

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BASSAM Y. ALGHANIM,

Plaintiff,

v.

KUTAYBA Y. ALGHANIM et al.,

Defendants.

Case No. 09-CIV-8098 (NRB)

**SUPPLEMENTAL 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 Second Declaration of Reema I. Ali dated June 10, 2010 ("Second Ali Declaration") and supporting exhibits, the Second Declaration of Ahmed Sadek El-Kosheri dated June 9, 2010 ("Second El-Kosheri Declaration"), and the Supplemental Declaration of Meshari Al Osaimi in Opposition to Motion to Dismiss and/or Stay Action in Favor of Arbitration dated June 10, 2010 ("Second Al Osaimi Declaration") and supporting exhibits. I am submitting this declaration ("Third Al-Samdan 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, as well as to the opinion of Mr. Al Osaimi on certain matters of procedure under the Kuwaiti Court of Cassation as expressed in the Second Al Osaimi Declaration.
2. Specifically, I have been asked to re-consider my expert opinion on whether the claims alleged in Plaintiff's first amended complaint ("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-Samdan Declaration"):
  - (1) whether, as a matter of Kuwaiti law, the Alleged Claims are capable of conciliation ("Solh");

- (2) whether, as a matter of Kuwaiti law, torts are arbitrable and further, whether parties may agree to arbitrate such matters before the commission of a tort; and
- (3) whether a Kuwaiti judge or arbitrator may adjudicate on matters of United States law.

In addition, I have been asked to consider the significance of the general prosecutor's opinion dated May 4, 2010, which was issued in connection with Plaintiff's appeal to the Kuwaiti Court of Cassation of the judgment dismissing Plaintiff's request for an expert to be appointed to calculate the profits of Yusuf Ahmed Alghanim and Sons W.L.L. ("YAAS") for the fiscal years 2007 and 2008 in favor of arbitration.

### 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-Samdan Declaration") and the Second Al-Samdan Declaration and my conclusions that the Alleged Claims are arbitrable under Kuwaiti law and are required to be arbitrated pursuant to the Agreements.
6. My esteemed colleagues' opinions in the Second Ali Declaration and the Second El-Kosheri Declaration do not in any way alter my opinions as I have expressed them previously. I therefore re-affirm my conclusions that the Alleged Claims are arbitrable under Kuwaiti law and are required to be arbitrated pursuant to the Agreements under Kuwaiti law.

### Analysis

#### *The Alleged Claims Are Capable of 'Solh'*

#### The Subject Matter of the Alleged Claims Does Not Pertain to Public Order

7. Here, I would first like to clarify what has always been my opinion on the matters that are capable of 'solh,' which Ms. Ali and Dr. El-Kosheri appear to have misunderstood. Contrary to their statements that I suggested that only criminal proceedings are matters of Public Order and that only criminal matters are excluded from arbitration on this basis, my statements on Public Order were much broader:
  - (1) "[C]ourts will not uphold an agreement to arbitrate matters that are against public policy. This public policy exception is recognized by the courts for matters relating to the political, social, and economic interests of the society.



Whether a particular agreement is against public policy is determined on a case-by-case basis, and examples include agreements to arbitrate matters relating to crimes, acts of state and constitutional rights. There is no public policy exception that applies to commercial contracts entered into by two private parties, as is the case here.” (First Al-Samdan Decl. ¶ 34.)

- (2) “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. 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.” (Second Al-Samdan Decl. ¶ 13.)
8. As demonstrated by my previous statements, I agree with Ms. Ali’s statement that civil and commercial matters can, depending on the facts of the case, be matters of Public Order, such as if the subject matter of a private agreement was an unlawful one. For example, a private agreement between two parties to commit an illegal act, such as theft, would not be enforceable through arbitration. Similarly, a private agreement between two parties containing interest on civil debt would also be unenforceable, as imposing interest on civil debt is considered unlawful under Kuwaiti law. (See Second Ali Decl., Ex. 1.) As illustrated by an authority cited by Ms. Ali, however, the general principle is that “[a]rbitration is permitted in all the civil and commercial matters.” (See First Ali Decl., Ex. E, Section 1 at 3.)
9. I also agree with Ms. Ali’s statement and the cited authority that “in order to be arbitrable, a civil or commercial matter must be linked with a private right, and must not involve a claim to enforce obligations that are legally prohibited.” (Second Ali Decl. ¶ 16 & Ex. 1.) The Alleged Claims satisfy these requirements. The Alleged Claims are a civil matter between private parties and is linked with a private right, through which plaintiff seeks civil and monetary damages. Furthermore, the Alleged Claims, which are very closely related to the MOU, do not seek to enforce obligations that are legally prohibited, and the MOU does not contain any terms or obligations that contain an unlawful subject matter. More specifically, the MOU does not seek to exonerate or mitigate liability of future wrongdoing, as discussed below in paragraph 11, and neither party seeks to enforce an agreement that would be considered to be unlawful. I therefore affirm my opinion that the subject matter of the Alleged Claims does not pertain to Public Order and are arbitrable. (See Second Al-Samdan Decl. ¶¶ 13, 21.)
10. Furthermore, when interpreting whether the subject matter of an agreement to arbitrate is capable of ‘solh,’ Kuwaiti law draws an important distinction between agreements to arbitrate that may touch upon matters relating to Public Order and agreements whose very terms violate Public Order. For example, arbitration agreements that permit the parties to settle a dispute reserved explicitly for decision by the State would be considered to violate Public Order, such as matters of divorce or guardianship. As the authority on which Dr. El-Kosheri relies clearly explains, “[t]he agreement of arbitration does not automatically become null when contradicting with the public order, however, it becomes null only if it contains a contravention for the public order.” (First El-Kosheri Decl., Ex. 8 at 126-127.) The arbitration clauses contained in the Agreements between the Brothers do not purport



