

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)

SECOND DECLARATION OF AHMED SADEK EL-KOSHERI

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

1. I make this my second declaration in these proceedings to respond to certain statements in the reply papers submitted on behalf of Defendants in this matter and to reiterate the opinions stated in my First Declaration of December 17, 2009.

2. In addition to the materials I reviewed in connection with my First Declaration, I have reviewed: (1) the Reply Memorandum filed by Defendants dated January 8, 2010; (2) the Second Declaration of Omar Al-Essa dated January 7, 2010 ("Al-Essa 2d Decl.") and exhibits thereto; (3) the Second Declaration of Dr. Nasser Ghunaim Al Zaid dated January 7, 2010 ("Al Zaid 2d Decl.") and exhibits thereto; (4) the Second Declaration of Dr. Ahmad Al-Samdan dated January 7, 2010 ("Al-Samdan 2d Decl.") and exhibits thereto; and (5) the Third Declaration of Omar Al-Essa dated April 4, 2010 ("Al-Essa 3d Decl.") and exhibits thereto.

3. Although I am not in agreement with numerous aspects of Dr. Al-Samdan's and Dr. Al Zaid's Second Declarations, I have been asked to address only the issue of whether, by their nature, the claims in the First Amended Complaint are capable of arbitration as a matter of Kuwaiti law, including my reaction to Defendants' assertion that I somehow believed that this case was a criminal prosecution, rather than a civil action. (Al-Samdan 2d Decl. ¶ 17; Al Zaid 2d Decl. ¶ 6.)

4. To allay any doubt, I confirm that I have always understood this to be a civil proceeding, and that, notwithstanding that this is a civil proceeding, the e-mail hacking allegations in the First Amended Complaint raise issues of Public Order, and are therefore incapable of being arbitrated under Kuwaiti arbitral law.

My Understanding that the Form of this Proceeding is Civil, Not Criminal

5. While I believe that my First Declaration is clear in this regard, I have always understood that the proceeding in New York is a civil proceeding in which various monetary and non-monetary civil remedies are sought against the Defendants for their involvement in an e-mail hacking scheme. I understand (and have always understood) that some of those claims involve torts giving rise to civil liability, while other claims involve violations of United States statutes. I understand further (and have always understood) that, while a violation of those statutes may give rise to criminal liability in the event a criminal prosecution occurs, this proceeding is civil in nature, and is not a criminal prosecution.

6. Thus, Defendants' claim that I was "likely misled by the description of plaintiff's causes of action evidently provided to them by [plaintiff's] counsel," or that this description "confuse[d]" me into thinking that the present Proceeding was a

criminal prosecution (Def. Reply at 1, 12 n.8) is clearly without foundation and erroneous.

7. My opinion that the claims in this Proceeding raise issues of Public Order, rendering such claims incapable of arbitration under Kuwaiti law, remains wholly unchanged.

The Issues Raised in the First Amended Complaint are Non-Arbitrable Under Kuwaiti Law

8. As I explained in my First Declaration, the principle of non-arbitrability of Public Order issues is manifest in the second paragraph of Article 173 of Law No. 38 of 1980 promulgating the New Kuwaiti Civil and Commercial Procedural Code (the "Kuwaiti Civil and Commercial Procedural Code"), under 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*)." (El-Kosheri 1st Decl. ¶ 20.)

9. Under Kuwaiti law, allegations concerning the "existence" of criminal conduct and the allocation of "responsib[ility]" for such conduct raise issues of Public Order, which are non-arbitrable. (El-Kosheri 1st Decl. ¶ 25; see also El-Kosheri 1st Decl. Ex. 4.) Such allegations are present in this case, because the e-mail hacking scheme described in the First Amended Complaint, although brought in a civil proceeding, clearly involves alleged criminal misconduct by the Defendants. (El-Kosheri 1st Decl. ¶ 15.)

10. My conclusion that such allegations are non-arbitrable is not affected by the fact that they have arisen in a civil case, rather than a criminal prosecution. For purposes of this rule, it is the true and inherent nature of the *issues* in a case, not

the form of the proceeding in which they appear, that is important. Numerous authorities illustrate this principle, including:

- 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" (El-Kosheri 1st Decl. ¶ 27; *see also* El-Kosheri 1st Decl. **Exhibit 8** (emphasis added).) The eminent Dean of Civil Procedures Law Professor was clearly addressing the issue of whether, within the context of civil proceedings, a given person could be considered as having or not having committed criminal activities.
- 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*" (El-Kosheri 1st Decl. ¶ 27; *see also* El-Kosheri 1st Decl. **Exhibit 9** (emphasis added).) The eminent judge was equally envisaging the non-arbitrability of issues pertaining to allegations of having committed actions of criminal nature.

11. I note that Dr. Al-Samdan, while conceding that Public Order issues are non-arbitrable, believes that this principle does not apply here because the claims have arisen in a civil proceeding. (Al-Samdan 2d Decl. ¶¶ 17-18.) Similarly, Dr. Al Zaid asserts in his Second Declaration that the claims in this Proceeding are arbitrable because the present Proceeding "is a bona fide civil action distinct from

those criminal matters that may only be brought by the government." (Al Zaid 2d Decl. ¶ 6.)

