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The American University in Cairo

School of Global Affairs and Public Policy

ARBITRATION: A COMPARATIVE STUDY

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for
the LL.M. Degree in International and Comparative Law**

By

Samer M. Badran

May 2010

The American University in Cairo
School of Global Affairs and Public Policy

Arbitration: A Comparative Study

A Thesis Submitted by

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LL.M. Degree in International and Comparative Law
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To my father, mother, wife, colleagues, tutors and friends who all helped and somehow put up with me, I sincerely thank you very much.

The American University in Cairo
School of Global Affairs and Public Policy
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ABSTRACT

In the following thesis I will discuss arbitration, I will focus on who the court system in Egypt views as a party to the arbitration agreement, and will compare the Egyptian courts' view of parties to the arbitration agreement and the view adopted by western legal systems.

The study will begin by viewing who might be considered a party upon the conclusion of the agreement, and will move on to view those who will become a party later on. The final stage is that of those who may be found to be a party to the arbitration agreement, after that I will conclude.

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I. INTRODUCTION

Who are the parties to a contract, is a question that has been answered in each jurisdiction and has inadvertently undergone change, throughout that country's legal history. This problem continues to plague us in a day and age where arbitration has emerged as the leading means of dispute resolution in the business world, especially where the transaction is trans-border.

II. PRIVACY OF THE ARBITRATION AGREEMENT

The legal systems that I will address in the following thesis, all have a concept of privity of contract. This concept therefore controls an arbitration agreement as it would control any other contract, the extent of this control may be partially clarified in this research, but is not the main focal point. The point of focus is mainly a comparison between arbitration worldwide and arbitration in Egypt, notably what the courts in Egypt have had to say on that matter.

A. Who is party to the arbitration agreement?

In the following section I will discuss one form of party to an arbitration agreement. Article II of the New York Convention states

Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or an differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.¹

The main principle is that “the rights and obligations of an arbitration agreement apply only to the agreement’s parties” and is “a straightforward application of the doctrine of privity of contract,”² a party to an arbitration agreement will be determined by a court through determining who has consented to the agreement to arbitrate, such consent can either be express or implicit³. In a straightforward sense “the parties to an arbitration agreement are- and are only- the entities that formally executed, and

¹ http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

² GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1133 (WOLTERS KLUWER LAW & BUSINESS, 2009)

³ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 8 (KLUWER INTERNATIONAL LAW, 2005)

expressly assumed the status of parties to, the underlying contract containing the arbitration clause”⁴ in other words “It is essential therefore that the party who is alleged to have concluded the contract or to have participated in its conclusion, did indeed have the intention to be bound by an arbitration agreement”⁵. According to Egyptian law consent is essential for there to be an agreement to arbitrate and is of the view that in the event of lack of consent there becomes no agreement⁶, and considers the agreement to arbitrate to be “a private law contract that is subject to the concept of private autonomy and subject to the general rules of contract, as defined by the general theory of contract.”⁷ It is essential that there be a meeting of the parties’ to the agreement’s minds, on seeking resolution of their disputes through arbitration as opposed to the national court system⁸. A further requirement is capacity, the capacity needed for “entering into an arbitration agreement, is not just the capacity for initiating legal procedure, but the capacity to transact with regard to the right being arbitrated.”⁹

The problem with consent, is when implied consent becomes the means of consent “Under most developed legal systems, an entity may become party to a contract, including an arbitration agreement, impliedly-typically, either by conduct or non-explicit declarations, as well as by express agreement or formal execution of an

⁴ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1136 (WOLTERS KLUWER LAW & BUSINESS, 2009)

⁵ JEAN-LOUIS DEVOLVÉ, JEAN ROUCHE & GERALD H. POINTON, FRENCH ARBITRATION LAW AND PRACTICE 63 (KLUWER LAW INTERNATIONAL 2003)

⁶ DR. NBYL `ISM`YL `MR, AL TAH`KYM FY AL MWĀD AL MDNĪ-A W AL TGARĪ-A AL WT`NĪ-A W AL DWLĪ-A, 43 (DAR AL JAM`-A AL GDYD-A, 2005)

⁷ DR. NBYL `ISM`YL `MR, AL TAH`KYM FY AL MWĀD AL MDNĪ-A W AL TGARĪ-A AL WT`NĪ-A W AL DWLĪ-A, 43 (DAR AL JAM`-A AL GDYD-A, 2005)

⁸ DR. NBYL `ISM`YL `MR, AL TAH`KYM FY AL MWĀD AL MDNĪ-A W AL TGARĪ-A AL WT`NĪ-A W AL DWLĪ-A, 43-44 (DAR AL JAM`-A AL GDYD-A, 2005)

⁹ DR. NBYL `ISM`YL `MR, AL TAH`KYM FY AL MWĀD AL MDNĪ-A W AL TGARĪ-A AL WT`NĪ-A W AL DWLĪ-A, 44 (DAR AL JAM`-A AL GDYD-A, 2005)

agreement,”¹⁰ the matter of the intent of the parties to the contract to whom the non-signatory is either to be /or not to be deemed party to; is important, as their intent to be bound by the agreement with the non-signatory must be considered as the non-signatory’s intent must also be, it is clear that the Paris Cour d’appel and the United States Court of Appeals for the Second Circuit have accepted the notion of implied consent¹¹, on the other hand the United States Court of Appeals for the Third Circuit and later on the First Circuit

Went even further than the Supreme Court in a subsequent decision, *Dayhoff v. H.J. Heinz Co.*, construing *First Options* to mean that no party could be compelled to arbitrate unless it specifically and expressly agreed to arbitration. The same conclusion was recently reached by the United States Court of Appeals for the First Circuit.¹²

The matter of implied consent to arbitration under Egyptian law, Article 12 of the Egyptian Arbitration Law no. 27 for the year 1994 stipulates that the agreement to arbitrate must be written or else the agreement is void¹³. Also article 53 of the said law stipulates that one of the grounds for a court vacating an arbitral award is there being no arbitration agreement. The requirement of writing is fulfilled if it is contained in a document signed by both parties, or in various written documents exchanged between both parties, the arbitration agreement does not have to be signed in a separate document; it may be part of another document or even a standard or pre-prepared agreement¹⁴. Article 10 of the abovementioned law also stipulates to the effect that reference to a document containing an arbitration agreement, shall be considered an agreement to arbitrate, on condition that it is clear from this reference

¹⁰ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1150 (WOLTERSKLUWER LAW & BUSINESS, 2009)

¹¹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1150 (WOLTERSKLUWER LAW & BUSINESS, 2009)

¹² BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 34 (KLUWER INTERNATIONAL LAW, 2005)

¹³ DR. NBYL `ISM`YL `MR, AL TAH`KYM FY AL MW`AD AL MDN`-A W AL TGAR`-A AL WT`N`-A W AL DWL`-A, 48 (DAR AL JAM`-A AL GDYD-A, 2005)

¹⁴ DR. NBYL `ISM`YL `MR, AL TAH`KYM FY AL MW`AD AL MDN`-A W AL TGAR`-A AL WT`N`-A W AL DWL`-A, 48-49 (DAR AL JAM`-A AL GDYD-A, 2005)

that the intention is to make this other document part of the agreement; according to that the parties to the agreement are under the obligation to honor the arbitration clause in the referred document if: the arbitration clause is referred to specifically or the referral was general but the parties knew or were capable of knowing of the arbitration clause in the referred document.¹⁵

An original party to an arbitration agreement “is the person who entered into the arbitration agreement in person or through his representative,”¹⁶ these parties “can be divided into four classes: natural persons, legal entities, public bodies and states. None of these classes of litigants is prevented from entering into an arbitration agreement and consequently from being party to arbitral proceedings.”¹⁷

Of course as an application of the requirement of intent to arbitrate, the party “that executes a contract is not necessarily a party to either that agreement or the arbitration clause associated with it,”¹⁸ as an “agent or representative may execute an agreement on behalf of its principal, producing the result that the principal is a party to the agreement (but the agent or representative is not).”¹⁹

Another application of the above is that merely sending a copy of the contract (which contains an arbitration clause) to the other party, in order to seek his opinion on technical matters, does not mean that they have become bound by an agreement to

¹⁵ DR. NBYL `ISM`YL `MR, AL TAH`KYM FY AL MW`AD AL MDN`-A W AL TGAR`-A AL WT`N`-A W AL DWL`-A, 49-50 (DAR AL JAM`-A AL GDYD-A, 2005)

¹⁶ DR. FTH`Y WALY, QAN`UN AL TH`KYM FY AL NZ`RY-A W AL TT`BYQ, 161 (MNSH`A-A AL M`ARF AL `ASKNDRY-A, FIRST EDITION 2007)

¹⁷ MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW, 167 (KLUWER LAW AND TAXATION PUBLISHERS, 1990)

¹⁸ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1136 (WOLTERS KLUWER LAW & BUSINESS, 2009), see also AL TH`KYM FY AL `LAQAT AL KHAS`-A AL DWLY-A W AL DAKHLY-A, DR. MS`T`F` MH`MD AL GMAL & DR. `KASH-A MH`MD `BD AL `AL, 451 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

¹⁹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1136 (WOLTERS KLUWER LAW & BUSINESS, 2009), see also EGYPTIAN COURT OF CASSATION VERDICT ON 11/1/1966, MJMW`-A AL SN-A 17 PAGE 65 AND EGYPTIAN COURT OF CASSATION VERDICT ON 20/1/1971 MJMW`-A AL SN-A 21 PAGE 146

arbitrate.²⁰ Furthermore not all the parties who's name appears in the contract that contains an agreement to arbitrate, becomes a party to the agreement to arbitrate, if no connection can be drawn between that party and the subject matter of the contract, or the performance of the legal effect that is based upon the contract, for example in the case of a sub-contractor.²¹

A final distinction must be made between a party to the arbitration agreement; and a party to the arbitral dispute. As a party to the arbitral dispute may not be party to the arbitration agreement, only in this case a procedural connection arises between parties that are not linked by a contractual relationship²²; as is the case with separate contracts that are used to perform international construction operations.

What becomes evident from the foregoing is that, in the clearest cases, a party to the arbitration agreement, is the party or his legal representative who signed and consented to the contract (containing the arbitration agreement or the agreement alone) with the intent of enforcing said agreement. The problem is, that this is the clearest form of defining, who is party to the arbitration agreement; the signatory.

