

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.	:	
	:	

**SUPPLEMENTAL 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:

1. I have reviewed the Second Declaration of Reema I. Ali dated June 10, 2010 (“Second Ali Declaration”) and supporting exhibits, and the Second Declaration of Ahmed Sadek El-Kosheri dated June 9, 2010 (“Second El-Kosheri Declaration”). I am submitting this declaration (“Third Al Zaid Declaration”) in order to respond to the opinions of Ms. Ali and Dr. El-Kosheri on certain matters of Kuwaiti law as expressed in the Second Ali Declaration and Second El-Kosheri Declaration, respectively.
2. Specifically, I have been asked to re-consider my expert opinion on whether the claims alleged in Plaintiff’s first amended complaint (the “Alleged Claims”) are required under Kuwaiti law to be arbitrated pursuant to the arbitration clauses contained in the Memorandum of Understanding dated March 27, 2008 (“MOU”) and the agreement dated March 12, 2008 (collectively, the “Agreements”) between Plaintiff and defendant Kutayba (the “Brothers”). In particular, I have been requested to address the following issues, on which I opined in my declaration dated January 7, 2010 (“Second Al Zaid Declaration”):
 - (1) whether, as a matter of Kuwaiti law, the Alleged Claims are capable of conciliation (“Solh”); and
 - (2) whether a Kuwaiti judge or arbitrator may adjudicate on matters of United States 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.

Summary of My Opinion

5. I refer to my declaration dated November 19, 2009 (“First Al Zaid Declaration”) and the Second Al Zaid Declaration, and my conclusions that the Alleged Claims are arbitrable under Kuwaiti law and are required to be arbitrated pursuant to the Agreements.
6. Ms. Ali and Dr. El-Kosheri appear to have drafted their second declarations in response to the Second Al Zaid Declaration. Both the Second Ali Declaration and the Second El-Kosheri Declaration merely repeat the legal rules, principles and arguments as they were previously presented in their respective first declarations. I respectfully disagree with their opinions and hereby reaffirm my conclusions stated in the First and Second Al Zaid Declarations that the Alleged Claims are arbitrable under Kuwaiti law and are required to be arbitrated pursuant to the Agreements under Kuwaiti law.
7. As I do not wish to burden the court by repeating my opinions stated in the First and Second Al Zaid Declarations, I will simply highlight a few points in which Ms. Ali and Dr. El-Kosheri seem to misinterpret the law.

Analysis

The Alleged Claims may be subject to conciliation (‘solh’)

8. My esteemed colleagues Ms. Ali and Dr. El-Kosheri opined that the Alleged Claims cannot be arbitrated because they are not capable of *solh*. (See Second Ali Decl. ¶ 9; Second El-Kosheri Decl. ¶ 7.) They appear to arrive at this erroneous conclusion by continuing to assimilate torts to criminal matters and citing provisions of Public Order that are not relevant to the Alleged Claims. It is true that conduct giving rise to a tort claim may also give rise to criminal liability. It is also true that criminal proceedings may raise issues of Public Order. However, one may not conclude on that basis that tort claims arising from allegedly criminal conduct are equivalent to criminal proceedings and thus implicate issues relating to Public Order.
9. I further note that neither Ms. Ali nor Dr. El-Kosheri supports such conclusions with any legal authority. As previously stated in the Second Al Zaid Declaration: “There is . . . 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.” (Second Al Zaid Decl. ¶ 18.)

Civil nature of the Alleged Claims

10. In their second declarations, Ms. Ali and Dr. El-Kosheri explain that they always understood that the action brought before this Court is a civil proceeding and not a criminal action. The proceeding before this Court is plainly a case that is concerned only with civil liability, even if the same conduct may give rise to criminal liability under a separate criminal proceeding. However, their analyses that the Alleged Claims before this Court cannot be resolved by arbitration are based on the incorrect proposition that criminal liability must first be determined before ascertaining civil liability. (See, e.g., Second Ali Decl. ¶ 25 (“[Submitting the civil controversy between the parties to arbitration] is not permissible under Kuwaiti law because it calls on an arbitrator to determine whether criminal misconduct . . . occurred and whether any of the Defendants are responsible for such conduct -- questions that are reserved for the Courts.”); Second El-Kosheri Decl. ¶ 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.”).)
11. In their opinions then, it does not appear that there is any distinction between a civil proceeding and a criminal one for purposes of determining whether the Alleged Claims can be arbitrated. I note here that both experts cite authorities discussing Public Order only as it pertains to matters of exclusive jurisdiction of criminal courts and determination of criminal liability. (See, e.g., First Ali Decl., Ex. I at 53; First El-Kosheri Decl., Ex. 8 at 124 & Ex. 9 at 195-196.)
12. I would agree with Ms. Ali and Dr. El-Kosheri’s opinions that the Alleged Claims would not be arbitrable if the resolution of the civil claim would necessitate a finding of criminal liability. However, it is my understanding that the US legal system (like the Kuwaiti system) does not require that criminal liability be established in order for a civil plaintiff to recover damages for the activity alleged in the Amended Complaint. (See Second Al Zaid Decl., Ex. 16 at 2, 4, 5.) Put another way, the findings in this case will not establish criminal liability against any defendant.
13. Similarly, an arbitrator hearing the Alleged Claims would not have to establish criminal liability to assess the claims and award damages if appropriate. Particularly, the rules of civil liability, whether in contract or in tort, are based on three elements: breach of a duty, the damage, and the causal relationship between them. The arbitrator therefore need not look at the criminal provisions to decide on the Alleged Claims.