to allow the Parties to arbitrate matters that are reserved for the State but rather relate to claims arising out of a lawful contract between two private parties. Therefore, even if the Alleged Claims could be considered to be related to matters of Public Order, which they do not, they would still be capable of 'solh' as they do not violate any Public Order.

#### Article 254 of the Civil Code Does Not Apply Here

11. Ms. Ali relies on Article 254 of the Civil Code for her conclusion that the Alleged Claims are prohibited from being conciliated. (See Second Ali Decl. ¶¶ 17-21.) Article 254, which prohibits an agreement “that is executed prior to the occurrence of a tort and has the effect of exonerating liability arising from the tort,” is irrelevant to the analysis of whether the arbitration clauses contained in the Agreements are valid or whether the Alleged Claims are arbitrable. (See First Ali Decl., Ex. D.) As I have already explained, the prohibition set forth in Article 254 does not apply here because the arbitration clauses in the Agreements “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.” (See Second Al-Samdan Decl. ¶¶ 19-21.) Under the terms of the arbitration clauses contained in the Agreements, the right and remedies available to Plaintiff would be the same in arbitration as if he were to litigate his claims before this Court. In other words, contrary to what Ms. Ali appears to believe, the arbitration clauses reflect only the Brothers’ intent to select arbitration as the forum in which all disputes relating to the subject matter of the MOU (including issues of liability) will be determined, and do not serve as a way of exonerating or mitigating liability.

#### The Alleged Claims Are Civil in Nature

12. While Ms. Ali and Dr. El-Kosheri confirm their understanding that the Alleged Claims are civil in nature and not criminal, with respect, their analysis appears to continue to fail to distinguish the very distinct natures of a civil proceeding and a criminal proceeding in the United States. For example, I understand that the standards of proof are different in a criminal proceeding and a civil proceeding. (See Second Al-Samdan Decl., Ex. P at 2.) Similar distinctions exist under Kuwaiti law, and the standard of proof in a criminal proceeding is much higher than in a civil proceeding. I also understand that in the United States, as is the case in Kuwait with respect to certain crimes that relate to private rights, civil proceedings can be brought to determine liability and damages arising from the alleged conduct, independently of a proceeding to establish criminal liability with respect to the same conduct.
13. My esteemed colleagues do not appear to consider these important distinctions in their analysis and instead consider that the determination of the facts underlying Plaintiff's Alleged Claims is within the exclusive jurisdiction of criminal courts. (See, e.g., Second Ali Decl. ¶ 25; Second El-Kosheri Decl. ¶ 9.) It is my understanding that in the United States, the determination of facts that are potentially relevant to both a civil and criminal claim are decided respectively by civil and criminal courts, independent of each other. (See Second Al-Samdan Decl., Ex. P.) Kuwaiti law and procedure are similar to that of the United States with respect to this issue. In other words, there is no need and no opportunity for the U.S. Court hearing Plaintiff's Alleged Claims to



determine criminal liability and, as a result, no need for the arbitrator to determine criminal liability in order to resolve Plaintiff's case.

14. Therefore, I must respectfully disagree with my esteemed colleagues that the Alleged Claims are matters of Public Order that are not capable of 'solh,' and I affirm my opinion in the Second Al-Samdan Declaration that the subject matter of the Alleged Claims do not pertain to Public Order. (See Second Al-Samdan Decl. ¶¶ 13-18.)

