

Analysis

Kuwait Times
Established 1961
The First Daily in The Arabian Gulf

THE LEADING INDEPENDENT
DAILY IN THE ARABIAN GULF
ESTABLISHED 1961

Founder and Publisher
YOUSUF S. AL-ALYAN

Editor-in-Chief
ABD AL-RAHMAN AL-ALYAN

EDITORIAL : 24833199-24833358-24833432
ADVERTISING : 24835616/7
FAX : 24835620/1
CIRCULATION : 24833199 Extn. 163
ACCOUNTS : 24835619
COMMERCIAL : 24835618

P.O. Box 1301 Safat, 13014 Kuwait.
E MAIL: info@kuwaittimes.net
Website: www.kuwaittimes.net

Misconduct outcry makes US lawyers rethink confidentiality

The wave of sexual misconduct allegations made against dozens of powerful men in recent weeks is causing lawyers to rethink how they handle such cases, including the longstanding use of confidentiality agreements. As more women, and sometimes men, speak out, settlement deals with non-disclosure agreements (NDAs) that bar victims from discussing past claims of harassment or abuse have come under fire, with many lawmakers and advocacy groups now arguing they should be abolished.

Lawyers who represent plaintiffs and defendants in harassment cases said they had previously assumed NDAs, which are rarely breached, would be upheld in court if challenged. But now there is a greater probability courts could void such agreements deeming them against the public interest. "I'd be surprised to find a lawyer who is confident in the enforceability of an NDA right now," says Ron Shechtman, head of the employment law practice at law firm Pryor Cashman, which represents employers.

Several lawyers said they are more likely now to recommend executives or other high-profile individuals facing misconduct claims step down rather than try to defend themselves or make the allegations go away. That has been the course chosen by several men in recent weeks. But lawyers say weakening confidentiality could have consequences for accusers too. Settlements could be smaller without a promise of secrecy. Confidentiality agreements, at least in some cases, can also prevent men accused of misconduct from falsely characterizing claims against them.

Plaintiffs' lawyers said that, moving forward, their advice may vary more depending on their clients' goals. Some may want to go public so harassers cannot claim new victims, said New York lawyer Douglas Wigdor. Others, however, "want confidentiality just as much as the person who harassed them." Such agreements only come about when an accuser has made or threatened a legal claim over misconduct allegations. Many of the women now publicly giving their accounts have not sued and have no plans to do so.

Critics of non-disclosure agreements say they enable serial harassers by keeping other people who work for or with them in the dark about their behavior. Lawmakers in New York, California, Pennsylvania and New Jersey have proposed banning non-disclosure agreements in sexual harassment and other employment-related cases. Those proposals could gain momentum as more claims of harassment come to light. By now, millions of people have posted stories under the social media hashtag "Me Too."

Prior NDAs have not necessarily stopped women from coming forward. Zelda Perkins, a former assistant to Hollywood producer Harvey Weinstein, said she violated such an agreement to publicly air harassment allegations against her former boss. Weinstein has denied all allegations of non-consensual sex. Reuters has not independently verified the claims.