B. Applications

The applications of the above principle of defining a signatory who is party to the arbitration agreement, is the easiest form of defining a party to the arbitration agreement. There are other cases where a non-signatory to the agreement is bound by the agreement, these instances can be better described as “consensual and non-consensual,”²³ in the following section I will discuss the consensual form of a non-

²⁰ AL TH□KYM FY AL 'LAQAT AL KHAS□-A AL DWLY-A W AL DAKHLY-A, DR. MS□T□□FĀ MH□MD AL GMAL & DR. 'KASH-A MH□MD 'BD AL 'AL, 450 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²¹ EGYPTIAN COURT OF CASSATION ON 14/3/1979 MJMW'-A AL SN-A 30 PAGE 786

²² DR. AH□MD H□SN AL GHNDWR AL TH□KYM FY AL 'KWD AL DWLY-A, 1-3 and thereafter (PHD FACULTY OF LAW CAIRO UNIVERSITY)

²³ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1142 (WOLTERS KLUWER LAW & BUSINESS, 2009)

signatory being bound by the arbitration agreement, it is worthy to mention that “the approach to non-signatories is coloured, if not dictated, by the national legal system that is applicable to the merits of the dispute, to annulment proceedings and to enforcement.”²⁴

1. Undertaking on behalf of a third party

According to French law (article 1120 of the French civil code) a person may undertake to acquire an undertaking by a third party, only if the promissor fails to acquire the approval he shall be liable towards the promisee.²⁵ The French court of cassation is of the opinion that in the event that the third party’s approval is acquired; it shall be effective as of the date on which the undertaking to acquire his approval was made by the promissor.²⁶

According to Egyptian law (article 153 of the Egyptian civil code) this type of undertaking is where a party (promissor) undertakes to acquire the approval of a third party to perform a certain matter to the benefit of the promisee.²⁷ In this case the promissor contracts in his own personal capacity; not the third party’s, and in this case the promissor intends to bind himself to that contract, not the third party.²⁸

In the event that the third party accepts, a new contract is formed between the third party and the promisee, that is different from the contract between the promissor and the promisee, as the latter is a contract in which an undertaking to acquire the

²⁴ MICHEAL W. BÜHLER & THOMAS H. WEBSTER, HANDBOOK OF ICC ARBITRATION COMMENTARY, PRECEDENTS, MATERIALS 95 (FIRST EDITION, LONDON SWEET & MAXWELL, 2005)

²⁵ AL TRAD[□]Y K’ASAS L’ATFAQ AL TH[□]KYM, DALY-A ‘BD AL M’T[□]□Y, 235 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

²⁶ AL TRAD[□]Y K’ASAS L’ATFAQ AL TH[□]KYM, DALY-A ‘BD AL M’T[□]□Y, 235 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

²⁷ AL TRAD[□]Y K’ASAS L’ATFAQ AL TH[□]KYM, DALY-A ‘BD AL M’T[□]□Y, 234 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

²⁸ AL TRAD[□]Y K’ASAS L’ATFAQ AL TH[□]KYM, DALY-A ‘BD AL M’T[□]□Y, 234 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

approval is made; the former will be the contract containing the subject matter of the approval.²⁹

The approval of the third party becomes effective once it is issued, and is not retroactive; unless the contract implicitly or explicitly states the contrary.³⁰ In the event that the third party does not accept to enter into contract with the promisee, the promisor shall become liable towards the promisee, unless he is capable of specific performance.³¹

2. Agency, apparent authority and powers of attorney

It is understood that

The simplest, least controversial circumstance in which a non-signatory will be bound by an arbitration agreement is when an agent executes a contract on behalf of its principal. It is well-settled, under all developed legal systems that one party (an “agent” or similar representative) may in certain circumstances legally bind another party (a “principal”) by its acts.³²

Arbitration agreements entered into by the agent will be binding to the principal, but not necessarily so to the agent,³³ in other cases the agent may be bound by the arbitration agreement together with the principal.³⁴

In the United States “agency theory is probably the most common basis asserted by a non-signatory claiming the benefit of an agreement to arbitrate,”³⁵ it is important to

²⁹ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 234-235 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

³⁰ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 235 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

³¹ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 235 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

³² GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1142 (WOLTERSKLUWER LAW & BUSINESS, 2009)

³³ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1143(WOLTERSKLUWER LAW & BUSINESS, 2009)

³⁴ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 11 (KLUWER INTERNATIONAL LAW, 2005)

note here that the “American theory of agency... is not identical to the agency doctrine applied in civil law countries.”³⁶ Also “the approach in the United States with respect to whether non-signatories are bound by an arbitration agreement may vary somewhat from district to district,”³⁷ but in the Third Circuit it was considered that the “agents, employees and representatives”³⁸ of a principal bound by an arbitration agreement, are also covered by its terms.³⁹

The main problem in finding an agency relationship is that “determining the relevant legal standards for establishing an agency relationship presents choice of law questions. Most authorities have applied national law to the question of agency status (rather than international principles).”⁴⁰

The case of “apparent or ostensible authority”⁴¹ is “closely related to agency as a basis for concluding that an entity is party to an arbitration agreement,”⁴² apparent authority is generally where a party is bound “by another entity’s acts purportedly on its behalf, even where those acts were unauthorized, if the putative principal created the appearance of authorization, leading a counter-party reasonably to believe that

³⁵ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 12 (KLUWER INTERNATIONAL LAW, 2005)

³⁶ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 12 (KLUWER INTERNATIONAL LAW, 2005)

³⁷ MICHEAL W. BÜHLER & THOMAS H. WEBSTER, HANDBOOK OF ICC ARBITRATION COMMENTARY, PRECEDENTS, MATERIALS 91 (FIRST EDITION, LONDON SWEET & MAXWELL, 2005)

³⁸ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 12 (KLUWER INTERNATIONAL LAW, 2005)

³⁹ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 12 (KLUWER INTERNATIONAL LAW, 2005)

⁴⁰ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1147 (WOLTERSKLUWER LAW & BUSINESS, 2009)

⁴¹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1148 (WOLTERSKLUWER LAW & BUSINESS, 2009)

⁴² GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1148 (WOLTERSKLUWER LAW & BUSINESS, 2009)

authorization actually existed.”⁴³ It is clear that in France and in the United States the concept of apparent authority exists, in addition to it having been recognized before the ICC, but will again raise choice of law issues.⁴⁴

Under Egyptian law, pursuant to the Commercial Agencies Law No. 120 of 1982 (the “Agencies Law”), commercial agents must be registered in an ad hoc register at the General Authority for Export and Import Control. In order for a commercial agent to qualify for such registration, the agent must inter alia be an Egyptian national or an Egyptian company wholly owned by Egyptians. Moreover, under the Agencies Law the agent is required to register in the Registry all of the agency agreements which the agent enters into. In order for any such agreement to be registered, it must (a) be legalized by the relevant chamber of commerce and the Egyptian consulate in the foreign principal's home country and (b) include the duties of the agent, the commission to be paid, the currency in which the commission should be paid in and the manner and place of payment.

Technically speaking, the Agencies Law applies only to commercial agents. This is to say an agent who represents a principal -- on an independent-contractor basis -- with the supply or purchase contract directly entered into between the principal and the ultimate customer. Accordingly, pure distributorship arrangements under which a distributor purchases certain products for resale purposes should not in our view be subject to the Agencies Law.

The new Commercial Code No. 17 of 1999 (replacing the Commercial Code of 1883) addressed, at length, the terms and conditions which govern the various types of commercial agents such as commission agents and contract agents. The commission agency is defined as a contract pursuant to which the agent conducts a transaction in his name, but in favour of the principal. The contract agency is defined as a contract

⁴³ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1149 (WOLTERS KLUWER LAW & BUSINESS, 2009)

⁴⁴ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1149 -1150 (WOLTERS KLUWER LAW & BUSINESS, 2009)

pursuant to which a person promotes, negotiates and concludes transactions in the name and for the account of the principal and where the agents mandate may include execution of the contract in the name and for the account of the principal.

As indicated above, and based on the definition of contracts agent set out in Article 177 of the Commercial Code, the contracts agency deals with agents who are granted the power to bind the principal or execute contracts on its behalf. Thus, it should not include distributors or conventional commercial agents who do not have that power.

The Commercial Code further states that as an exception to the general laws applicable for jurisdiction, any dispute in relation to contract agents shall fall in the jurisdiction of the court where the agreement is performed (i.e. the territory of Egypt in this case).

The case of apparent authority in Egyptian law is where: a party claims a specific legal capacity, which is evidenced by the surrounding facts, when in reality it does not actually exist.⁴⁵ In this case the principal is in fact a third party to the contract, and according to the principle of privity of contract, the legal effects of the contract do not bind him; but according to the apparent authority doctrine they do.⁴⁶

In the event that the party with apparent authority enters into an arbitration agreement with a third party who is not the principal; a distinction must be drawn between two situations: the first is where the party with apparent authority appears to be the principal, and the second is where he appears to be a legal representative of the principal.⁴⁷

⁴⁵ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 503 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

⁴⁶ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 503 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

⁴⁷ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 504 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

In the first instance the arbitration agreement will bind the principal in accordance with the theory of apparent authority, in the second instance “in our view”⁴⁸ the arbitration agreement will be one of the elements of the undertaking/right that was transferred to the party who transacted with the apparent legal representative, and therefore the arbitration agreement will initially bind the party with apparent authority, and will also bind the principal to the arbitration agreement, as for the relationship between the apparent legal representative and the principal; it will be a matter for the courts to resolve and will not be subject to the arbitration agreement.⁴⁹

In the case of powers of attorney, the French law’s position is that

A mandate to conclude an arbitration agreement must be express, and, for example, “a power to settle a dispute by agreement does not encompass the power to conclude an arbitration agreement” (Code Civil, article 1989). A simple mandate “ad litem” which is given to a lawyer to represent or assist a party in arbitration proceedings, does not empower the lawyer to agree on the client’s behalf to vary the arbitration agreement in a subsequent agreement, and in particular, to agree to an extension of the period for completion of the arbitration, unless the principal has given specific authority.⁵⁰

In Egyptian law a special –written- power of attorney is required for a legally empowered representative to enter into an arbitration agreement that will be binding to the principal, thus in the case of juridical persons, the representative enters into the agreement to arbitrate, not as a representative –as such-, but as if he was the juridical person himself, therefore his actions are considered the actions of the juridical person and not his own.⁵¹ The general rule when it comes to juridical persons being bound by arbitration is that, the person who possesses the power to manage the private juridical

⁴⁸ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 505 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

⁴⁹ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 505 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

⁵⁰ JEAN-LOUIS DEVOLVÉ, JEAN ROUCHE & GERALD H. POINTON, FRENCH ARBITRATION LAW AND PRACTICE 60 (KLUWER LAW INTERNATIONAL 2003)

⁵¹ DR. NBYL `ISM‘YL ‘MR, AL TAH◻KYM FY AL MWĀD AL MDNĪ-A W AL TGARĪ-A AL WT◻NĪ-A W AL DWLĪ-A, 51 (DAR AL JAM‘-A AL GDYD-A, 2005)

person may enter into arbitration agreements on behalf of the juridical person and to its account, a special power of attorney is not required in this case, a general power of attorney or the mention of this power in the articles of association is sufficient,⁵² unless the articles of association or statutes of the company restrict or prohibit such a power.⁵³ A managing partner in a partnership has the power to bind the partnership into an arbitration agreement, even if no such explicit authority is given, whereas a silent partner or a non-managing partner do not possess the same power.⁵⁴ The liquidator in the event of the liquidation of a joint stock or limited liability company, may according to Article 145 of the law 159 for the year 1981 (The Companies' Law) may enter into an arbitration agreement concerning the actions taken by him for the purpose of the liquidation.⁵⁵

The position on the requirement of a special power of attorney is voiced in Article 702 Of the Egyptian Civil code, and has been reiterated by the Cairo Court of Appeals, which stated that a special power of attorney is required to enter into an arbitration agreement⁵⁶, which would mean that a general power of attorney would not convey upon the empowered party the necessary capacity to enter into an arbitration agreement on behalf of the principal.