*Article 173 of the Civil Code Does Not Prevent Non-Contractual Claims from Being Arbitrated*

15. According to Ms. Ali, my opinion that parties to a contract may agree to arbitrate all disputes between them relating to the subject matter of the contract, whether contractual or non-contractual, "directly contradicts the plain language of Article 173 of the Kuwaiti Civil & Commercial Procedural Code." (Second Ali Decl. ¶ 27.) I respectfully disagree with Ms. Ali's narrow reading of Article 173.
16. The confusion may have resulted from the inaccurate translation of Article 173 provided by Ms. Ali. According to Ms. Ali's version of Article 173, "[i]t is permissible to agree on all disputes that arise from the *performance* of a specific contract." (First Ali Decl., Ex. C.) (Emphasis added) The correct translation, and the one officially issued by the Kuwaiti Ministry of Justice Judicial Arbitration Department, is broader and provides: "Agreement may be made . . . on arbitration in *all disputes arising from the implementation of a certain contract.*" (First Al-Samdan Decl., Ex. E.) (Emphasis added). Article 173 requires a connection between the subject matter of the dispute in question and the contract containing the arbitration clause, but it does not limit the jurisdiction of an arbitrator to the narrow scope of contractual disputes as suggested by Ms. Ali.
17. This is further evidenced by the Court of Cassation decision that I attached as Exhibit Q of the Second Al-Samdan Declaration. Although Ms. Ali states that there is insufficient presentation of the underlying facts, (see Second Ali Decl. ¶ 28), the Court of Cassation case, in the first two pages of the judgment, explains the facts that are necessary to understand the nature of the arbitration. The arbitration, as is clear from the judgment, involved claims for "exploiting [claimant's] name, agencies, files and stationary without her knowledge." (Second Al-Samdan Decl., Ex. Q at 1-2.) It is clear that a claim of misuse or exploitation is not a contractual claim. The arbitrators, as is clear from the judgment, nonetheless "adjudicated respondent's liability with respect to these claims and ordered respondent to pay damages to claimant." (Second Al-Samdan Decl. ¶ 33.) The Court of Cassation affirmed the arbitral award. This is a clear example of a general principle that all claims, whether contractual or non-contractual, relating to a contract can be arbitrated if the contract at issue contains an agreement to arbitrate disputes relating to the particular contract.
18. I also note here that Ms. Ali does not provide any authority to support her narrow reading of Article 173 that an arbitration clause must only be limited to contractual disputes. None of the authorities cited by Dr. El-Kosheri indicate that there is such a limitation either.
19. The authorities in fact suggest otherwise. For example, according to an authority submitted by Dr. El-Kosheri, "[t]he parties may agree in the condition of arbitration



on processing all the disputes arising between them and *affecting* a certain contract.” (First El-Kosheri Decl., Ex. 8 at 131.) (Emphasis added). There is no restriction that the disputes arise from the “performance” of the contract or be limited to contractual claims, as Ms. Ali suggests. The same authority also states: “The Court has ruled that if an arbitration clause is limited to disputes arising from the interpretation or execution of the contract, then this clause does not cover disputes based on non-contractual liability.” (*Id.* at 132.) This demonstrates that it is up to the parties to restrict the disputes to be arbitrated, if they so wish, to exclude non-contractual claims.

20. As I have already stated, there is no such restriction in the arbitration clause contained in the Agreements. (See Second Al-Samdan Decl. ¶ 32 (“[W]hile parties to a contract may, in the arbitration clause, choose to limit the subject matter of dispute arbitrated . . . in the present case, the Brothers did not stipulate any such limitations in the Agreements.”).) Furthermore, the Alleged Claims concern disputes that arise from the implementation of the MOU. (First Al-Samdan Decl. ¶ 47 (“[T]he Complaint directly relates to the subject matter of the Agreements, which is the division of family assets.”).) I therefore affirm my opinion that all disputes related to the subject matter of the MOU, including the Alleged Claims, are subject to arbitration. (See Second Al-Samdan Decl. ¶¶ 29-36; see also First Al-Samdan Decl. ¶¶ 45-49.)

