) The law is not so limiting. Rather, Article 173 provides that arbitration may be reached in “all disputes arising from the implementation of a certain contract,” and the nature of the claims may lie either in contract or tort. (See First Samdan Decl., Ex. E (emphasis added).) This is confirmed by the Court of Cassation Decision No. 984/2004. (Samdan Reply Decl., Ex. Q.) In that case, the claimant had initiated arbitration against respondent alleging claims of misuse of trademark, stamps and files, when the contract entered into between the two of them had already been deemed null and void, and requesting damages. These claims are considered to be non-contractual civil claims under Kuwaiti law. The arbitrators adjudicated respondent’s liability with respect to these claims and ordered respondent to pay damages to claimant. Respondent’s request for an annulment of the award on procedural grounds was rejected by the Court of Cassation. This judgment shows that arbitration can be held on tort claims and that an arbitrator has the power to determine tort liability.
34. In this regard, Ms. Ali’s reliance on the fact that the Kuwaiti courts “did not find the arbitration clauses broad enough to exclude its Urgent Matters jurisdiction despite the fact that it is permissible for the parties to agree to provide for arbitration over urgent matters,” (Ali Decl. ¶27), is a misunderstanding of Article 173, which specifically provides that “[a]rbitration shall not include summary matters, unless otherwise is explicitly agreed upon.” (First Samdan Decl., Ex. E.) There is no such exception with respect to civil matters arising out of contract or tort.
35. Lastly, while it is accurate to state that a Kuwaiti court adheres to “the rule of non-expansion in the interpretation of arbitration clauses,” (Ali Decl. ¶ 26), a Kuwaiti court is also “authorized to interpret contracts and provisions as long as its interpretation holds to the contract’s text and does not stray outside the explicit, comprehensive meaning of the text . . . clarity of expression in the contract[, and the] interpretation may not deviate from the clear expression of the contract to discern the desires of the contracting parties.” (Ali Decl., Ex. M, Commercial Appeal No. 93/157 (omission in translation).) In other words, although a Kuwaiti court will not expand the meaning of a narrow arbitration clause, it will give full deference to a broad

arbitration clause that clearly reflects the intent of the parties.

36. I refer to my discussion on this issue in my prior declaration at paragraph 42 where I conclude that “an arbitration agreement that provides that any dispute arising between the parties related to a certain subject matter is a type of arbitration agreement that the Kuwaiti courts will consider to be broadly drafted”. (See First Samdan Decl., Ex. K, Court of Cassation Decision No. 441/98 February 1, 1999.) Therefore, all disputes related to the subject matter of the MOU (i.e., the family’s businesses and assets, the manner in which they have been divided between the brothers, and the resolution of any disputes related to that division) are subject to arbitration.

Authority of a Kuwaiti Arbitrator to Apply U.S. Law

37. The main purpose of conflict of law rules is to determine the applicable law to a specific dispute. As explained by Dr. El-Kosheri, the applicable law for torts is the law of the country where the wrongdoing took place (Lex Loci Delicti). This is a well admitted rule of Private International Law. Pursuant to Kuwait’s conflict of law rules, a Kuwaiti judge or arbitrator presiding over a matter involving a foreign law would not only be authorized to apply such foreign law, but be required to do so. (See First Samdan Decl., Ex. A, Law No. 5 of 1961, Art. 66 (“Obligations arising from unlawful [act] shall be governed by the laws of the country in which the act giving rise to the obligation took place.”).) Therefore, contrary to Dr. El-Koreshi’s assertion that “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,” a Kuwaiti judge or arbitrator must apply the laws of the foreign jurisdiction to the facts of the case. (See El-Kosheri Decl. ¶ 32.)
38. In the present case, as alleged, the conduct underlying the Alleged Claims took place in the United States in violation of United States laws or common law. The Kuwaiti arbitrator chosen by the Brothers to adjudicate claims under the Agreements would be required to apply the relevant United States laws in making his final determination with respect to the Alleged Claims. The arbitrator’s application of foreign law to the present case would fulfill his obligations under Kuwait’s conflict of law principles.