Another form of powers of attorney is what is known as the “borrowed name” which is based upon the principle that, if a person transacts in his own name, he becomes a party to the contract, which is the case when an empowered party transacts in his own name; this case is where the principal empowers the transacting party to transact on a

⁵² MH□MWD ‘ARF ARH□YL AL KFARNH, AL NZAM AL QANWNY LL TH□KYM FY Z□L AL QANWN AL MS□RY W AL ARDNY, 54 (Unpublished P.h.D Arab League of Nations 2008, Cairo)

⁵³ DR. FTH□Y WALY, QANŪN AL TH□KYM FY AL NZ□RY-A W AL TT□□BYQ, 111 (MNSH’A-A AL M‘ARF AL ’ASKNDRY-A, FIRST EDITION 2007)

⁵⁴ DR. FTH□Y WALY, QANŪN AL TH□KYM FY AL NZ□RY-A W AL TT□□BYQ, 110 (MNSH’A-A AL M‘ARF AL ’ASKNDRY-A, FIRST EDITION 2007)

⁵⁵ DR. FTH□Y WALY, QANŪN AL TH□KYM FY AL NZ□RY-A W AL TT□□BYQ, 111-112 (MNSH’A-A AL M‘ARF AL ’ASKNDRY-A, FIRST EDITION 2007)

⁵⁶ CAIRO COURT OF APPEALS 91ST COMMERCIAL CIRCUIT, CASE NO. 22 FOR THE JUDICIAL YEAR 119 VERDICT ON 20/12/2002

specific matter, on the condition that the empowered party transacts in his own name; without revealing the principals name.⁵⁷

The agency relationship in this case between the principal and the agent, is an undertaking by the agent to transfer the effects of the transaction to the principal.⁵⁸ In this case the second party to the transaction is not in a legal relationship with the principal, but in a legal relationship with the agent or the borrowed name, who in turn will be bound by all the effects of the contract, and in the event that the agent goes beyond his mandate he alone will bear the consequences as he may not seek relief against the principal, all the foregoing will not affect the initial legal relationship between the agent and his principal.⁵⁹

The second instance is where the second party to the contract becomes aware of the actual legal capacity of the agent, in this case the legal effects of the contract will be borne by the principal (on the condition that it is evident that the second party, was not aware or capable of knowing that the agent was transacting in his own personal capacity –a commission agent).⁶⁰

3. Intertwined claims

⁵⁷ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 454 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

⁵⁸ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 455 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

⁵⁹ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 455 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

⁶⁰ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 455-456 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

In the case of intertwined claims; the theory of estoppel or the “alternative” estoppel theory⁶¹ in the United States of America, has been used, the definition of this theory is that

Non-signatories to the arbitration agreement have standing to compel arbitration against a signatory and the signatory is estopped from avoiding arbitration with a non-signatory when the issues in dispute are intertwined with the agreement that the signatory signed, or if there is a close relationship between the entities involved and between the alleged wrongs and the contract, or if the claims are intimately founded in and intertwined with the underlying contract obligations.[12] In addition, it is generally accepted that equitable estoppel applies against a signatory to a written agreement—so as to require the signatory to arbitrate its claims—when the signatory must rely on the terms of the agreement to assert its claims against the non-signatory such that the signatory's claims make reference to or presume the existence of the written agreement, or the signatory's claims arise out of and relate directly to the written agreement.⁶²

Some federal courts have gone a step further where “the court in Denney v. BDO Seidman, L.L.P., 412 F.3d 58, R.I.C.O. Bus. Disp. Guide (CCH) ¶10884 (2d Cir. 2005) (§ 31), held that, under the principles of equitable estoppel, arbitration may be compelled between two non-signatories.”⁶³

According to Egyptian scholars if the agreement to arbitrate was entered into, by the majority or by the representative of the majority of one of the parties, the arbitration agreement will be binding to the rest of the members of that party; thus creating an intertwined claim situation, which should be submitted to arbitration.⁶⁴ It is the opinion of the latter scholar (see previous footnote), that even in the event of the link

⁶¹ MICHAEL A. ROSENHOUSE, J.D., WESTLAW, 39 A.L.R. Fed. 2d 17 (Originally published in 2009), page 11

⁶² MICHAEL A. ROSENHOUSE, J.D., WESTLAW, 39 A.L.R. Fed. 2d 17 (Originally published in 2009), page 11

⁶³ MICHAEL A. ROSENHOUSE, J.D., WESTLAW, 39 A.L.R. Fed. 2d 17 (Originally published in 2009), page 11

⁶⁴ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 503 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors) see also DR. FTH◻Y WALY, QANŪN AL TH◻KYM FY AL NZ◻RY-A W AL TT◻◻BYQ, 161 (MNSH’A-A AL M‘ARF AL ‘ASKNDRY-A, FIRST EDITION 2007)

between the subject matter of the claim not reaching the level of “intertwined”, the agreement to arbitrate should be honored by both parties.⁶⁵

⁶⁵ DR. FTHAY WALY, QANŪN AL THAKYMFY AL NZORY-A W AL TTBYQ, 163 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007)

III. ARBITRATION AGREEMENT AND SUCCESSORS TO THE PARTIES

The matter of transfer of a contract containing an arbitration clause, or a contractual right itself will be discussed in the following chapter, as matters of privity of the arbitration agreement may be raised here, due to the introduction of a new party to the agreement; a party that may be considered until the conclusion of the assignment or transfer a third party to it, as this transaction will bring him into contact with a party who may not have envisaged being bound by an agreement with him “the almost unanimous view, today, is that the arbitration clause is transferred whether there has been an assignment of the whole of the contract or an assignment of contractual rights. This is also the position in France.”⁶⁶

A. Universal Succession

According to the English law “on the death of a party, any cause of action which survives his death and which vests in his personal representatives may be referred to arbitration by them even in the absence of an arbitration clause in the original agreement,”⁶⁷ the death of a party as having an “effect of discharging the arbitration agreement and also the cause of action to which the agreement related”⁶⁸ has been changed, it is now possible for the “parties to agree that death is to have an automatic terminating effect on the arbitration agreement.”⁶⁹

On the matter of bankruptcy according to English law “a person who had earlier entered into an arbitration agreement does not have an automatic discharging effect

⁶⁶ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 194 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

⁶⁷ ROBERT MERKIN, ARBITRATION LAW, 87 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁶⁸ ROBERT MERKIN, ARBITRATION LAW, 87 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁶⁹ ROBERT MERKIN, ARBITRATION LAW, 87 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

upon the contract to which the arbitration agreement relates or upon the arbitration agreement itself.”⁷⁰ The trustee in the case of bankruptcy is vested with the power “to disclaim unprofitable contracts, and his decision to affirm or to disclaim a contract to which an arbitration clause relates will generally determine the fate of that clause.”⁷¹ Upon adopting the contract “the arbitration agreement is enforceable by or against the trustee in relation to matters arising from or connected with the contract.”⁷²

In the case of the trustee disclaiming the contract

The position is governed by s 349A(3) of the Insolvency Act 1986: If the trustee in a bankruptcy does not adopt the contract and a matter to which an arbitration agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings— (a)the trustee with the consent of the creditors committee, or (b)any other party to the agreement, may apply to the court which may, if it thinks fit in all the circumstances of the case, order that the matter be referred to arbitration in accordance with the arbitration agreement.⁷³

The effect of this clause will be the avoidance of “the arbitration clause if the contract to which it relates is unlikely to effect the bankruptcy proceedings,”⁷⁴ on the other hand if the arbitration clause is connected to the bankruptcy proceedings “and it is thought that this will generally be the case, given that the question in any arbitration will generally be whether a sum of money is owing to or owed by the

⁷⁰ ROBERT MERKIN, ARBITRATION LAW, 87 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁷¹ ROBERT MERKIN, ARBITRATION LAW, 87 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁷² ROBERT MERKIN, ARBITRATION LAW, 88 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁷³ ROBERT MERKIN, ARBITRATION LAW, 88 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁷⁴ ROBERT MERKIN, ARBITRATION LAW, 88 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

bankrupt,”⁷⁵ the court will be vested with the power to allow arbitration on that matter or be decided by a court.⁷⁶

The above rules do not apply in English law except where the arbitration agreement is prior to the bankruptcy of a party, due to the fact that on the date of the bankruptcy order the bankrupt party loses control over his property; and the trustee “may, with the permission of the court or the creditors’ committee, enter into an arbitration agreement concerning outstanding claims against the bankrupt.”⁷⁷ The court under English law has the right to “stay any outstanding proceedings against the bankrupt, including arbitration proceedings,”⁷⁸ in the event that “proceedings on a bankruptcy petition are pending, or where a bankruptcy order has been made.”⁷⁹

In the event of the issuance of an administration order under English law, whether voluntarily initiated by the company or by a court order “no legal proceedings may be instituted or continued against the company except with the consent of the administrator or with the permission of the court,”⁸⁰ although the administrator may “initiate arbitration against a third party on behalf of the company.”⁸¹ In the event of the liquidation of the company, the liquidator (as with the trustee in bankruptcy) “may

⁷⁵ ROBERT MERKIN, *ARBITRATION LAW*, 88 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁷⁶ ROBERT MERKIN, *ARBITRATION LAW*, 88 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁷⁷ ROBERT MERKIN, *ARBITRATION LAW*, 88 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁷⁸ ROBERT MERKIN, *ARBITRATION LAW*, 89 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁷⁹ ROBERT MERKIN, *ARBITRATION LAW*, 89 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁸⁰ ROBERT MERKIN, *ARBITRATION LAW*, 89 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁸¹ ROBERT MERKIN, *ARBITRATION LAW*, 89 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

disclaim unprofitable contracts,”⁸² this will of course include the arbitration agreement within; prior to the making of a winding up order “the court may on the application of the company, or a creditor or contributory, make an order staying proceedings against the company.”⁸³

