

**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. NASSER GHUNAIM AL ZAID  
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

I, Dr. Nasser Ghunaim Al Zaid, do hereby affirm and declare under the penalty of perjury as follows:

**I. INTRODUCTION**

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 ("Zaid Reply Declaration") in order to supplement my November 21, 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 Mrs. 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, 2010 ("Al-Essa Declaration").



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

(A) Whether the claims asserted under the Complaint (the “Alleged Claims”) are arbitrable under Kuwaiti law and required to be arbitrated pursuant to the arbitration agreements contained in the Agreements. In this respect, I have been asked to provide my expert opinion on:

(I) whether, as a matter of Kuwaiti law, the alleged claims are capable of conciliation (solh),

(II) whether, as a matter of Kuwaiti law, torts are arbitrable, and

(III) whether, a Kuwaiti judge or arbitrator may adjudicate on matters of the United States law.

(B) Whether, the Alleged Claims against the other 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 Bassam Y. Alghanim (“BYA”) and Kutayba Y. Alghanim (“KYA” and together, the “Brothers”) would be referred to arbitration under Kuwaiti law.

3. I refer you to my own declaration dated November 21, 2009 in support of defendants’ Motion to Dismiss and / or Stay the Action Pending Arbitration (“First Zaid Declaration”).

4. I affirm that this report contains my independent opinions of the issues under discussion at present, in my capacity as an expert in Kuwaiti law. My compensation is not dependent on the opinions expressed or the outcome of the motion.

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.

## II. LEGAL ANALYSIS

**First Question:** Whether the Alleged Claims are arbitrable under Kuwaiti law and required to be arbitrated pursuant to the arbitration agreements contained in the Agreements.

### *The Alleged Claims are of a civil nature*

6. In order to answer the first question submitted by Shearman & Sterling, one should first determine the nature of the Alleged Claims. In this regard, based on my understanding of BYA’s first amended complaint (the “Complaint”) and the information provided to me by Shearman & Sterling, the New York proceedings are, contrary to the statements by Dr. El-Kosheri and Mrs. Ali, civil in nature, not criminal. (See Zaid Reply Decl., Ex. 16, Shearman & Sterling Memorandum dated January 4, 2010; El-Kosheri

Decl. ¶ 15; Ali Decl. ¶¶ 24, 28(e)). The subject of BYA's claims before the New York court is a request for monetary damages resulting from alleged civil wrongdoing based on statutes or common law, which permit a private individual, like BYA, to bring a lawsuit to recover such damages. This is a bona fide civil action distinct from those criminal matters that may only be brought by the government. (See Zaid Reply Decl., Ex. 16 at 1).

7. I agree with Dr. El-Kosheri and Mrs. Ali that criminal matters cannot be arbitrated. (El-Kosheri Decl. ¶ 22; Ali Decl. ¶ 10). However, since the Alleged Claims are civil in nature, the arbitrability thereof cannot be questioned on the basis of this principle.

*The Alleged Claims may be subject to conciliation (solh)*

8. My esteemed colleagues Dr. El-Kosheri and Mrs. Ali argue that the Alleged Claims cannot be arbitrated because they are not capable of solh pursuant to Article 173 of the Kuwaiti Civil and Commercial Procedure Code. (El-Kosheri Decl. ¶¶ 20, 21, 28; Ali Decl. ¶ 11). I disagree with them.

9. Article 173 of the Kuwaiti Civil and Commercial Procedure Code stipulates in its third paragraph that "Arbitration is not permissible except in matters which may be subject to conciliation (solh)." (See First Zaid Decl., Ex. 1). Article 552 of the Kuwaiti Civil Code defines reconciliation or solh as "an agreement by virtue of which two parties settle an existing dispute, or prevent a possible future dispute, by mutual renouncement to part of their respective claims," and Article 554 of the same Code stipulates that "reconciliation is not permissible in matters that pertain to public order while it is permissible in financial matters arising from them". (Zaid Reply Decl., Ex.17).

10. The definition of solh provided by Article 552 implies that agreements for reconciliation can be entered into by parties after the dispute has arisen but also before, with regard to a dispute that could possibly arise in the future.

11. In our case, the Brothers had entered into the Agreements that contained arbitration clauses, pursuant to which "any dispute arising in the future between [the Brothers] related to the subject matter of this agreement shall be finally decided by H.H Sheikh Nasser Mohamed Al-Ahmed Al Jaber Al Sabah." (MOU ¶ 15). The Alleged Claims which relate to the subject matter of the Agreements were "possible future disputes" within the meaning of Article 552, at the time the Brothers entered into the Agreements. Therefore, the Alleged Claims satisfy the definition of solh and are thus capable of being arbitrated.

12. The other requirement for a dispute to be capable of solh is that the subject matter of such dispute should not pertain to public order. My eminent colleagues Dr. El-Kosheri and Mrs. Ali argue that the Alleged Claims pertain to public order and that they cannot be capable of solh.