Reluctant to Sue

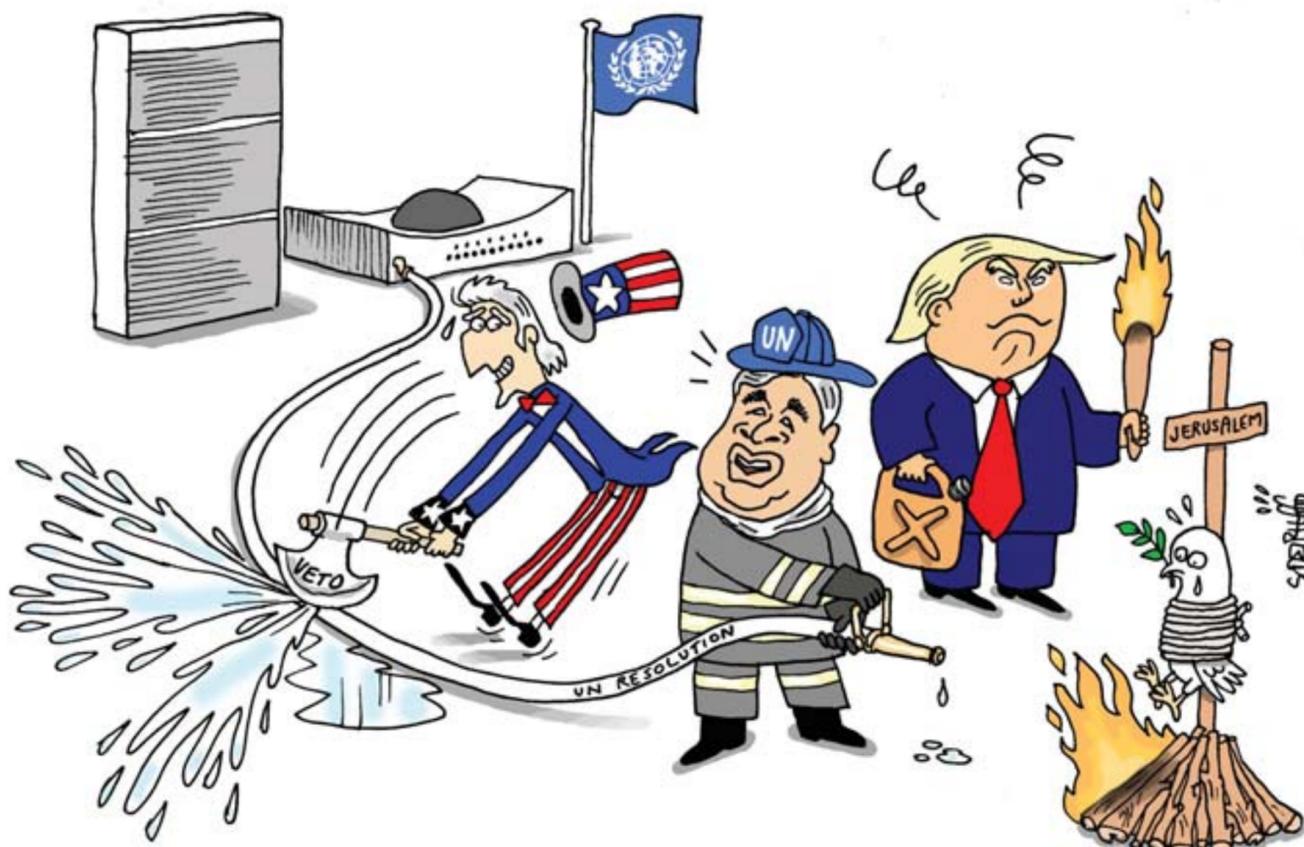
Women violating confidentiality deals potentially face lawsuits for breach of contract. But lawyers on both sides said companies and those accused of misconduct would be reluctant to sue victims of assault or harassment in the current climate. Even if they did, there is no guarantee they would win. Judges have discretion to void agreements if they think they are unfair to one of the parties or they violate public policy. Earlier this year, a federal appeals court in Washington DC invalidated employment agreements that barred hospital workers from discussing their wages and other working conditions.

Some states already have laws restricting confidentiality agreements that conceal "public hazards", such as product defects or environmental contamination. The same reasoning could potentially be used to invalidate non-disclosure agreements covering allegations of sexual misconduct, lawyers say, on the theory that some harassers could pose danger to others if their conduct is not revealed. Courts would particularly look askance at agreements covering allegations of sexual assault or other criminal acts, said Jennifer Drobac, a law professor at Indiana University who formerly represented plaintiffs in harassment cases.

As a result, several lawyers said non-disclosure agreements will probably be used less in the future and might be less restrictive when they are. Dabney Ware, a lawyer with Foley & Lardner who represents employers in harassment lawsuits, said future confidentiality agreements might cover only the names of the parties and the amount paid in settlement, while allowing allegations to be made public.

Lawyers noted that companies, under pressure from the public and investors to show they take sexual misconduct charges seriously, are far less motivated now to protect employees, no matter how senior, from allegations of misconduct. Wigdor, who is representing two dozen people in discrimination cases against Fox News, noted the network's parent, 21st Century Fox Inc, paid \$90 million to settle shareholder lawsuits over its payment of settlements on behalf of former host Bill O'Reilly and former network chief Roger Ailes.

Lawyers say some hardball tactics aimed at enforcing confidentiality might also go away. Plaintiffs' lawyers say clients have previously been asked to hand over or destroy evidence or sign affidavits absolving defendants of wrongdoing. —Reuters



Brexit, Catalonia test EU resolve

From the hammer blow of Brexit to turbulence in Catalonia, new forms of nationalism are testing the relevance and unity of the European Union, analysts say. The crisis in Spain served as a stark reminder of the fault lines that run through Europe, with a country's central government battling a region whose leaders want to break away. In Britain, the cry for sovereignty brought 17.4 million people to the polls to vote for Brexit in June 2016.