Upon the liquidation of a company

The assets of the company are transferred to the custody of the liquidator and may be vested in him by the court, and where the company is being wound up by the court the liquidator may be authorized by the court or liquidation committee to bring or defend any action or legal proceedings, including arbitration.⁸⁴

The more apparent cases of succession are “takeovers, merger of companies, or the acquisition of the assets and liabilities of a company entail the transfer of the arbitration agreement to the new owner or the new combined company in the case of merger...” the latter being approved by the Swiss Federal Tribunal, the author went on to say

This is in particular the solution applicable to the restructuring of state owned companies, where one entity takes over all or part of the activities and, consequently, the assets and liabilities of another, regardless of whether the latter is then liquidated or not. A recent English judgment applied this rule to an insurance company which had taken over part of the assets of a liquidated state entity.⁸⁵

Under Egyptian law, Article 145 of the Egyptian civil code states that the effects of a contract shall be transferred to the parties to the contract and to their universal successors without prejudice to rules pertaining to inheritance on the condition that it

⁸² ROBERT MERKIN, ARBITRATION LAW, 89 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁸³ ROBERT MERKIN, ARBITRATION LAW, 89 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁸⁴ ROBERT MERKIN, ARBITRATION LAW, 89 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

⁸⁵ JEAN-FRANCOIS PLOUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 252- 253 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

is not evident from the contract, the nature of the transaction or the law that these effects are not transferable to the universal successors.

The transferable nature of a contract under Egyptian law relates to privity of contract, as a contract has an obligatory nature on the one hand, but at the same time this obligation is limited to the parties that are obliged to enforce the effects of the contract; at the same time the obligatory nature of the contract is also limited to that which the contract contains (its scope).⁸⁶

The definition of a universal successor is he who succeeds his predecessor in all the rights of the latter,⁸⁷ the universal successor of a natural person will be either an heir (or heirs) or the beneficiary (or beneficiaries) of a will, universal succession is not limited to natural persons, but is also applicable to legal entities.⁸⁸ A legal entity “B” becomes a universal successor, when another legal entity “A” ceases to exist with all of its rights and obligations, through being merged into the successor (whether the successor was present before or after “A” ceased to exist) and in this instance all the rights and obligations of entity A will be transferred to entity B.⁸⁹ This viewpoint has been upheld by the verdict of Egyptian court of cassation in case No. 38 for the judicial year 113 issued on 18/12/1973 where the court found that merger of two companies through joining them, results in the merged company ceasing to exist and the merging company succeeding it in all its rights and obligations, whereby the successor is the only entity that may be sued concerning the rights and debts of the

⁸⁶ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 322 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

⁸⁷ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 323 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

⁸⁸ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 323 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

⁸⁹ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 323-324 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

merged company, this rule is the norm unless the merger contract contains an agreement to the contrary.⁹⁰

An exception to the rule of universal succession is where the state seizes the monies or properties of natural or legal persons, this matter was decided by the verdict of Egyptian court of cassation in case No. 412 for the judicial year 35 issued on 3/12/69, when a law was passed stating the right of the state to seize certain movables and warehouses for a certain fee, the court found that the state did not become a successor of the seized persons in whatever rights or obligations they had; and that those persons were still liable for the payment of the debts of their establishments to their creditors.⁹¹

The instances where the effects of the contract are not transferred to the universal successors are: if the contract states that its effect is not transferable to the universal successor; or if it is evident from the natures of the transaction that the effect of the contract is not transferrable to the universal successor.⁹² In the first case a contract may include a provision that one of the effects of the contract is not transferable to the universal successor, the condition for such a provision to be enforceable is that the said provision must not contradict with a matter of public policy.⁹³ In the second case, if it is evident from the nature of the transaction that the effect of the contract should not be transferable, the cases where this prohibition would be upheld are when the law dictates that the transaction is non-transferable or when there is a personal nature to the transaction that results in the contract that is required to be transferred.⁹⁴ The

⁹⁰ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 325-326 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

⁹¹ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 330 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

⁹² MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 340-341 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

⁹³ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 341 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

⁹⁴ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 341-342 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

court of cassation, on this matter, in the case No. 106 for the judicial year 33 ruled on 13/2/1968 that article 145 of the Egyptian civil code set a general rule, that the effects of a contract are not limited to the contracting parties; but are transferred to the universal successors through inheritance or as beneficiaries of a will, and that article set as an exception to this rule, instances, where the legal relationship between the contracting parties, was of a purely personal nature; this personal nature can be deduced from the explicit or implicit will of the parties, the nature of the contract; or the rule of the law.⁹⁵

The final exemption to the transferable nature of the effects of a contract, is where the law prohibits such a transfer, an example would be the termination of a sole proprietorship when the sole proprietor ceases to exist, in accordance with article 528 of the Egyptian civil code.⁹⁶

B. Limited Succession

1. Assignment

Assignment of the contract and the transfer of the arbitration agreement in Swiss Law

Must not be confused; they are not necessarily governed by the same law. While the contractual assignment is generally subject to the law governing the assigned contract or claim, assignment of the arbitration agreement is, according to most authors, governed by the law applicable to such agreement,⁹⁷

And in 2001 the Swiss Federal Tribunal “set aside the arbitral award for lack of jurisdiction of the arbitral tribunal because the main contract and the rights resulting

⁹⁵ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 342 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

⁹⁶ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 343 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

⁹⁷ JEAN-FRANCOIS PLOUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 244 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

from this contract (including the right to arbitrate) were not assignable.”⁹⁸ The explanation of this view would be that “the absence of an assignment of the claim deprives the arbitration agreement of an object, making it inoperative, which in turn leads to the lack of jurisdiction of the arbitrators over the alleged assignee without it being necessary to decide on the transfer of the arbitration agreement.”⁹⁹ When it comes to the matter of what is assigned upon the conclusion of an assignment, the Swiss Federal Tribunal was of the view that “in the case of assignment, privileges and ancillary rights, notably that arbitration clause, are transferred along with the claim unless the latter is inseparable from the person of the assignor.”¹⁰⁰

For an assignment to be legal in England “it must satisfy the requirements of s.136 of the Law of Property Act 1925. The assignment must be in writing, be absolute, and express notice must be given to the assignor,”¹⁰¹ when it comes to assignment the general principle is that “the burden of a contract may not be assigned without the consent of the debtor.”¹⁰² Therefore one of the important factors is that there is no prohibition on assignment present in the contract.¹⁰³ For the assignee to become able to enforce the benefit bestowed upon him by the contract, he must recognize the obligation to arbitrate,¹⁰⁴ as the assignee “cannot assert its rights inconsistently with

⁹⁸ JEAN-FRANCOIS PLOUDRET, SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 248 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

⁹⁹ JEAN-FRANCOIS PLOUDRET, SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 248 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

¹⁰⁰ JEAN-FRANCOIS PLOUDRET, SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 247 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

¹⁰¹ DAVID JOSEPH QC, *JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT* 181 (First edition, LONDON SWEET & MAXWELL, 2005)

¹⁰² DAVID JOSEPH QC, *JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT* 181 (First edition, LONDON SWEET & MAXWELL, 2005)

¹⁰³ DAVID JOSEPH QC, *JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT* 182 (First edition, LONDON SWEET & MAXWELL, 2005)

¹⁰⁴ DAVID JOSEPH QC, *JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT* 182 (First edition, LONDON SWEET & MAXWELL, 2005)

the terms of the contract.”¹⁰⁵ A further obligation on the assignee is that “where the contract between assignor and debtor contains an exclusive jurisdiction agreement, an assignee of benefits under this contract or of a cause of action is likewise only entitled to enforce those rights in accordance with the terms of the contract including the choice of court agreement.”¹⁰⁶ As for the scope of the right assigned, it was concluded in the case of *Through transport mutual insurance association (Eurasia) Ltd v. New India Assurance Co Ltd* that

A person who obtains by assignment or transfer of some other kind the right to pursue a claim under a contract can only enforce that right in accordance with the terms of the contract and subject to any restrictions or limitations which those terms may impose. In other words, what he obtains is a *chose in action* whose precise scope is determined by the contract under which it arises and which is inherently subject to certain incidents, in this case a requirement that it be enforced by arbitration.¹⁰⁷

The matter of assignment before commencement of arbitration proceedings, in English law, will be subject to the normal rule that governs the assignability of contracts. When it comes to assignment after the commencement of arbitration proceedings, in *The Jordan Nicolov* case it was ruled that “an arbitration clause is assignable even after proceedings have commenced, and that the assignee may simply take over the assignor’s proceedings without the need to start fresh,”¹⁰⁸ for the assignment to be valid “there are two qualifications. First, the arbitrator must be given notice of the change of claimant and his consent must be obtained,”¹⁰⁹ in the event that notice “to the arbitrator seeking his consent is not given within reasonable time,

¹⁰⁵ DAVID JOSEPH QC, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT 182 (First edition, LONDON SWEET & MAXWELL, 2005)

¹⁰⁶ DAVID JOSEPH QC, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT 184 (First edition, LONDON SWEET & MAXWELL, 2005)

¹⁰⁷ STEPHEN JAGUSCH AND ANTHONY SINCLAIR, PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 316 (Loukas A. Mistelis and Julian D.M. Lew QC ed., KLUWER LAW INTERNATIONAL, 2006)

¹⁰⁸ ROBERT MERKIN, ARBITRATION LAW, 93(LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

¹⁰⁹ ROBERT MERKIN, ARBITRATION LAW, 94(LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

the assignee loses the right to participate in the arbitration proceedings”¹¹⁰ as “neither the assignor nor the assignee has the right to continue,”¹¹¹ in this situation the assignee would become “an equitable assignee.”¹¹² Second “if required by the other party, the assignee must prove title to sue by presenting evidence that the requirements of s 136 of the Law of Property Act 1925 have been fulfilled, ie that there has been absolute assignment of the clause, in writing, with notice to the other party.”¹¹³

The view in England on the assignability of the arbitration clause in a contract, has changed¹¹⁴, the Court of Appeal “subsequently determined....in *Shayler v. Woolf* that the presence of an arbitration clause in a contract which is by its nature assignable will not prevent assignment of the entire contract, including its arbitration provisions, as arbitration clauses are by their nature assignable,”¹¹⁵ it is evident that the assignability of the contract will play a key role in the Court’s view on the matter of whether the arbitration clause is assignable,¹¹⁶ it is understood that “if the main contract is one involving personal services or is otherwise not assignable, any purported assignment is void and the assignee cannot be regarded as a party to any arbitration clause.”

