

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)
:
:

**SUPPLEMENTAL DECLARATION
OF MESHARI AL OSAIMI IN
OPPOSITION TO MOTION TO
DISMISS AND/OR STAY ACTION IN
FAVOR OF ARBITRATION**

MESHARI AL OSAIMI declares under penalties of perjury pursuant to 28 U.S.C. 1746
as follows:

1. I refer the Court to my prior Declaration dated December 17, 2009 (my “First Declaration”) which sets forth my background, including that I have previously served as a lawyer before the Court of Cassation and Constitutional Supreme Court in the State of Kuwait. (See First Declaration ¶ 1). As also stated therein, since July 2009 I have been counsel to Bassam Y. Alghanim (“Bassam”) in various actions and proceedings taking place in Kuwait over the break-up of the business empire of Bassam and his brother, Kutayba Y. Alghanim (“Kutayba”).

2. I submit this Supplemental Declaration (a) to respond to both the Declaration of Omar Al-Essa dated January 7, 2009 (the “Second Al-Essa Declaration”) and the Declaration of Omar Al-Essa dated April 4, 2010 (the “Third Al-Essa Declaration”), each of which I understand was submitted in support of the Defendants’ motion to dismiss and/or stay this action in favor of

arbitration, and (b) to further update the Court on recent developments in Kuwait relevant to the Court's determination of the present motion by Defendants.

Background

3. The principle focus of the Second and Third Al-Essa Declarations has been on the issue of whether the March 12, 2008 Agreement and the March 27, 2008 Memorandum of Understanding entered into between Kutayba and Bassam (together, the "March Agreements") contain valid arbitration agreements.

4. Specifically, in his evidence before this Court, Mr. Al-Essa, as Kutayba's Kuwait counsel, pointed out that, in an action that Mr. Al-Essa terms the "YAAS Accounting Action," a Court of First Instance in Kuwait had held that the March Agreements contain valid arbitration clauses.

5. In my First Declaration, I responded that Bassam had appealed the Court of First Instance's decision to the Court of Appeals and that, in any event, "[t]he case does not involve in any way the issue of whether clause 7 of the March 12 Agreement and Clause 15 of the MOU, if valid, would encompass the allegations of hacking into Bassam's personal email accounts and the theft of his personal and privileged communications, as alleged in the First Amended Complaint, which they do not and could not under Kuwait law." (See First Declaration at ¶ 7.)

6. In his Second and Third Declarations, submitted since I signed my First Declaration, Mr. Al-Essa notes that the Kuwait Court of Appeals affirmed the decision by the Kuwait Court of First Instance in the "YAAS Accounting Action." In fact, in his Third Declaration Mr. Al-Essa transmits to this Court a copy of the Court of Appeals' decision.

Developments Before the Court of Cassation, the Highest Court in Kuwait

7. I now wish to inform the Court that Bassam has appealed the Court of Appeals' decision in the YAAS Accounting Action to the Kuwait Court of Cassation, the highest court in Kuwait. In his appeal, Bassam contends, among other things, that, as a matter of law, the March Agreements do not contain arbitration agreements at all and that the Court of Appeals' judgment dismissing the YAAS Accounting Action in favor of arbitration was, therefore, in error.

8. Under Clause 4, Article 154 of Kuwait's Code of Civil and Commercial Procedure "The office of the clerk shall record the appeal on the day the notice of action and its attachments are recorded in the register set up to that end . . ." The Code continues; "The Cassation Court prosecution, following the expiration of the former deadlines, shall put forth a motion stating its opinion on the reasons for the appeal, or shall refer through this opinion to the appeal file if that is sufficient, returning it to the office of the clerk within a period that is not greater than two days from the date it was sent by the said office."

9. In accordance with this provision, the Court of Cassation prosecution has now reviewed the merits of Mr. Alghanim's appeal and has concluded that it should be formally accepted by the full court because the Court of Appeals' decision referred to by Mr. Al-Essa in his Third Declaration is "faulty" and "should be cassated." (A certified translation of the Court of Cassation prosecution's opinion (together with the original Arabic) is attached hereto as Exhibit A.)

10. Specifically, the Court of Cassation prosecution states:

The challenge is accurate.