Campaigners also played on anger about having to fund the EU - arguing that it imposed bureaucratic rules from afar and prevented the country from engaging with the rest of the world. In Catalonia, emotional arguments dating back to the Franco dictatorship combined with economic issues to fuel calls for independence. "The nationalists understood that in developed and prosperous regions, you can no longer simply appeal to the idea of historic oppression," said Bruno Yammine, a Belgium-based historian. "Economic arguments have now legitimized cultural and ethnic nationalism, especially by renouncing fiscal solidarity with poorer regions," he added.

'Thirst for local democracy'

The "Brexiters" argued that money currently being paid by London to the EU would be better spent on the public health service, despite their financial figures being hotly disputed. In Barcelona, "there was the idea of a Catalonia that could be an international platform within the framework of the EU, a North American style of platform that could bring additional growth," said Andres de Blas Guerrero, a political scientist at Spain's National University of Distance Education.

Other sentiments seized on by populist nationalists

include the threat of immigration to national identity and a rejection of elites. For Renaud Thillaye, European Affairs analyst at Flint Global in London, a management consultancy, the success of nationalism is linked "on the one hand to corruption and the discrediting of traditional parties, and the thirst for more local democracy. "On the other hand, there is a need for cultural anchoring around a

“ Economics has legitimized cultural, ethnic nationalism ”

common language and heritage at a time when everything is moving very fast and the artificial character of nation states is all the more apparent."

Against this backdrop, nationalists have been able to paint supra-national bodies such as the EU as instruments of globalization, which they blame for reinforcing the domestic wealth gap and testing national solidarity.

Separatist risk 'theoretical'

Thillaye said the EU wants to avoid the proliferation of states at all costs and is doing everything possible to discourage independence movements, whether it be in

Scotland, Catalonia or Corsica, who may at one point have seen the EU as an ally in their fight against the central state. The EU sided with Spain in the Catalan crisis and refused Scotland's demand for a separate status after Brexit.

Bruno Yammine said this demonstrated that the danger posed by Catalan nationalism, and by extension all nationalist movements within the member states, is more than theoretical. "No state wants a proliferation of separatism, since almost every European country has minorities of its own, some of whose leading figures have nationalist aspirations."

'Unstable' Europe

Europe has so far resisted the shock of Brexit. The eurozone has been spared any financial instability linked to the move since Britain is not a member. The tortuous nature of the Brexit negotiations may deter other member states considering leaving. But nationalist tensions are "not about to disappear," warned Thillaye. "The countries that will not be able to find an outlet for these demands risk being plunged into serious trouble, as we see in Catalonia."

For Matthew Goodwin, political scientist at the University of Kent, Europe's political systems "have never before been so unstable, with record levels of vote-switching and a loss of support for the mainstream". The value-divide between nationalists and cosmopolitans is "becoming as important as the traditional divide between left and right," he said. The performance of anti-elite, eurosceptic and populist parties in next year's elections in Italy, Hungary and Sweden will be an acid test of the scale of the challenge facing the EU. —AFP

Is corporate inaction on mica condemning Indian kids to death?

Since 12-year-old Laxmi Kumari was buried alive in a mica mine eight months ago, her family's grief has turned to despair on realizing promises by global companies to end child labor in the mines in eastern India have so far led to nothing. Just over a year ago, a Thomson Reuters Foundation investigation found children in India were dying in the depths of crumbling, illegal mines for the prized mineral that puts the sparkle in make-up and car paint - but their deaths covered up.

The discovery that seven children had died in two months alone prompted pledges by multinationals sourcing mica from India to clean up their supply chains, and state authorities vowed to accelerate plans to legalize and regulate the sector. But returning to the major mica producing areas in India's Jharkhand and Bihar states in recent weeks, the Thomson Reuters Foundation found that children were continuing to die in these remote, abandoned "ghost" mines.

Interviews with local communities, government officials and charity workers, along with local newspaper reports, revealed at least nine people - including Laxmi and three other children - have died in collapses at unregulated mines this year. Laxmi and three others from her village in Jharkhand's Giridih district, including a teenage girl, died on May 1. By the time her mother Parvatiya Devi got word that the mine had collapsed and made the one hour trek from her village to the makeshift mine, it was too late.

"We dug with our bare hands. We found my younger daughter who had clawed and dragged herself out of soil despite her broken leg," said Parvatiya, sitting beside the

10-year-old who could still barely walk, outside their mud home in Duda village. "But Laxmi was dead by the time we found her. She was not breathing. There was no life in her."

Toll Much Higher

Campaigners fear the death toll is likely much higher than nine as bodies are often not recovered from the rubble, or are quickly and silently cremated in the forests by mine operators. Yet as children continue to risk their lives, an initiative set up in January and backed by multi-billion dollar companies to end child labor in India's mica supply chain by 2022 has failed to have any tangible action on the ground, they said.