¹¹⁰ ROBERT MERKIN, ARBITRATION LAW, 93-94 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

¹¹¹ ROBERT MERKIN, ARBITRATION LAW, 94 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

¹¹² ROBERT MERKIN, ARBITRATION LAW, 94 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

¹¹³ ROBERT MERKIN, ARBITRATION LAW, 94 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

¹¹⁴ ROBERT MERKIN, ARBITRATION LAW, 91 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

¹¹⁵ ROBERT MERKIN, ARBITRATION LAW, 91 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

¹¹⁶ ROBERT MERKIN, ARBITRATION LAW, 91 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

It is therefore clear that the English court of Appeal, has taken a similar approach to that of the Swiss Tribunal Fédéral, on the matter of the criterion for the assignability of the arbitration clause, which would be “if the contract cannot be assigned, the arbitration clause cannot be transferred either.”¹¹⁷

For an assignment of right to become effective in France, there is no specific requirement other than the offer and acceptance of the assignor and the assignee, but for it to become effective with regard to the second party to the assigned contract (where the first party would be the assignor), the requirements of article 1690 of the French civil code must be met; whereby the second party must be notified or accept the assignment in order that it become effective against him, the date of acceptance or of notification of the assignment must be evidenced, for the assignment to be effective.¹¹⁸ The acceptance is not necessary if the second party is notified of the assignment as his consent is not a prerequisite.¹¹⁹ The French legal system has accepted the idea of implicit consent -by the second party to the original contract of the assignment- but will only give it effect against him and not third parties, for it to become effective against them the requirements of article 1690 of the French civil code must be met.¹²⁰

The fear when it comes to the transfer of a contract containing an arbitration clause, is that “the consequence of severability would be that the arbitration clause, not being transferred with the rest of the contract in the absence of a specific agreement to do so, would be deprived of its object and would in fact disappear. There can be no

¹¹⁷ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 196 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

¹¹⁸ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 240 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

¹¹⁹ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 240 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

¹²⁰ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 240 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

justification for that.”¹²¹ The Paris Court of Appeal was of the view that “an arbitration clause contained in an international contract has its own validity and effectiveness which require its extension to all parties acceding, even partially, to the rights of one of the contracting parties”¹²² the underlying explanation of this is that “because of its jurisdictional nature, the validity of the arbitration agreement is autonomous and separable from the contract which contains it,”¹²³ the main issue with the French interpretation is that

The *Cour de cassation* does invoke the autonomy of the clause in one specific circumstance: when the arbitration clause does not act as an obstacle to the transfer, but as the only possible justification of the transfer...the *Cour de cassation* declared, in a decision of 2002, that “in international matters, the arbitration clause, legally independent from the main contract, is transferred with it, regardless of whether the substantive rights were validly transferred.”¹²⁴

When it comes to the need for the “assignee’s separate or express consent”¹²⁵ to be bound by the arbitration clause in the assigned contract itself the Paris Cour d’appel

In *CCC Filmkunst GmbH v. EDIF* suggested that there was a presumption that the right to arbitration was automatically transferred along with the assignment of the main contract because assignment ‘necessarily implies that the assignor transfers the benefit of the arbitration clause –which forms part of the economics [of the] contract to the assignee’By the same token , any suggestion that the nature of the

¹²¹ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 195 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

¹²² JEAN-FRANCOIS POUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 244 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

¹²³ JEAN-FRANCOIS POUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 246 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

¹²⁴ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 195 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

¹²⁵ STEPHEN JAGUSCH AND ANTHONY SINCLAIR, PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 306 (Loukas A. Mistelis and Julian D.M. Lew QC ed., KLUWER LAW INTERNATIONAL, 2006)

arbitration agreement also requires the agreement of the signatory counterparty for it to be effectively assigned was also rejected.¹²⁶

On another occasion the Paris Court of Appeal “ruled that an arbitration clause in an international contract had its own validity and effectiveness which required that it be extended to an assignee along with the contract or the contractual rights assigned, provided that the dispute came within the scope of the clause.”¹²⁷

The Cour de cassation in *Banque Worms v. Bellot* ruled that “the international arbitration agreement, the validity of which is based exclusively on the will of the parties, is assigned together with the rights [to which it relates], in the same shape and form as those rights existed between the assignor and the original co-contractor.”¹²⁸ It has therefore been held by French courts that “in the absence of an agreement to the contrary, the transfer of rights and duties resulting from a contract includes the transfer of the arbitration clause, which is a part of the terms and conditions of such contract, so that the assignee is bound by that clause.”¹²⁹

On the matter of whether the transfer was binding to the obligor (since his obligation was to arbitrate with the assignor) “French authors and courts have overcome this difficulty by either the presumption of consent or by considering that the arbitration clause is firmly bound to the contract and therefore should follow it,”¹³⁰ the exception

¹²⁶ STEPHEN JAGUSCH AND ANTHONY SINCLAIR, PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 306 (Loukas A. Mistelis and Julian D.M. Lew QC ed., KLUWER LAW INTERNATIONAL, 2006)

¹²⁷ STEPHEN JAGUSCH AND ANTHONY SINCLAIR, PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 307 (Loukas A. Mistelis and Julian D.M. Lew QC ed., KLUWER LAW INTERNATIONAL, 2006)

¹²⁸ STEPHEN JAGUSCH AND ANTHONY SINCLAIR, PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 307 (Loukas A. Mistelis and Julian D.M. Lew QC ed., KLUWER LAW INTERNATIONAL, 2006)

¹²⁹ JEAN-FRANCOIS POUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 246 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

¹³⁰ JEAN-FRANCOIS POUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 246 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

being “if an agreement to the contrary exists between the parties or if it results from the circumstances that the clause was concluded *intuitu personae*.”¹³¹

The view in other continental European countries like Germany is that

The arbitration clause is transferred along with the substantive right because the clause is a modality of the right pursuant to BGB §401. The same is the case where a contract is transferred. In both cases a reservation must be made where there is an agreement by the parties to the contrary, which might result from a relationship of trust on which the agreement to arbitrate was based.¹³²

In the event of the assignment of a single contractual right, which is part of a contract that contains an arbitration clause, the French *Cour de cassation* stated that “the contractual right is assigned as it stood between the assignor and the assigned debtor.”¹³³ In the words of the author of the article the explanation of this theory is that (in a hypothetical case where B is the assignor, A is the assigned and C is the assignee)

The explanation for the fact that C’s claims against A must be brought before an arbitral tribunal is, in my opinion, the following...the arbitration clause has produced an effect on the contractual right: it has configured it, shaped it, or more precisely, it has configured the right of action which is ancillary to the substantive contractual right. A and C therefore have the reciprocal duty to submit to arbitration the substantive rights that were assigned, not as parties to the arbitration agreement...but as parties to the legal relationship existing between the debtor and creditor, as configured by that arbitration agreement.¹³⁴

1. Assignment of right under Egyptian Law

¹³¹ JEAN-FRANCOIS PLOUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 246-247 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

¹³² JEAN-FRANCOIS PLOUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 249 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

¹³³ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 196 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

¹³⁴ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 196 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

Under Egyptian law, assignment and its conditions are regulated by articles 303 through 322 of the Egyptian Civil Code, there are two types of assignment specified in the civil code: an assignment of right and an assignment of debt.

To be valid against third parties, an assignment must first be effected against the debtor. Moreover, such assignment must have an established date. Article 15 of the Egyptian Law of Evidence provides for creating a date certain, the most common means of which are: (a) notarization of a document by the relevant Egyptian Notary Public, (b) serving a legal notice through a court bailiff attaching the assignment contract thereto or clearly describing the underlying assignment or (c) having the documents evidenced by an official employee of the Government which will usually include his signature and the State seal. Egyptian law does not require for the validity of such assignments for them to be registered or filed with any authority in the Arab Republic of Egypt.

Articles 303 to 314 deal with assignment of right; and articles 315 to 322 deal with assignment of debt. I will first deal with an assignment of right. An assignment of right according to Egyptian law, is where a creditor assigns the debt of a debtor to another creditor (the assignee)

For an assignment of right to become enforceable with regard to the second party of the assigned contract (“the assigned party”), the assignment must not contradict a law that prevents such assignment or the will of the parties to the assigned contract, also the nature of the assigned obligation must be assignable. The acceptance of the assigned party is not necessary.¹³⁵ The assigned right may not exceed that which may be attached.¹³⁶

An assignment is not enforceable against the assigned party unless he accepts it or is notified of it, the condition for the enforceability of the assignment against third parties through the acceptance of the assigned party is that such acceptance must have

¹³⁵ Article 303 of the Egyptian Civil Code

¹³⁶ Article 304 of the Egyptian Civil Code

a certified date.¹³⁷ The assignee may –before the notification of the assigned party or his acceptance- undertake any action aimed at protecting the right that has been transferred to him.¹³⁸ Also, an assignment includes all the guarantees thereof and is considered to include all that has become with regard to interest and installments.¹³⁹

Finally the assigned party may raise the same pleas/defenses the assignor may have raised against the assignee at the time the assignment became enforceable, he may also raise the pleas/defenses that originate from the assignment contract.¹⁴⁰

Under Egyptian law for an assignment of right to be concluded, it must fulfill the requirements of the general rules on the conclusion of contracts; acceptance, subject and reason, the subject matter of an assignment is the right to be assigned to the assignee, and therefore if this right no longer exists then the assignment cannot be concluded.¹⁴¹ A further requirement is capacity of the parties concluding the assignment, in addition to the absence of diminished capacity.¹⁴²

An assignment of right can be concluded when the subject matter of it is a personal right, the subject of the assignment may be an immovable, but the right being assigned must be a personal right to it not a right *in rem*.¹⁴³ The court of cassation in a

¹³⁷ Article 305 of the Egyptian Civil Code

¹³⁸ Article 306 of the Egyptian Civil Code

¹³⁹ Article 307 of the Egyptian Civil Code

¹⁴⁰ Article 312 of the Egyptian Civil Code

¹⁴¹ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 305 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

¹⁴² MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 305-306 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

¹⁴³ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 307 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

ruling stated that a personal right may be assigned unless that is impossible because of a law or the agreement of the parties or the nature of the undertaking.¹⁴⁴

If the agreement between the original parties to the contract contains an undertaking that prevents the creditor from assigning the contract, then this undertaking will be upheld since the ability to assign a right is not a matter of public order.¹⁴⁵ If the nature of the undertaking in the original contract itself (when there has been no prevention of assignment in the contract) shows that the person of the creditor was taken into consideration when concluding the contract (*intuitu personae*), the assignment may be barred.¹⁴⁶