Scope of the agreements to arbitrate

14. According to Ms. Ali, the Alleged Claims may not be subject to arbitration because it violates Article 254 of the Civil Code. (See Second Ali Decl. ¶¶ 17-18.) Article 254 prohibits “[an] agreement signed prior to the occurrence of the illegal act that has the effect of exonerating liability arising from the tort either in whole or part.” (First Ali Decl., Ex. D.) As I discussed in the First and Second Al Zaid Declarations, the arbitration clauses contained in the Agreements are valid. (See First Al Zaid Decl. ¶¶ 29-35; Second Al Zaid Decl. ¶¶ 8-15.) The arbitration clauses set forth in the Agreements do not deal with exoneration of liability but rather provide for a method of dispute resolution. (Second Al Zaid Decl. ¶ 20.) Furthermore, “[a]n 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." (Id.) Article 254 of the Civil Code, however, does not prohibit arbitration on liability relating to future torts as Ms. Ali asserts. (See Second Ali Decl. ¶ 17.)

15. Furthermore, as Ms. Ali explains, if the Brothers had entered into an agreement to arbitrate disputes relating to a contract which subject matter was legally prohibited, that agreement to arbitrate would be considered null and void. (See id. ¶ 16.) For example, if the purpose of the arbitration clauses was to enforce the Brothers' agreement to commit a crime, that agreement would not be enforceable. As I stated in the First Al Zaid Declaration, "[t]he subject matter of the arbitration agreements is any dispute arising between the Brothers that relates to the subject matter of the Agreements, an ordinary and lawful purpose," and the Agreements themselves relate to a "commercial matter that may be settled directly between the Brothers." (First Al Zaid Decl. ¶ 32.) (Emphasis added). Therefore, the arbitration clauses in the Agreements are not in breach of Public Order and must be considered valid.

Parties' ability to conciliate claims relating to Public Order

16. All experts in this case agree that arbitration is generally impermissible in matters related to Public Order. There is, however, one important exception for such rule -- an exception that my esteemed colleagues Ms. Ali and Dr. El-Kosheri failed to observe, and one that would apply to the Alleged Claims if the Alleged Claims were to be considered to relate to Public Order. This exception emerges very clearly in cases in which a dispute relates to matters related to Public Order, and yet is accompanied by financial rights that may arise out of the dispute. Arbitration is allowed concerning these financial rights, as well as conciliation and a waiver of those rights. This exception is clearly provided for in Article 554 of the Civil Law: "Reconciliation [solh] is not possible in matters related to public order, but it is possible regarding financial rights arising therefrom." (See Second Al Zaid Decl., Ex. 17.) This is a very well-established exception that has also been discussed extensively by various authorities, including Dr. Azmi Abdel Fattah Attiya who is relied upon by both Ms. Ali and Dr. El-Kosheri. (See First Ali Decl., Ex. E, Section Two, Heading Three; First El-Kosheri Decl., Ex. 2 at 1 ("Arbitration shall be permitted in the financial rights resulted from the issues related to the Public Order.")) (See also Ex. 19, Dr. Hosni Al-Masri, INTERNATIONAL COMMERCIAL ARBITRATION IN THE LIGHT OF KUWAIT LAW AND COMPARATIVE LAW, 630-631; Ex. 20, Prof. Ahmed Meleji, ARBITRATION RULES IN THE LAW OF KUWAIT, 84, 85-89.)
17. The proceeding before this Court is an action for monetary damages and other remedies to compensate for the harm allegedly suffered by Plaintiff. Therefore, even if the subject matter of the Alleged Claims could be said to relate to Public Order (which I maintain they do not), they would still be arbitrable because they relate to the financial rights relating to a matter related to Public Order. (See Ex. 20, Prof. Ahmed Meleji, ARBITRATION RULES IN THE LAW OF KUWAIT, 86-87 ("It should be noted that arbitration may be sought for deciding the financial rights related to the public order pursuant to Article 554 of the Civil Law. So, the public-order related issue may not be resolved by arbitration, unlike the related financial rights which can be arbitrated. For example, the issue of determining whether an act is considered a criminal offence or

not cannot be arbitrated. However, the financial rights related to the crime, such as the civil compensation, may be arbitrated.”.)