*A Kuwaiti Arbitrator Would Be Authorized to Apply U.S. Law*

21. Dr. El-Kosheri states that “a Kuwaiti arbitrator would be subject to the same limitations [as a Kuwaiti court, which would be obligated to decline jurisdiction over a case that involved only violation of US statutes and US Common Law Torts] unless two parties had specifically consented to submit such disputes to him after they had arisen.” (Second El-Kosheri Decl. ¶ 16.) He, however, offers no authority to support this statement, and I must respectfully disagree with this statement as it is not a correct statement of the law.
22. First, the jurisdiction of Kuwaiti courts does not depend on the applicable law of the dispute. Under Article 23 of the Civil & Commercial Procedure Code, “Kuwaiti courts shall have jurisdiction to hear the lawsuits lodged against Kuwaitis and against the expatriates residing in Kuwait. . . .” (Ex. R.) This shows that the Kuwaiti courts’ jurisdiction depends on the nationality or residency of the defendant and not on the applicable law. Therefore, Dr. El-Kosheri’s statement that “[a] Kuwaiti court would . . . be obligated to decline jurisdiction over a case that involved only violation of US statutes and US Common Law Torts” is not correct.
23. Second, it is a clear principle of arbitration that the jurisdiction of an arbitrator is derived from the parties’ agreement to submit the dispute to arbitration, and that it has nothing to do with the limitations of jurisdiction of the Kuwaiti courts. (See, e.g., Ex. S, Fathi Wali, *ARBITRATION LAW IN THEORY AND PRACTICE*, 122 at ¶ 58.) Furthermore, there is nothing under Kuwaiti law that would suggest that a Kuwaiti arbitrator cannot arbitrate disputes brought to him by parties’ prior agreement, regardless of the applicable law.
24. Dr. El-Kosheri also states that “nothing in Article 173 of the Kuwaiti Civil & Commercial Procedure Code suggests that a Kuwaiti arbitrator would have the power to determine non-contractual tortious claims relating to activities occurring in foreign



countries.” (Second El-Kosheri Decl. ¶ 17.) This, with respect, is a conclusion unsupported by any authority, including Article 173 or any other provision under the Kuwaiti Civil & Commercial Procedure Code.

25. The conflict-of-law rules are capable of being applied by the arbitrators as much as by the courts. I therefore affirm my opinion that the arbitrator, in making his determination with regard to the Alleged Claims, is capable of applying the relevant laws of the United States to the dispute. (See Second Al-Samdan Decl. ¶¶ 37-38.)

#### **Procedure of the Court of Cassation Appeal**

26. As I stated in the First Al-Samdan Declaration, I am a senior partner with Ahmad Al-Samdan and Partners Law Firm, which is affiliated with the law firm Denton, Wilde & Sapte in Kuwait. (First Al-Samdan Decl. ¶ 6.) In this capacity, I have personally appeared before the Kuwaiti Court of Cassation several times. Furthermore, I supervise all of the appeals to the Court of Cassation that are handled by my law firm, which on average consist of about twenty appeals per year. I am therefore very familiar with the appeals process before the Court of Cassation.
27. Parties can appeal judgments as a matter of right, and the Court of Cassation has a selection process through which it chooses the appeals it will actually hear. After the clerk of the Court of Cassation records the appeals that are submitted to the Court, a general prosecutor for the Court of Cassation, who should not be confused with a prosecutor that brings criminal charges, is required to opine as to whether the Court of Cassation should hear the appeal. Once the prosecutor has issued an opinion with his recommendation, a special committee (the “Committee”) that consists of three to five judges of the Court of Cassation decides whether to hear the appeal. The Committee will issue an opinion if it determines that the appeal should not be heard. If it decides that the appeal should be heard, it will place the appeal on the docket of the Court of Cassation but will not issue an opinion.
28. My experience demonstrates that neither the general prosecutor’s opinion nor the Committee’s decision to send the appeal to the Court of Cassation can accurately predict what the judgment of the Court of Cassation will be. The prosecutor’s opinion does not bind the Court of Cassation in any way, and the Committee’s decision to send the appeal is not indicative of the Court of Cassation’s ultimate judgment.
29. Moreover, the general prosecutor’s opinion cannot be considered to be binding judicial authority on the lower courts. For example, the Appellate Court recently affirmed the judgment of the Court of First Instance dismissing, on the basis that there is a valid agreement to arbitrate, Plaintiff’s request that the court confirm his fifty percent ownership in YAAS. I have reviewed the judgment of the Appellate Court dated May 30, 2010, which affirmed the Court of First Instance’s dismissal. (Ex. T.) Although this judgment was issued after the general prosecutor had rendered his opinion on May 4, 2010, the Appellate Court made no mention of it in its judgment.
30. Furthermore, in my opinion, a reversal by the Court of Cassation of the Appellate Court’s judgment would mean that the Court of Cassation would also have to overturn existing legal principles and introduce new requirements to the law of arbitration in Kuwait, possibly including the issues of who can properly serve as an arbitrator or how the parties must demonstrate their intent to enter into an agreement to arbitrate.

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.

A handwritten signature in blue ink, consisting of a long, sweeping horizontal stroke followed by a large, circular flourish on the right side.