When the assignment is notified to the assigned party or accepted by him, the assignee becomes the sole creditor of the assigned party (the exception to the rights that are transferred to the assignee are: any rights that were present before the conclusion of the assignment, that were fulfilled or lapsed for any reason before the notification or acceptance of the assignment), the second outcome is that the assigned party may raise the same challenges that he could have raised against the assignor before the notification of the assignment or its acceptance, in addition to the challenges that are derived from the assignment contract.¹⁴⁷ The relationship between the original creditor and the assigned party –after the notification of the assignment or

¹⁴⁴ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 309 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006) Ruling No. 352 for the judicial year 41 issued on 22/3/1977

¹⁴⁵ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 312 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

¹⁴⁶ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 312 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

¹⁴⁷ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 602 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

its acceptance- ceases to exist, whereby the original creditor no longer has any legal standing with regard to the assigned party.¹⁴⁸

One of the requirements is that acceptance of the assignment on the part of the assigned party, must occur after or at the time of the conclusion of the assignment, the reason being that for the assigned party to agree beforehand to the assignment, does not evidence his knowledge of the date of the conclusion of the assignment and the assignee.¹⁴⁹ The relationship between the assignee and the assigned party before notification or acceptance of the assignment, is a conditional relationship whereby the assignee is a conditional creditor of the assigned party, and this relationship requires enforceability in order to become a full relationship.¹⁵⁰ The assignee may take certain preventative measures concerning the right assigned even before the assignment is notified or accepted by the assigned party.¹⁵¹

On the matter of evidencing acceptance or notification of the assignment, for it to become enforceable against the assigned party, the assignee must either accept it or be notified of it, and this notification must have a certified date. Acceptance in this context can take many forms as it may be explicit or implicit; explicit forms can be written or spoken. As for implicit acceptance it can take the form of actions or expressions that evidence his acceptance of the assignment, in all cases knowledge of

¹⁴⁸ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 613 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁴⁹ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 318-319 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

¹⁵⁰ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 597 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁵¹ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 597-598 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

the assignment on the part of the assigned party must be actual knowledge of the assignment, even if he later on acknowledges it.¹⁵²

Evidencing the acceptance of the assigned party of the assignment will be governed by the general rules of evidence,¹⁵³ whereby the assignment may be proven by evidence, presumption and/or witnesses (if the right in question does not exceed a certain sum, if it does, then it would normally require written evidence).¹⁵⁴

When it comes to the matter of notification of the assignment, the court of cassation has ruled that

The notification that will cause the assignment to be valid vis a vis the assigned party -in accordance with article 305 of the Egyptian civil code- is that which is notified via official notification, through the court bailiffs, and is sent from the assignor or the assignee informing the assigned party of the occurrence of the assignment and its main conditions; it is not necessary for both the assignor and assignee to notify.¹⁵⁵

The only condition concerning the notification document is that it be an official document notified through the court bailiffs.¹⁵⁶

As for the assignment becoming enforceable against third parties (the term third party here means persons who might become affected negatively by the assignment, as they might have a specific right vis a vis the assigned right; before the conclusion of the assignment, the court of cassation regarded a third party to an assignment as any person, who gained from the assignor a right with regard to the right being assigned,

¹⁵² MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 316-317 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

¹⁵³ As present in the Egyptian Law of Evidence No. 25 for the year 1968

¹⁵⁴ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 320 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

¹⁵⁵ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 321 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006). Ruling No. 879 for the judicial year 47 issued on 26/11/1981

¹⁵⁶ MSTSHAR/ MH□MD ‘ZMY AL BKRY, MWSŪ‘-A AL FQH W AL QD□A’ FY AL QANŪN AL MDNY, 321 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY‘, 2006)

that is in conflict with the right of the assignee¹⁵⁷) the condition is that the assigned party accepts or is notified of the assignment, and in the case of the acceptance of the assignment through an unofficial document, the assignment shall not be enforceable against the third party unless the date of the acceptance has a certified date.

There are a number of guarantees according to articles 308 through 311 of the Egyptian civil code, that the assignor guarantees to the assignee according to the law. The first of these guarantees (whether this assignment is in return for consideration or not) concerns the assignor's personal actions (or those deemed to be so; an example would be those taken by one of the assignors creditors, like interim/conservatory seizure), notably those that will undermine the right assigned (even prior to notification or acceptance on the part of the assignee), whereby upon committing any of these actions he will become liable.¹⁵⁸ In the event of the assignment being in return for consideration, assignor shall also guarantee to the assignee the actual presence of the assigned right at the time of the assignment, in the event of the right not being present at the time of the assignment, the assignor will have to fulfill his guarantee, as an example in this case, if the origin of this right is capable of being nullified at the time of the assignment, and is later on -after the assignment is effected- nullified, the assignor will have to fulfill the guarantee.¹⁵⁹ The same will be in the event that the right in question has been concluded before the assignment for any reason whatsoever.¹⁶⁰ If on the other hand the right has been concluded after the assignment, due to the personal action of the assignor, then the first form of guarantee

¹⁵⁷ MSTSHAR/ MH□MD 'ZMY AL BKRY, MWSŪ'-A AL FQH W AL QD□A' FY AL QANŪN AL MDNY, 325-326 (volume 3, DAR MH□MŪD LLNSHR W AL TWZY', 2006). Ruling No. 208 for the judicial year 33 issued on 25/4/1967

¹⁵⁸ 'BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 571-572 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL 'RBY-A , 1983 PART 3, VOLUME 1)

¹⁵⁹ 'BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 573-575 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL 'RBY-A , 1983 PART 3, VOLUME 1)

¹⁶⁰ 'BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 575 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL 'RBY-A , 1983 PART 3, VOLUME 1)

will come into effect; which is the assignors guarantee to abstain from acting in a way that will undermine the right assigned.¹⁶¹

The guarantee of the assignor of the existence of the right and its ancillaries, only extends to the time when the assignment was concluded, it does not extend to after the conclusion of the assignment, so if the right is time barred after the conclusion of the assignment, even though the time frame extends to the period before the conclusion of the assignment, the assignee will not be able to claim the assignor's guarantee.¹⁶² A further matter to which the assignor's guarantee does not extend is the matter of the ability of the assigned party to perform, (the exception being when the assignor and assignee agree that the guarantee will extend to ability of the assigned party) the exception by law in this case would be where the assignor knew before the conclusion of the assignment that the assigned party was incapable of performance, and in bad faith concluded the assignment without informing the assignee.¹⁶³

2. Assignment of debt under Egyptian Law

According to Egyptian law an assignment of debt is where a debtor assigns a debt to another debtor (the assignee). Again as in an assignment of right the assignment will include the debt with all its characteristics, guarantees and claims that arise out of

¹⁶¹ 'BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 575 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL 'RBY-A , 1983 PART 3, VOLUME 1)

¹⁶² 'BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 576-577 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL 'RBY-A , 1983 PART 3, VOLUME 1)

¹⁶³ 'BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 577-578 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL 'RBY-A , 1983 PART 3, VOLUME 1)

it.¹⁶⁴ Normally the assignment of debt occur due to an agreement between the original creditor and the assignee, without the intervention of the original debtor.¹⁶⁵

Again we will find as in an assignment of right, that an assignment of debt is an agreement that will require the presence of all the general conditions for an agreement that is concluded between two parties: consent, subject matter of the assignment and the reason behind the transaction.¹⁶⁶ The transaction must also be entered into by one who has capacity and the agreement must be free of vitiating factors that will cause the consent to become defective “the quality of a party’s consent will be vitiated by *violence, dol, erreur substantielle* (which bear some resemblance to, but do not correspond exactly with duress, fraud and fundamental mistake in English law)”,¹⁶⁷ a further vitiating factor in Egyptian law is unfair advantage and exploitation.

Egyptian legal theory distinguishes between two types of assignment of debt, the first is where the original debtor assigns his debt to another, and the second is where the original creditor intervenes directly and concludes an assignment whereby the debt is assigned from the original debtor to another.¹⁶⁸

In the first form of assignment whereby the original debtor assigns the debt, this transaction is concluded again -according to article 315 of the Egyptian civil code- by the agreement of the debtor and a third party, where the third party accepts to bear the

¹⁶⁴ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 630-631 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁶⁵ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 631 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁶⁶ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 639 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁶⁷ JEAN-LOUIS DEVOLVÉ, JEAN ROUCHE & GERALD H. POINTON, FRENCH ARBITRATION LAW AND PRACTICE 62 (KLUWER LAW INTERNATIONAL 2003)

¹⁶⁸ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 640 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

debt.¹⁶⁹ In this preliminary stage the assignment has been concluded, but is not enforceable against the original creditor, as his acceptance is required for it to become enforceable against him,¹⁷⁰ this agreement will bring into existence undertakings on the part of the assignee to the benefit of the assignor, but until the acceptance of the original creditor, it will not transfer the burden of honoring the debt to the assignee with regard to the original creditor.¹⁷¹ On the matter of capacity at this stage, the capacity required on the part of the assignor in this case is the general requirements of capacity, but in the case of the assignee the ability to honor the debt, in accordance with the agreement between him and the assignor (the original debtor).¹⁷²

For the assignment to become legally binding to the original creditor, the creditor must accept the assignment (as mentioned previously), the view according to Egyptian scholars is that in an assignment of right the change in creditor does not pose any form of danger to the original debtor, as in all cases he is in debt; but on the other hand in the event of a change in debtor, there is a danger in change, as the new debtor might not be capable of honoring the debt, which would in turn negatively affect the original creditor, and there lies the requirement of the acceptance of the original creditor, in order that the assignment be legally binding to him.¹⁷³

¹⁶⁹ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 641-642 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁷⁰ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 643 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁷¹ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 644 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁷² ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 644 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁷³ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 646 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

Under Egyptian law if the assignor (original debtor) notifies the assigned party, of the assignment, while granting him a period of time in which to declare acceptance or refusal, and the assigned party does not respond, it shall be considered refusal on his part.¹⁷⁴ The issuance of the acceptance of the assignment on the part of the original creditor, may only occur after the conclusion of the assignment, and it is not a requirement that he be notified of the assignment prior to his being legally able to accept it; he may preemptively accept so long as it exists.¹⁷⁵ But upon the issuance of the acceptance the assignor and assignee may not introduce any change to the assignment or revoke it; they may only revoke or make changes to the assignment before the acceptance reaches either of them.¹⁷⁶

There is no specific form for the acceptance of the assignment on the part of the assigned party; again acceptance may be explicit or implicit as in an assignment of right.¹⁷⁷

The effect of acceptance on the part of the original creditor in an assignment of debt, is that the assignment of debt becomes enforceable against the original creditor, the acceptance is retroactive, whereby it is considered to have been issued upon the conclusion of the assignment; this is due to the fact that this acceptance is not a condition for the proper formation of the assignment, but for its enforceability with regard to the original creditor.¹⁷⁸ In the event of the assigned party refusing the

¹⁷⁴ Article 316 of the Egyptian civil code

¹⁷⁵ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 651 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁷⁶ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 651 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁷⁷ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 655 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁷⁸ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 658-659 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

assignment, it does not become enforceable against him, but the refusal does not nullify the assignment contract itself, as it remains legally binding to both the assignor and assignee.¹⁷⁹

The second form for the conclusion of an assignment is where the original creditor enters into an assignment agreement with a third party whereby, the debt is assigned from the original debtor to the third party.