Complaint by Plaintiff Against the Remaining Defendants

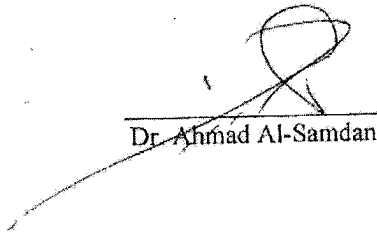
39. I have been asked to review the issue of whether Kuwaiti courts have the power to dismiss claims against individuals who are closely connected to the parties and the subject matter of an arbitration agreement, even though they are not signatories to such agreement. I refer to my discussion on this issue in my prior declaration at paragraphs 50-58, where I conclude that “a court, properly presented with the facts, would consider the Complaint as it relates to the Remaining Defendants to be related to the subject matter of the Agreements and refer it to arbitration pursuant to the arbitration clauses contained in the Agreements.” (First Samdan Decl. ¶ 57.)
40. In her declaration, Ms. Ali asserts that “[n]on parties may not be forced into arbitration and a party to the arbitration agreement may not be forced to arbitrate its claims against non parties.” (See Ali Decl. ¶ 32.) Ms. Ali does not, however, analyze the facts relevant to this case or consider the power of Kuwaiti Courts to manage such claims. As stated in my previous declaration, there is a clear and indisputable

relationship between the Remaining Defendants and the subject matter of the arbitration including a relationship to both the Plaintiff and defendant Kutayba. (See First Samdan Decl. ¶¶ 50-58.)

41. My esteemed colleagues also fail to consider a recent case brought by Bassam Y. Alghanim against his brother and, among others, Yusuf Alghanim and Sons W.L.L. ("YAAS"); the defendants in that case argued that the subject matter of the case was covered by the Agreements and that the matter should be dismissed and referred to arbitration, even with respect to YAAS (which is not a party to the Agreements). As I mentioned in my previous declaration, the Kuwaiti Court of First Instance dismissed Plaintiff's claims against defendant Kutayba as well as defendant YAAS in favor of having the matter settled by arbitration. The court "did not concern itself with the fact that non-signatories to the arbitration agreement were named as defendants when it dismissed the case and referred the dispute to arbitration." (First Samdan Decl. ¶ 58.) Bassam Y. Alghanim appealed this decision, and I have been informed that the decision of the lower court was recently upheld on appeal. (See Al-Essa Decl., Ex. 1.)

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

Executed on January 7, 2010 in Kuwait City, Kuwait.



Dr. Ahmad Al-Samdan

Curriculum Vitae – Dr. Ahmad Dhaen Al-Samdan

PERSONAL INFORMATION

FULL NAME Ahmad Dhaen Al-Samdan
Secretary General for the Drug Prevention Committee
Senior Partner of Ahmad Al-Samdan & Partners Law Firm
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NATIONALITY Kuwaiti

DATE OF BIRTH 1.1.1947

ACADEMIC QUALIFICATIONS

S.J.D. (Doctor of Juridical Science), Duke University, U.S.A, 1981
Title of Doctoral Thesis: *Conflict Rules in Arab Private International Law*

M.C.L. (Master of Comparative Law), Duke University, U.S.A., 1979

L.L.B. (Bachelor of Law), Kuwait University, Kuwait, 1971

ACADEMIC POSITIONS

The Dean of College of Law, Kuwait University, 1994–1999

Chairman of International Law, College of Law, Kuwait University, 1990–1994

Associate Professor, College of Law, Kuwait University, 1989–Present

Assistant Professor, College of Law, Kuwait University, 1981–1989

MEMBERSHIPS, PARTICIPATION & EXPERIENCE

College Level

1. Editorial Board of the Law and Shari'a Committee (1975–1976)
2. Member of Writing, Publishing & Translation Committee (1985–1989)
3. Member of Library Committee (1985–1989)
4. Member of Postgraduate Studies Committee (1989–1990)
5. Chairman of Faculty Board (1994–1999)
6. Member of Scholarship Committee (1981–1993)
7. Chairman of Scholarships Committee (1994–1999)
8. Reporter of Committee for Programming and Classification of Court Decisions (1988–1999)