13. To this end, one argument that they raise is that the Alleged Claims are of a criminal nature and therefore pertain to public order. (See, e.g., El-Kosheri Decl. ¶¶ 17, 19-25;



Ali Decl. ¶¶ 18, 24, 28). As mentioned above in paragraph 6, the Alleged Claims are civil in nature and this argument is therefore not applicable.

14. Another argument raised by Mrs. Ali relates to the fact that an agreement to arbitrate future torts would amount to exoneration of liability in violation of Article 254 of the Civil Code. (Ali Decl. ¶¶ 10, 15). For the reasons discussed below in paragraphs 19 to 21, this argument does not have any merit.

15. Therefore, the Alleged Claims do not pertain to public order and are capable of solh as they do fulfill, as shown above, the requirements provided by the law for matters to be capable of solh.

*Parties may agree to arbitrate disputes arising from alleged torts before these are committed*

16. The other argument that is submitted by Mrs. Ali for her conclusion that the Alleged Claims are not arbitrable is that Kuwaiti law does not allow agreements to arbitrate torts before such torts have been committed (Ali Decl. ¶ 15 ). Such argument is ancillary to Mrs. Ali's notion that liability relating to tort claims is not arbitrable while determination of damages resulting from the tort is. (Ali Decl. ¶ 9).

17. I do not agree with this argument which, in my opinion, was not supported by authorities or judicial precedent. In my opinion, as long as the parties abide by the conditions provided by Article 173 of the Kuwaiti Civil and Commercial Procedure Code (which they did as discussed above in paragraphs 9 to 11), they may agree to arbitrate any civil or commercial disputes. Article 173 of the Kuwaiti Civil Code does not distinguish between disputes that arise before the commission of a tort or after, or whether the arbitration agreement must be concluded prior to the occurrence of the dispute or not. (See First Zaid Decl., Ex. 1)

*Parties may agree to arbitrate liability arising from alleged torts*

18. Dr. El-Kosheri and Mrs. Ali also state that liabilities arising from criminal and tort matters cannot be arbitrated. (El-Kosheri Decl. ¶¶ 28, 29; Ali Decl. ¶ 10). I agree with my esteemed colleagues that matters of criminal guilt cannot be arbitrated as this issue is reserved to be handled by the State Judiciary. There is, however, no provision under Kuwaiti law that would generally prevent the parties from agreeing on having their civil disputes, including tort claims, heard by way of arbitration. Torts and criminal matters should not be considered as being submitted to the same rules and limitations as they are of different natures.

*Arbitration is not tantamount to exoneration of liability*

19. Mrs. Ali refers 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). While I do

agree that parties cannot agree prior to the occurrence of a tort to exonerate their liability arising from the tort and that such article is mandatory, I do not think that such article supports her argument as to the impossibility to agree to arbitrate before the tort has been committed.

20. In my opinion, Article 254 deals with the exoneration of liability of the parties whereas an arbitration clause is a method of settlement of dispute. An agreement to arbitrate does not imply that one party's liability would be partially or totally exonerated but rather that the liability would be determined through a specific dispute resolution method.

21. Agreements to arbitrate may be considered as a renouncement of the parties' rights to seek recourse in a court of law and, in many cases, the right to appeal. However, this cannot be said to constitute a compromise and partial waiver of rights that is prohibited by Article 254. The prohibition in Article 254, which prevents parties from entering into any prior agreement that has the effect of exonerating liability arising from a tort, must be distinguished from the nature of arbitration, which does not exonerate liability for a wrongdoing and obliges an arbitrator to apply the substantial provisions of the law while allowing the parties to agree to waive certain procedural provisions of the law. (See Zaid Reply Decl., Ex. 18, Art. 182).

22. In view of the above, I conclude that arbitration clauses that are concluded before a tort has been committed are valid under Kuwaiti law and that arbitrators may determine liability as well as damages resulting from such tort.

#### *Scope of the arbitration clause*

23. I refer to my previous declaration in which I analyze the Agreements and conclude that the arbitration clauses contained therein constitute valid and enforceable agreements to arbitrate, (see First Zaid Decl. ¶¶ 29-36), and moreover, that the claims alleged by BYA in the Complaint would fall within the scope of the Agreements. (See id. ¶¶ 42-49).

24. In their respective declarations, my colleagues Mrs. Ali and Dr. El-Kosheri have argued that the arbitration clauses would not apply to the claims alleged by BYA in the Amended Complaint. (See Ali Decl. ¶ 6(a); El-Kosheri Decl. ¶ 11(iii)). The main reason that both Mrs. Ali and Dr. El-Kosheri arrive at this conclusion is because, in their view, the subject matter of the arbitration clauses in the Agreements cannot be construed broadly so as to encompass the claims alleged by Plaintiff. (See Ali Decl. ¶¶ 23-24; El-Kosheri Decl. ¶ 34). I respectfully disagree.