The conditions for the conclusion of this agreement –again- do not require a specific form, but it must be concluded to include the debt itself in order that the debt be transferred with all guarantees to the new debtor; therefore the agreement must be concluded with the form of an assignment in mind, for if the conclusion of this transaction is undertaken with a guarantor status in mind, the debt is not transferred to the third party, all that will happen is that he will become a guarantor.¹⁸⁰

In this type of assignment the approval of the original debtor of the assignment is not required, as the rules of Egyptian civil law dictate that a third party may repay a debt without the acceptance of the debtor (Art 323 of the Egyptian civil code); and in the event that the creditor accepts –even if the debtor refuses- the debt is fulfilled; and the third party may seek repayment from the original debtor on the grounds of unjust enrichment, if repayment was without the original debtor’s knowledge or without his consent.¹⁸¹

¹⁷⁹ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 659 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁸⁰ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 661-662 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁸¹ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 664 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

In this form of assignment the assignment is enforceable as soon as the assignment agreement is concluded.¹⁸² One of the main differences between this form of assignment of debt and the previous form is that the original creditor in the first form guarantees the ability of the assignee to honor the debt, in the second form of assignment the original debtor does not make that guarantee as he took no part in the assignment agreement as it was not initiated by him.¹⁸³

The effects of an assignment of debt (in either form) will dictate the relationships between the three parties. In the event that the original debtor has either accepted the assignment of the debt; or has himself caused the assignment by directly negotiating the assignment with the new debtor (the party to whom the debt is assigned), the debt will transfer from the original debtor to the new debtor, along with its guarantees and any challenges relating to it.¹⁸⁴

The effects of this transfer are that the original debtor is released from the debt, and the new debtor takes his place; the release of the original debtor from the debt takes effect from the date of the assignment, in addition to the fact that this release occurs of its own accord without the need for the creditor to declare it.¹⁸⁵

One of the effects of the release of the original debtor from the debt as of the date of the assignment is that if the new debtor becomes unable to fulfill his obligations towards the creditor; the creditor may not seek fulfillment from the original debtor, as

¹⁸² ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 664 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁸³ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 665 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁸⁴ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 666-667 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁸⁵ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 667-668 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

he has been released from the debt.¹⁸⁶ The only exception to this full release is in the case where the assignment occurred as a result of the original debtor entering into an agreement with the new debtor to assign the debt, that was later on accepted by the creditor; in this case the original debtor guarantees to the creditor, the ability of the new debtor to honor the debt up until the time the creditor accepts the assignment.¹⁸⁷

On the matter of what is transferred with the assigned debt; a distinction is drawn between the guarantees of the original debt that were given by the original debtor, and those given by a guarantor of the original creditor, the guarantees given by the original debtor are transferred along with the assigned debt; those given by the guarantor are not transferred along with the debt unless he himself accepts the assignment; as it is considered that the reason the guarantor committed himself to guaranteeing the original debtor are personal, therefore the transfer of this guarantee shall not be effected unless he accepts it.¹⁸⁸

The legal challenges that are transferred along with the assigned debt, to the new debtor are the same ones that the original debtor was capable of raising against the creditor (those that pertain to the assigned contract); the main categories that the challenges will fall into are nullity of the debt, that the debt may be voidable, that it has lapsed, been fulfilled or that performance has become impossible.¹⁸⁹ Another set

¹⁸⁶ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 668 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁸⁷ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 668 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁸⁸ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 673-679 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁸⁹ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 682-685 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

of challenges are those that pertain to the assignment agreement itself, in both of its forms mentioned above.¹⁹⁰

The final set of challenges that the new debtor may raise, are those that pertain to the relationship between the original debtor and the new debtor; the important factor is that this relationship be the reason behind the assignment, and that the creditor was aware of this relationship and of it being the reason behind the assignment; in the event of the lack of knowledge of the creditor (which in itself will negate this set of challenges) then the new debtor may sue the original debtor, for whatever the new debtor becomes liable for towards the creditor.¹⁹¹ An example of a problem that may arise in the last type of challenges, is in the event that the assignment agreement contains reciprocal undertakings on both parties to it; in this event the original debtor may not require the new debtor to fulfill his obligations towards the creditor, when he himself (the original debtor) has not fulfilled his obligations (those present in the assignment agreement) towards the new debtor, this will of course require proof that upon accepting the assignment the creditor knew of this relationship.¹⁹²

The problem that arises in the Egyptian law is that according to the civil code there are only two types of assignment, an assignment of right and an assignment of debt. The idea of an assignment of contract is not set out in the Egyptian civil code, in certain cases of assignment in the field of leases, the Egyptian court of cassation viewed the matter of the assignment there as one of right, whereby the acceptance of the lessee of the assignment of his lease to a new landlord was not required.¹⁹³ The

¹⁹⁰ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 686 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁹¹ ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 687-688 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁹² ‘BD AL RZAQ AL SNHWRY, AL WSYT□□ FY SHRH□ AL QANŪN AL MDNY, 704-706 (ED MSTSHAR/ MS□T□□FY MH□MD AL FQY, DAR AL NHD□-A AL ‘RBY-A , 1983 PART 3, VOLUME 1)

¹⁹³ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 283 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

point of view of the court of cassation in these cases is rather strange, as a lease contract in Egyptian law comprises of reciprocal undertakings; whereby the debtor is also a creditor and vice versa (as an example it will contain an undertaking to pay rent, and an undertaking on the second party to provide what has been rented). The choice made by the court in its verdict, in these specific cases, may have been one of policy; more than of law.

IV. EXTENSION OF THE ARBITRATION AGREEMENT

In the following I will deal with the instances where the arbitration agreement may be extended to a third party.

A. Third party Beneficiary

The third party beneficiary although not party to the contract will acquire rights conveyed to him under the contract, this has also raised the question of whether the arbitration clause will follow.

In the United States

Courts may base an extension of the arbitration agreement on six different principles: (1) incorporation by reference; (2) assumption; (3) agency; (4) third-party beneficiary;..... Finally, if the third party avails itself of the benefit conferred on him by a contract containing an arbitration clause (principle 4) [FN46], the extension of that clause's scope is similarly based on the intention of the parties.¹⁹⁴

In England a recent case

Nisshin Shipping Co Ltd v Cleaves & Co Ltd and others... The Court applied the Contracts (Rights of Third Parties) Act 1999 in an **arbitration** context. Section 8 of the Contracts (Rights of Third Parties) Act 1999 provides that a **party** can and must enforce its rights by **arbitration** if that right is conferred on it by virtue of a contract between two distinct entities that contains an **arbitration** clause. *Nisshin* interprets that Act and states in particular that an **arbitration** clause which is clearly aimed at a two-**party** situation need not stand in the way of an application of the Contracts (Rights of Third Parties) Act 1999. [FN37] In other words, the third **party** can and must resort to **arbitration** even if the **arbitration** clause was not conceived for such a situation.¹⁹⁵

Again in the event that the benefit conferred “on a third party under a contract which contains an exclusive jurisdiction clause, then the third party can only enforce the benefit in accordance with the relevant terms of the contract which will include the

¹⁹⁴ DANIEL BUSSE, WESTLAW, Int. A.L.R. 2005, 8(3), 95-102, page 5-6

¹⁹⁵ DANIEL BUSSE, WESTLAW, Int. A.L.R. 2005, 8(3), 95-102, page 5

jurisdiction agreement.”¹⁹⁶ In the event that the contract contains an exemption clause to the benefit of the “contract party’s agents, servants and sub-contractors”¹⁹⁷ this group of persons may enforce that benefit,¹⁹⁸ in order for the party to enforce “the protection of an exclusion clause, then that can only be done by the third party in accordance with any other relevant terms of the contact.”¹⁹⁹

Under German law “a third-party beneficiary must enforce its right through arbitration if the contract conferring the benefit contains an arbitration clause.”²⁰⁰

The view of the Egyptian law on this matter is that, the third party acquires direct rights in connection with the issuer of the undertaking, and due to that, the third party in an agreement which stipulates a matter to the benefit of the third party, may seek the enforcement of that clause to his benefit, and if that agreement contains an arbitration clause, the third party will resort to arbitration.²⁰¹ The third party beneficiary in this case may initiate or intervene in the arbitration procedures, but in all cases the third party beneficiary must resort to arbitration in accordance with the terms of the agreement; and in the event that the third party doesn’t the undertaking party may invoke the arbitration agreement against him in accordance with article 154 paragraph 2 of the Egyptian Civil Code.²⁰² Also the parties to the contract containing the undertaking may enforce the third party’s rights against the other party, without the necessary intervention of the third party, and in the event of a ruling in favor of

¹⁹⁶ DAVID JOSEPH QC, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT 191 (First edition, LONDON SWEET & MAXWELL, 2005)

¹⁹⁷ DAVID JOSEPH QC, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT 192 (First edition, LONDON SWEET & MAXWELL, 2005)

¹⁹⁸ DAVID JOSEPH QC, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT 192 (First edition, LONDON SWEET & MAXWELL, 2005)

¹⁹⁹ DAVID JOSEPH QC, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT 193 (First edition, LONDON SWEET & MAXWELL, 2005)

²⁰⁰ DANIEL BUSSE, WESTLAW, Int. A.L.R. 2005, 8(3), 95-102, page 4

²⁰¹ DR. FTHAY WALY, QANŪN AL THOKYM FY AL NZRY-A W AL TTBYQ, 171 (MNSH’A-A AL M’ARF AL ’ASKNDRY-A, FIRST EDITION 2007)