It is established in the precedents of the Court of Cassation that the provision of the Paragraph 1 of Article 173 of the Code of Civil and Commercial Procedure states that "Agreement may be made for arbitration in a specific dispute and for arbitration in all disputes arising from the implementation of a certain contract. Arbitration may only be established in writing." The Second Paragraph of Article 174 of the same Law provides that "The arbitrator shall be specified in the agreement for arbitration or in a separate agreement." Article 175 of the Law provides that "If the dispute occurs without the litigant parties having agreed on the arbitrators..., and without the litigants having any agreement in this regard, the original competent court for examining the dispute shall appoint the needed arbitrators upon the request of any of the litigant parties in accordance with the usual case filing procedures ...". This shows that in order for regular arbitration to have jurisdiction in resolving a dispute arising from the execution of a contract, such contract must include an explicit agreement between both parties to resort to arbitration in settling such dispute. The provisions of Article 166 of the Constitution provides that the right to adjudication is guaranteed to all people, and the Law set forth the procedures and standings that are necessary in order to exercise such right.

"Appeal No. 449/2004 Commercial, Hearing of June 4, 2005, Q No. 33, A No. 2, Page No. 158".

Whereas that is the case, and whereas the Seventh Article of the Agreement dated March 12, 2008, a copy of which is included in the files of both parties to the Appeal, provides that "in case of future disputes between both parties, the advice, opinion, and final decision shall be made by H.H. Sheikh/ Nasser al-Mohammed al-Ahmad al-Jabir al-Sabah." However, that does not indicate that the intentions of both parties were to choose arbitration, as defined by Law, for settling any disputes arising from the execution of the Agreement. The Agreement does not include such provision. The Agreement, however, provided for settling any dispute between them amicably, based on the advice and opinion of H.H. the Prime Minister, this does not, however, preclude the right of any of the parties to resort to its regular judge to decide upon the dispute existing between both of them, as it is a right guaranteed by the Constitution to all people;
Since the appealed ruling had disagreed with this view and resolved to accept the initial defense of the respondent which argued that the court did not have jurisdiction to consider the case, the ruling is thus faulty and must be cassated.

Therefore,

The Prosecution recommends:

First: Accepting the Appeal pro forma

Second: In substance, the ruling must be cassated.

Deputy Prosecutor
Abu Baker Ibrahim

Chief Prosecutor
Ashraf [illegible]

(See Exhibit A hereto, emphasis added.)

11. Pursuant to the provision of the last clause of Article 154, Code of Civil and Commercial Procedure, which provides that: "the appeal shall be submitted to the Court, which convenes in the consultation chamber, accompanied by the opinion of the Court of Cassation prosecution; if the Court believes that it is not acceptable for deficiency in form, or because its procedures are faulty, or because it rests on reasons that are not set forth in Article 152 of this Law, it decides not to accept it pursuant to an irrevocable ruling, stating briefly the reasons as established in the Court session's records, if the Court believes otherwise, a court session shall be determined in order to examine the appeal."

12. In accordance with these procedures, the file of the YAAS Accounting Action, together with the Court of Cassation prosecution's opinion (Exhibit A hereto), has been transmitted to the Cassation consultation chamber, which has set **June 22, 2010** as the date for the consultation chamber to examine the appeal, without the presence of the litigants, in order to determine two matters: (1) whether to accept the appeal as to form (which the Cassation prosecution recommends); and (2) to set a date for the full Court of Cassation to examine the appeal.

13. After review by the consultation chamber on June 22, 2010, the file will be transmitted to the full court in assembly. **In my view, it is likely that the appeal will be heard in the last quarter of 2010** and that a decision on the appeal will be rendered very shortly thereafter, with the Court of Cassation resolving whether the clauses referred to by defendants in this action as "arbitration clauses" are, in fact, arbitration clauses or whether they are not, as Bassam contends and as the Court of Cassation prosecution has concluded. In this regard, although the opinion by the Court of Cassation prosecution is not binding on the Court of Cassation, it is nevertheless always taken into consideration and is generally considered as

persuasive by the full court. As a result, I believe that Bassam's appeal is likely to be successful and that the March Agreements will be held by the Court of Cassation not to contain arbitration agreements at all.