9. Member of Faculty Board (1989–Present)
10. Chairman of the Center for Programming and Classification of Court Decisions (1994–Present)

University Level

1. Dean of Student Affairs (1984–1985)
2. Chairman of Drafting Committee of Higher Education Law (1989–1990)
3. Member of Arbitration Committee for Patent for Faculty of Engineering (1992)
4. Member of Advisory Committee to the University President (1990–1994)
5. Chairman of Writing, Publishing & Translation Committee (2004–2005)
6. Chairman of the Committee for Reviewing University Law (1994, 2004 & 2009)

Community Level

1. Member in the International Bar Association (IBA) (1985–1989)
2. Member in the Arab-European Commercial Arbitration (1988)
3. Member of the Legal Committee for Drafting Copyright Law for Kuwait National Council for Arts and Culture (1988–1989)
4. Member of the Legal Committee of Gulf Co-operation Council Countries for Establishing a Uniform Copyright Law (1990–1992)
5. Committee Member of Arbitration Council in Kuwait (1993–1994)
6. Member of the Committee for Writing and Publishing Translation at the Kuwait Foundation for the Advancement of Sciences (1991–1996)
7. Member in the Committee for Complaints at Kuwait Petroleum Company (KPC) – Ministry of Oil (1993–1997)
8. Committee Member of Arbitration Panel in Kuwait (1993–Present)
9. Committee Member of Reporter of Lawyers Magazine (1994–Present)

Administrative Level

1. Consultant at the General Department of Customs (1982–1986)
2. Supervision of the Execution of Judgment Classification Center, a project subsidized by Kuwait University (1989–1994)
3. Consultant of the Public Authority of Training and Applied Science (1988–2005)

PUBLICATIONS

Papers and Researches

1. A Research in English under the title "Islamic Conflicts of Law", published in Law Journal, Faculty of Law, Kuwait University ("F.L.K.U."), No. 1, Year 6, March 1982 (p. 226–248)
2. A Research in the role of public and legislature institutions in developing industry in Kuwait (Presentation in the seminar conducted by Kuwait Foundation for the Advancement of Sciences, Kuwait, December 1983)
3. Unifying Kuwaiti Nationality (Presentation for University Staff Association, Kuwait University, 1993)
4. Comments on Court of Cassation Judgment in Law, Law Journal, F.L.K.U., Year 6, November–December 1983 (p.81–85)
5. A brief comment on the Attitude of Kuwaiti Courts Toward Foreign Laws, Law Journal, F.L.K.U., No. 1, Year 10, March 1986 (p.11–52)
6. The Legal System of Protecting Software Computer Law, Law Journal, F.L.K.U., No. 4, Year 11, 1987 (p. 11–51)
7. Maritime Salvage According to Kuwaiti Law, Law Journal, F.L.K.U., No. 2, Year 11, 1987 (p.137–162)
8. Civil Legal Protection of Computer Software, Application in Comparative Law in the Gulf States (Presentation in the Kuwait First Conference in Law and Computer, Faculty of Law and Kuwait Foundation for the Advancement of Sciences, Kuwait Sheraton, 1989)
9. The Applicable Law in Commercial and International Arbitration, Law Journal, F.L.K.U., Nos. 1&2, Year 17, 1992
10. Iraqi War Crimes (financed research by Research Department, Kuwait University, 1992)
11. Conflict of Laws in International Arbitration Contract (Presentation for seminar on International Arbitration in Engineering Contracts, Bahrain Engineers Society, Bahrain, April 1993)
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