25. First, as I discuss in my previous declaration, the Agreements contain arbitration clauses that "provide for very broad terms" which simply reflect the intent of the parties "not to limit the arbitration agreements to very narrow and specific disputes so long as they relate to the subject matter of the Agreements." (See First Zaid Decl. ¶ 40). While I agree with Mrs. Ali's statement that Kuwaiti courts "do not grant a broad interpretation to arbitration clauses", (see Ali Decl. ¶ 25), her analysis is irrelevant in the present case because the Agreements do not require any such broad interpretation. The parties clearly



intended the arbitration clauses to apply to “any dispute” arising between them “related to the subject matter of [the MOU]”. (See First Zaid Decl. ¶ 40). Second, the Alleged Claims, by BYA’s own admission in the Complaint, are related to the subject matter of the Agreements (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). (See *id.* ¶¶ 42-49). Therefore, the alleged claims are clearly within the scope of the arbitration clauses and would be arbitrable pursuant to the Agreements.

*Adjudication by Kuwaiti Arbitrators on matters governed by foreign law*

26. Kuwaiti law does not prevent a Kuwaiti judge or arbitrator from adjudicating on matters of foreign law. The Kuwaiti conflict of law rules reflect the general principle of Private International Law that the applicable law for the adjudication of torts is the “law of the Country where the wrongdoing (i.e. the illegal activity) took place (*lex loci delicti*).” (See El-Kosheri Decl. ¶ 32).

27. For example, Article 59 to 65 of law No. 5 of the year 1961 on legal relations containing a foreign element apply to contracts in general and the applicable law. In this respect, it is provided that where parties have not chosen a governing law to the agreements and no circumstance point to a specific law, the law of the state of common domicile of the parties shall apply. Absent such common domicile, the law of the place where the agreement was concluded will apply. (See First Zaid Decl. ¶¶ 21, 22 & Ex. 3).

28. Article 66 of the same law requires Kuwaiti courts to apply foreign laws under certain circumstances. (*Id.*, Ex. 3). Specifically, Article 66 states that “[o]bligations arising from unlawful business shall be governed by the laws of the country in which the act giving rise to the obligation took place.” If the dispute in question relates to a tort and such tort took place in foreign country, the Kuwaiti judge or arbitrator would apply the laws of that foreign jurisdiction.

29. In addition, it is widely acknowledged that an arbitrator, as a chosen judge by the parties, can consider and determine any arbitrable dispute pursuant to the governing law applicable to the dispute in the circumstance, and that the arbitrator’s nationality is not a relevant consideration. Mrs. Ali’s assertion that the Prime Minister of Kuwait could not be expected to arbitrate such claims is devoid of any support. (See Ali Decl. ¶ 28(d)).

**Second question:** Whether, the Alleged Claims against the non-signatories to the Agreements are arbitrable under Kuwaiti law?

30. I refer to my discussion on this issue in my previous declaration at paragraphs 50-54, wherein I state several grounds on which a Kuwaiti court would decide that the claims against the defendants other than KYA (the “Additional Defendants”) should also be settled through arbitration. In sum, I note that each of the Additional Defendants: (i) “is closely connected to KYA” (First Zaid Decl. ¶ 51); (ii) “has been affected by the

implementation of the Agreements" (id. ¶ 52); and (iii) "acted together for the common purpose of thwarting the implementation of the Agreements." (Id. ¶ 53.)

1. The effect, as "the claims against the Additional Defendants are directly related to and dependant on the claims asserted against KYA, a Kuwaiti court should decide that it does not have jurisdiction over the claims against the Additional Defendants and that they too should be settled through arbitration." (Id. ¶ 54).

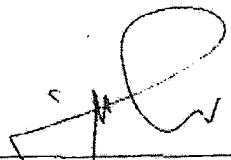
32. Dr. El-Kosheri and Mrs. Ali have not applied the principles they refer to the facts at hand and in particular, they fail to consider the recent holding of decisions by two courts on this very question. Indeed, the outcome of BYA's recent case against KYA and Yusuf Ahmed Alghanim and Sons W.L.L. ("YAAS"), one of the Additional Defendants, confirms my conclusion. BYA filed an action against KYA and YAAS requesting the court to appoint an expert to calculate the profit of YAAS to which BYA claimed he was entitled. KYA and YAAS asked that the case be dismissed as the matter should be resolved via arbitration pursuant to the arbitration clause contained in the MOU (even though YAAS is not a signatory). When it dismissed the claim, the Court of First Instance did not consider the claims against KYA (as a signatory to the Agreements) and the claims against YAAS (as a non-signatory to the Agreements) separately in determining that the entire matter should be referred to arbitration pursuant to the Agreements. I have been informed that the Appellate Court, Commercial Circuit has affirmed this decision. (See Al-Essa Decl., Ex 1).

**Summary of conclusions :**

- 1- The Alleged Claims in BYA's Complaint are arbitrable under Kuwaiti law and should be arbitrated pursuant to the terms of the arbitration agreements set forth in the Agreements.
- 2- The Alleged Claims against the non-signatories to the Agreements are arbitrable, and a Kuwaiti court should decide that it does not have jurisdiction over these claims as these too should be settled through arbitration.

I declare under the 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. Nasser Ghunaim Al Zaid  
7/1/2010