The Responsible Mica Initiative (RMI) - whose 39 members include cosmetics firms Estee Lauder and L'Oreal, and German drugs and chemical group Merck KGaA - has raised little funds, and village activities to curb child labor have not started. "The RMI is an initiative with a lot of promise, yet it has in the last year failed to live up to that promise," said Sushant Verma from Nobel Laureate Kailash Satyarthi Children's Foundation (KSCF), a charity working to end child labor in mica mines for over a decade that initially supported the RMI. "Could the companies have done more? The answer is yes. They had a year and yet there is little to show on the ground. Children are dying in these mines, but there is no sense of urgency to really tackle the problem."

The Paris-based RMI, however, said its first year was a "preparation year" dedicated to setting up the organisation, enlisting members and raising funds. Projects to improve the lives of rural communities are expected to begin next year. "When I compare many other initiatives, it's incredible that already around 40 members have decided to join and take action together and have a five-year program with real impact," said RMI's Executive Director Fanny Fremont. "I don't think it could have been done any quicker. You need to align all the stakeholders. It's actually a very short time if you compare it to similar organizations." RMI members such as Merck KGaA dismissed claims the poor

show of funds in 2017 - around 4 percent of its targeted budget of \$12 million - reflects a lack of commitment from corporates. Many companies have also dedicated resources, such as staff time and expertise, which cannot be monetized, they said. "2017 was a preparation phase for RMI set-up and even not a full year for collecting contributions," said Matthias Lergenmueller from Merck KGaA, which holds RMI's vice-presidency and will take over as RMI president in Jan 2018. "The increased number of members by 2017 year-end and higher contributions of individual members will certainly make sure the full budget will be reached for the entire project duration at RMI, namely for the implementation phase starting 2018."

Cover-Ups and Blood Money

India is one of the world's largest producers of the silver-colored mineral found in a list of consumer goods from make-up and car paint, to electronics and construction materials. Once boasting over 700 mines with over 20,000 workers, the industry was hit by 1980 legislation to limit deforestation and the discovery of substitutes for natural mica, forcing most mines to close due to cost and stringent environmental rules.

But renewed interest in mica from China's economic boom and a global craze for "natural" cosmetics saw illegal operators scurry to abandoned mines, creating a lucrative black market. In one of the poorest regions of India, children as young as five are part of an opaque supply chain - beginning in Giridih's decrepit mines and ending in Paris' fragrant beauty stores.

Indian law forbids children below the age of 18 working in mines and other hazardous industries, but many families living in extreme poverty rely on children to boost household incomes which average around 200 rupees (\$3) daily. "I started going to the mines with my parents when I was about five or six years old," said a former child worker Basant Kumar, now 22, from Faguni village, a mud-and-brick settlement of 40 families in Bihar's Nawada district. "There was no school in the village then and there was no-one to look after me so I went along with my parents ... We

knew it was dangerous but there was little choice."

The Thomson Reuters Foundation's August 2016 investigation found child workers not only suffer injuries and respiratory infections but they risked being killed with deaths hushed-up. In some cases, the victims' families are threatened by mine operators or buyers not to report the deaths, or they are given "blood money" to keep silent so the illicit industry continues with few other ways to earn money available. Campaigners estimate this illegal trade accounts for some 25 percent of the global production of mica and involves up to 50,000 child workers in India.

'Top-Most Priority'

In the past year, the Jharkhand government has moved ahead with plans to legalize and regulate the industry. Geological surveys to determine the size of mica deposits are underway and demarcated blocks will be auctioned next year. The state has also begun selling old mica dumps where children often gather, squatting with small hammers which they use to break off shiny flakes of mica from discarded rocks.

Sunil Kumar Barnwal, Jharkhand's Secretary for Mines, said legalization will ensure fairer wages, health and safety standards for workers, and inspections to check on child labor. "Legalizing the industry is one of our top-most priorities," Barnwal told the Thomson Reuters Foundation by phone from Ranchi, Jharkhand's state capital. "It will solve the child labor problem to a certain extent because it will come under regulation and that will help enforcement agencies to enforce the law and ensure any work in the mines is governed by labor laws."

District officials said schemes to help communities shift from mica to other forms of income generation such as goat and cattle-rearing are being rolled out while police are cracking down on so-called "mica mafias" by conducting raids on mines. But they added multinational firms - who have for decades profited from purchasing the mineral at dirt-cheap rates from India's illegal mica trade - must also play their part. —Reuters