12. Dr. Al-Samdan and Dr. Al Zaid both appear to believe that Public Order issues are only capable of arising in criminal proceedings. This, with respect, is an erroneous assertion. The above-stated principle of non-arbitrability of issues "related to Public Order" would be seriously undermined, indeed violated, if a Kuwaiti arbitrator was to seek to determine "issues encompassing the crime itself." As I have already indicated, the allegations in this Proceeding raise "issues" concerning "the existence" of a criminal act, as well as determining whether a given person can be held "responsible" for those "criminal activities." In my opinion, no arbitrator could determine the First Five and the Tenth causes of action without determining (i) the existence or non-existence of conduct that violated a number of criminal statutes, and (ii) whether the defendants were responsible for that conduct – and neither issue would be permissible to be undertaken by an arbitrator under Kuwaiti Law.

13. The authorities cited in paragraphs 25-27 of my First Declaration clearly support the submission that in similar situations related to criminal misconduct no arbitration could have taken place in Kuwait.

The inability of a Kuwaiti Arbitrator to Adjudicate Claims Based on "Common Law Torts" or Violations of US Statutes

14. As I explained in my First Declaration, an arbitrator in Kuwait would not have jurisdiction to adjudicate common law tort claims arising under U.S. law. (El Kosheri 1st Declaration ¶¶ 32-34.)

15. I note that Dr. Al-Samdan contends instead that an arbitrator would have the power to apply US tort law to the present action. (Al-Samdan 2d Decl. ¶ 37.) I disagree with this assertion.

16. First, Kuwaiti courts do not have worldwide extraterritorial jurisdiction over any disputes that may exist, regardless of where they occurred. A Kuwaiti court would therefore be obligated to decline jurisdiction over a case that involved only violation of US statutes and US "Common Law Torts." *A fortiori*, a Kuwaiti arbitrator would be subject to the same limitations unless two parties had specifically consented to submit such disputes to him after they had arisen, which is not the case here.

17. Second, Dr. Al-Samdan points out that Article 66 of the Law Regulating the Legal Relationships of Foreign Elements provides 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." (Al-Samdan 1st Decl. Ex. A.) This conflict-of-law rule, however, has no bearing on the threshold question of whether an arbitrator would have *jurisdiction* to hear and determine a dispute based on US "Common Law Torts." As I explained in my First Declaration, such jurisdiction would need to flow from the arbitration clause. And, in this case, nothing in the alleged arbitration clause, and nothing in Article 173 of the Kuwaiti Civil & Commercial Procedural Code, suggests that a Kuwaiti arbitrator would have the power to determine non-contractual tortious claims relating to activities occurring in foreign countries.

18. Indeed, as I have noted, Article 173 of the Kuwaiti Civil & Commercial Procedural Code only permits arbitration in two circumstances: (i) agreements regarding disputes existing at the time of the arbitration (which is not the case here); or (ii) arbitration agreements concerning the performance of a specified contract. "Common Law Tort" claims that were not in existence at the time of the contract, and which do not relate to the performance of the relevant contract (here involving

division of commonly-owned property), do not fall within Article 173 and therefore, for this reason as well, do not fall within the permitted jurisdiction of a Kuwaiti arbitrator.

19. The conclusion that an arbitrator would lack jurisdiction over "Common Law Tort" claims is reinforced by the fact that these claims concern the same e-mail hacking scheme that is raised by the First to Fifth and Tenth Causes of Action and which, as I have explained above, are non-arbitrable in all events because they raise issues of Public Order. Indeed, since the "Common Law Tort" claims raise the same issues as the US statutory claims, I believe that they would also be treated as raising Public Order issues and therefore would be regarded as non-arbitrable, for this reason as well.

20. Finally, I should add that there is nothing in Article 173 of the Kuwaiti Civil & Commercial Procedural Code or any reported authority to suggest that a Kuwaiti arbitrator would have power to apply a foreign statute which (as here) provides for civil relief based on conduct that may also be criminal. I therefore disagree with Dr. Al-Samdan's claim that an arbitrator would have power to "apply the relevant United States laws" in this case. (Al-Samdan 2d Decl. ¶ 38.) For an arbitrator to apply the US laws set forth in the First to Fifth and Tenth Causes of Action would be totally unprecedented and would, in my opinion, be completely outside the arbitrator's permitted jurisdiction under Kuwaiti law.

21. I therefore adhere to the opinions I expressed in my First Declaration that:

"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." (El-Kosheri 1st Decl. ¶ 11(a).)

...

[N]o Kuwaiti 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). (El-Kosheri 1st Decl. ¶ 11(b).)

22. Nothing in the reports of Dr. Al-Samdan or Dr. Al Zaid, nothing in the evidence of Mr. Al-Essa, and nothing in the memorandum apparently prepared for Defendant's experts by Shearman and Sterling describing the form of the present Proceedings, changes my views as to the nature of the allegations made by the Plaintiff in the First Amended Complaint, or my conclusion that these allegations raise non-arbitrable issues under Kuwaiti law.

23. As explained above, I have not been asked to discuss each and every issue in respect of which Defendants' experts and I hold different views. Nevertheless, for the avoidance of doubt, I can confirm that all of the other opinions in my First Declaration remain unchanged.

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 9 June 2010.


AHMED SADEK EL-KOSHERI