18. Furthermore, even in cases of crimes, conciliation may be permitted in certain cases. For example, certain criminal actions may be brought only after the injured party files a complaint. (Ex. 21, Kuwaiti Criminal Procedures Law, Art. 109.)¹ In such cases, the injured party who brings the complaint that results in a criminal proceeding may abandon the complaint, upon which the criminal proceeding will be withdrawn against the defendant. (*Id.*, Art. 110.) In that event, the injured party “shall have the right to bring his lawsuit before the civil court unless the plaintiff has declared his intention to abandon his civil right.” (*Id.*, Art. 114.) In other words, the injured party’s complaint would be capable of conciliation in these circumstances. (*Id.*, Art. 240 (“A harmed party may pardon or conciliate with the defendant against a compensation before or after the judgment is passed in the offences where filing of a legal action is dependent upon the defendant’s filing a complaint. . . .”)).
19. A simple way of determining whether a dispute can be conciliated and therefore arbitrated is to determine whether the parties can settle the matter outside of the courts. In the proceeding before this Court, it is my understanding that the parties can settle the Alleged Claims outside of the Court, upon which Plaintiff would withdraw the Amended Complaint. The fact that he is able to do this at his will, with no prohibition against the parties’ ability to settle and withdraw the civil action, is indicative of the fact that the Alleged Claims are capable of conciliation and therefore can be arbitrated.

A Kuwaiti arbitrator can apply U.S. Law

20. Dr. El-Kosheri states in his Second Declaration that a Kuwaiti arbitrator does not have the power to apply a foreign law. (Second El-Kosheri ¶¶ 14-20.) He reaches this conclusion by stating that “Kuwaiti courts do not have worldwide extraterritorial jurisdiction over any dispute that may exist,” and that “a Kuwaiti arbitrator would be subject to the same limitations. . . .” (*Id.* ¶ 16.) Dr. El-Kosheri’s position contradicts the basic rules of conflict law, Article 23 of the Civil & Commercial Procedure Code and Articles 59 to 65 of Law No. 5 of 1961 regulating the legal relationships involving a foreign entity. (See First Al Zaid Decl., Ex. 4; Ex. 22, Dr. Khaled Al Yakout, WASSEET IN KUWAIT ARBITRATION LAW, 86-88. See also First Al Zaid Decl., Ex. 3.)
21. First, it is incorrect to say “Kuwaiti courts do not have worldwide extraterritorial jurisdiction.” In fact, Dr. El-Kosheri does not even distinguish several circumstances under which the Kuwaiti courts would be empowered to exercise jurisdiction even if the acts were committed outside the country. For example, Kuwaiti courts have jurisdiction over a dispute where a party to such a dispute is a Kuwaiti National, or when a contract at issue is entered into inside Kuwait, or where the contracting parties have agreed on such jurisdiction. The applicable law will in any event be determined based on the court’s conflicts-of-law analysis.

¹ Article 109 sets forth four categories of such crimes: (i) libel and disclosure of secrets, (ii) adultery and fornication, (iii) abduction of a female victim, and (iv) theft, blackmailing, fraud and breach of trust, where the injured party is an ancestor, descendant or a spouse of the criminal.

22. Second, the arbitrator's jurisdiction is not related to the jurisdiction of the Kuwaiti courts, but depends on the parties' agreements. (Ex. 22, Dr. Khaled Al Yakout, WASSEET IN KUWAIT ARBITRATION LAW, 85 ("The arbitrator derives his power from the arbitration agreement.")) Here, the arbitration agreements entered into between the parties in the Agreements stipulate that all disputes arising in the future between them would be finally decided through arbitration, and it does not limit the disputes to disputes arising either inside or outside Kuwait. This indicates that the parties submitted all disputes to arbitration, regardless of the applicable law. It is from this agreement that the arbitrator derives his jurisdiction, and he would then have to apply the rules of conflict law to determine which law to apply to the dispute. (See Second Al Zaid Decl. ¶¶ 26-29 ("If the dispute in question relates to a tort and such tort took place in [a] foreign country, the Kuwaiti judge or arbitrator would apply the laws of the foreign jurisdiction."))

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 23, 2010 in Kuwait City, Kuwait.

Dr. Nasser Al-Zaid