Developments Before the Kuwait Stock Exchange

14. Separately, it is my understanding that defendants Omar Alghanim and Waleed Moubarak, are contending in this action that, even though they are not parties to the March Agreements, Bassam, nevertheless, is required by the March Agreements to arbitrate his email hacking claims against them.

15. Setting aside for the moment that I believe the Court of Cassation will conclude that the March Agreements between Bassam and Kutayba do not contain arbitration clauses at all (see paragraphs 7-13 above), I wish to inform the Court that Omar Alghanim, Yusuf Ahmed Alghanim and Sons W.L.L. ("YAAS") and Alghanim Industries Company W.L.L. ("Alghanim Industries"), all of which are defendants before this Court, have taken the exact opposite position in Kuwait to the one they are taking before this Court on this issue.

16. Specifically, in connection with interrogations that took place before the Kuwait Stock Exchange ("KSE") concerning a complaint that was filed with the KSE asserting that five companies, including YAAS, Alghanim Industries and a company known as Shamsin Company (represented by Omar Alghanim), had violated certain disclosure obligations under KSE rules, each of these entities made submissions to the KSE in which they asserted that the MOU is a private agreement between Bassam and Kutayba that had nothing to do with them.

17. Attached hereto as Exhibit B is a certified translation, together with the original Arabic, of a letter sent by counsel to YAAS to the KSE in which counsel to YAAS asserts:

It is established that the companies mentioned in the Complaint – which is the object of this rebuttal - are legal personalities that are independent of their partners or shareholders, and they maintained these attributes until now. They are thus not concerned by what was stated in the Complaint regarding the Agreement of 27 March 2008, mentioned in the Complaint, which binds its two parties solely, whereby Yusuf Ahmed Alghanim & Sons Company does not have any reason for responding to what was set forth therein and that pertains to that section.

(Emphasis added).

18. Attached hereto as Exhibit C is a certified translation, together with the original Arabic, of a similar letter sent by counsel to Alghanim Industries to the KSE in which counsel to Alghanim Industries stated:

It is established that the companies mentioned in the Complaint - the object of this rebuttal - are legal personalities that are independent from their partners or shareholders, and they maintain these attributes until now. They are thus not concerned by what was stated in the Complaint regarding the Agreement of 27 March 2008, mentioned in the Complaint, which binds its two parties solely, whereby Alghanim Industries Company does not have any reason for responding to what was set forth therein and that pertains to that section.

(Emphasis added).

19. In the legal opinion issued by the KSE legal advisor, he notes that Mr. Al-Essa, as counsel to Shamsin, took the position that “the agreement between Kutayba and Bassam Yousef Ahmad Alghanim does not obligate the company to anything as it is a personal issue that only concerns them.” (See Exhibit D hereto, which is a copy of a certified translation of the legal opinion issued by the legal advisor to the KSE, at page 2 (bottom of the page)).

20. Ultimately, the KSE legal advisor agreed that because the MOU is a private agreement between Bassam and Kutayba solely, the companies have no obligations under it. He said:

Considering the foregoing and whereas it has been established in the agreement dated March 27, 2008 and the memorandum of understanding attached to it that the agreement was entered between each of Kutayba and Bassam Yousef Ahmad Alghanim in their personal capacity, and nothing in it indicated that anyone of them acted in another capacity in relation to the five companies referred to by the complainant in his complaint. Moreover, these companies have neither signed the agreement nor committed to its implementation against them; but maintained during the investigation that it was not to be argued with or to be effective against them. Therefore, all of the content of the agreement is still restricted to its parties.

See Exhibit D at 4 (bottom of the page) (emphasis added).

21. This shows that what Mr. Al-Essa, as Kuwait counsel to Kutayba, is saying to this Court, namely that the parties who are not signatories to the MOU nevertheless may invoke its provisions, is contrary to what he said and was resolved in Kuwait, namely that anyone who is not a party to the MOU has neither an obligation nor a right stemming therefrom because the agreement is personal to Kutayba and Bassam.

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

Executed on June 10th, 2010 in Kuwait City, Kuwait.



Meshari al Osaimi

Al-Osaimi Attorneys &
Legal Consultants