²⁰² DR. FTHAY WALY, QANŪN AL THOKYM FY AL NZRY-A W AL TTBYQ, 171 (MNSH’A-A AL M’ARF AL ’ASKNDRY-A, FIRST EDITION 2007)

the third party beneficiary, the beneficiary may enforce.²⁰³

According to Egyptian law, creditors have a guarantee over the entire debtor's monies, this guarantee grants them the right to acquire their rights from those monies, this is known as the general guarantee for creditors, which is not to be confused with a specific guarantee possessed by a creditor against a specific element of the debtor's monies.²⁰⁴ This general guarantee encompasses the rights of the debtor against third parties, therefore the law grants any creditor the right to enforce the rights of the debtor on his behalf when the latter is complacent, in order to preserve this general guarantee, this can be achieved through what is known as the indirect claim.²⁰⁵

When the creditor uses the indirect claim, he is considered to be acting in the capacity of an agent of the debtor, and the creditor will benefit from this type of claim with the remaining creditors if present, in the event that the right the creditor is attempting to enforce against contains an arbitration clause, the creditor will have to proceed through arbitration.²⁰⁶

When the creditor enforces the indirect claim and is obliged to seek arbitration on behalf of the debtor, the creditor is not considered a party to the arbitration

²⁰³ DR. FTHAY WALY, QANŪN AL THAKYM FY AL NZRY-A W AL TTBYQ, 171 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007)

²⁰⁴ AL THAKYM FY AL 'LAQAT AL KHAS-A AL DWLY-A W AL DAKHLY-A, DR. MSTQFĀ MHMD AL GMAL & DR. 'KASH-A MHMD 'BD AL 'AL, 488 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁰⁵ AL THAKYM FY AL 'LAQAT AL KHAS-A AL DWLY-A W AL DAKHLY-A, DR. MSTQFĀ MHMD AL GMAL & DR. 'KASH-A MHMD 'BD AL 'AL, 488 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁰⁶ AL THAKYM FY AL 'LAQAT AL KHAS-A AL DWLY-A W AL DAKHLY-A, DR. MSTQFĀ MHMD AL GMAL & DR. 'KASH-A MHMD 'BD AL 'AL, 488 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

agreement; he will remain a third party to the arbitration agreement.²⁰⁷ It is only that the right being enforced contains an arbitration agreement, which must be honored.²⁰⁸

B. Class actions

The class action “is a procedural device allowing plaintiffs to sue not only for injury done to themselves but on behalf of other persons similarly situated for injury done to them,”²⁰⁹ the benefit of the class action is that it “enables plaintiffs to command more litigation resources by combining their cases and gives them much greater leverage by compounding the defendant’s risk of loss.”²¹⁰

In the United States of America members of the class must be notified of the action, the “notice to the putative class members will tell them that they need not take any action if they want to be a member of the class and that unless they mail in an “opt-out” form, they will be bound by the result of the litigation,”²¹¹ the court after holding a hearing will determine “whether the suit can be certified as a class action.”²¹²

Arbitration clauses in agreements were thought to be capable of preventing class actions, as they would provide for individual procedures only “but as evidenced by the recent United States Supreme Court decision, in *Green Tree Financial Corp. v.*

²⁰⁷AL TH□KYM FY AL ‘LAQAT AL KHAS□-A AL DWLY-A W AL DAKHLY-A, DR. MS□T□□FĀ MH□MD AL GMAL & DR. ‘KASH-A MH□MD ‘BD AL ‘AL, 489 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁰⁸AL TH□KYM FY AL ‘LAQAT AL KHAS□-A AL DWLY-A W AL DAKHLY-A, DR. MS□T□□FĀ MH□MD AL GMAL & DR. ‘KASH-A MH□MD ‘BD AL ‘AL, 489 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁰⁹ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 260 (KLUWER INTERNATIONAL LAW, 2005)

²¹⁰ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 260 (KLUWER INTERNATIONAL LAW, 2005)

²¹¹ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 262 (KLUWER INTERNATIONAL LAW, 2005)

²¹² BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 262, (KLUWER INTERNATIONAL LAW, 2005)

Bazzle, this increasingly proves ineffective.”²¹³ The case concerned a dispute that arose between Green Tree that had granted a loan to home owners and “had failed to provide them with a form mandated by a South Carolina statute”²¹⁴ which would “have alerted them to the borrowers’ right to name their own lawyers and insurance agents”²¹⁵, the borrowers filed claims seeking damages, the loan agreements contained arbitration clauses.²¹⁶

Two class actions were filed against Green Tree, that sought in both cases to compel arbitration, in one case the court compelled arbitration in the other it found the agreement unenforceable, in the first case the award was confirmed, in the other the State Appeals Court reversed the trial court’s decision and arbitration was sought, later on damages were awarded and the award was confirmed by the trial court;²¹⁷ both cases were later one withdrawn from the Appeals Court by the South Carolina Supreme Court, that “consequently authorized class arbitration and that arbitration had properly taken that form. Certiorari was granted by the Supreme Court of the United States.”²¹⁸

The decision of the U.S Supreme Court

In the first place... decided that the South Carolina Supreme Court judgment had rightly rejected Green Tree’s argument that the arbitration clause prohibited class arbitration. But not automatically accept the South Carolina Supreme Court’s resolution of this contract interpretation question. Indeed, the dispute about what the

²¹³ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 264 (KLUWER INTERNATIONAL LAW, 2005)

²¹⁴ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 340-341 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²¹⁵ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 341 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²¹⁶ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 264 (KLUWER INTERNATIONAL LAW, 2005)

²¹⁷ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 264 (KLUWER INTERNATIONAL LAW, 2005)

²¹⁸ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 264 (KLUWER INTERNATIONAL LAW, 2005)

arbitration contract in each case means was a dispute relating to the contract. It was therefore for the arbitrator to decide.²¹⁹

It is therefore evident that arbitration of class actions in the United States is possible, and that there is no general exemption for class actions from arbitration.²²⁰

the arbitration rules of the securities industry “have stated that class actions are not arbitrable”²²¹ and the courts “have interpreted these rules to mean that plaintiffs may litigate class action claims and need only arbitrate individual claims.”²²²

The Courts have not yet reached a unanimous opinion, on whether arbitration agreements with class action exemption clauses are enforceable or not; as different Appeals Courts have reached different conclusions,²²³ but

There seems to be an agreement that in case a company would try to impose on its customers a clause that would preclude the use of class actions in any form, it may be expected that such clause would be deemed unenforceable by the courts in most cases, either on the basis of the unconcionability theory, or because it contravenes the terms, legislative history or purpose of a specific statute.²²⁴

Again as in class action exemption cases, arbitration clauses that are silent on the matter of class action; have also seen courts differ on whether class action was permissible or not.²²⁵ Some other Courts of Appeals, have been of the opinion, that it

²¹⁹ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 264-265 (KLUWER INTERNATIONAL LAW, 2005)

²²⁰ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 266 (KLUWER INTERNATIONAL LAW, 2005)

²²¹ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 267 (KLUWER INTERNATIONAL LAW, 2005)

²²² BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 267 (KLUWER INTERNATIONAL LAW, 2005)

²²³ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 345 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²²⁴ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 270 (KLUWER INTERNATIONAL LAW, 2005)

²²⁵ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 271 (KLUWER INTERNATIONAL LAW, 2005)

is for the arbitrator to decide whether the silence in the arbitration agreement; on the matter of class action, meant that it was or was not permissible.²²⁶

The main concern of courts in the United States is that all plaintiffs in a class action “be bound by the final adjudication,”²²⁷ this requirement results in the problem of class actions binding “foreign class members,”²²⁸ due to the problem that may arise over the law applicable to those foreign class members.²²⁹ When the matter of the dispute concerns a U.S federal law, since this law is applicable to all states without variation, a nationwide class action will not pose a problem, as all the plaintiffs wherever their domicile in the U.S is; will be subject to the same federal law.²³⁰ On the other hand if the matter of the claim concerns a state law, a nationwide class action will pose a problem when certification is sought due to the variations in state laws that govern the matter of the dispute.²³¹ This same problem will arise if some of the members seeking to be members of the class action; are foreign,²³² as the legal standards governing the matter of the dispute in those foreign countries may be different, also the United States may not be bound by a treaty for the enforcement of its judgments in those countries; which may leave the judgment unenforceable in those countries or leave the defendant at risk of having claims brought against him by

²²⁶ BERNARD HANOTIAU, *COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS*, 273 (KLUWER INTERNATIONAL LAW, 2005)

²²⁷ PIERRE MAYER, *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 359 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²²⁸ PIERRE MAYER, *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 359 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²²⁹ PIERRE MAYER, *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 359 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²³⁰ PIERRE MAYER, *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 359 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²³¹ PIERRE MAYER, *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 359 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²³² PIERRE MAYER, *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 360-361 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

the foreign plaintiffs in their home jurisdictions based “on the class action settlement.”²³³

When it comes to arbitral awards in class actions, due to the New York Convention, enforcement should be easier;²³⁴ the “AAA... will not, for now, accept cases with arbitration clauses that contain class action waivers.”²³⁵ In addition to the fact that a “number of U.S jurisdictions have ruled that such express waivers, where present, are not enforceable on public policy grounds,”²³⁶ only the problem in class arbitrations is that they will come up against arguments that “a class-wide award would exceed the scope of the submission of the parties to the arbitration or that the composition of the tribunal was not in accordance with the agreement of the parties,”²³⁷ also that class-wide arbitrations may face is non-enforcement “both domestically and under the New York Convention,”²³⁸ due to notice requirements in some jurisdictions,²³⁹ or lack of consent.²⁴⁰ But enforcement of class wide arbitration should be more feasible in cases “where all of the parties have expressly consented to submit their claims to class-wide arbitration,”²⁴¹ as that is what they have expressly agreed to.²⁴²

²³³ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 360(Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²³⁴ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 364 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²³⁵ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 368 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²³⁶ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 368 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²³⁷ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 368 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²³⁸ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 369 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²³⁹ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 370 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²⁴⁰ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 367 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²⁴¹ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 369 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

According to Egyptian law there exists the theory of group contracts, and it is a contract that binds a group of people in their capacity as a group with another person or persons,²⁴³ the effects of this type of contract will bind not only the persons who are party to the contract but also the remaining members of the group even though they did not sign the contract, on the condition that the majority required by law entered into it.²⁴⁴ The examples of this type of contract are employment contracts entered into by labor union or unions with an employer, contracts entered into by debtors with the group of creditors to avoid bankruptcy, sale contracts between majority sellers and a buyer.²⁴⁵ The features of this type of contract are that it is entered into by the majority representatives of the group they contract on behalf of; and that this type of contract binds the whole of the group, that it was entered into on behalf of. Arbitration agreements entered into by the majority of the group shall be binding to the rest of the group even though they did not sign it.²⁴⁶

The concept of the class action as present in the United States, is very different from the concept of the group contract present in Egyptian law.

C. The group of contracts

²⁴² PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 369 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²⁴³ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 493 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁴⁴ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 493 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁴⁵ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 493 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁴⁶ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 494 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

There are two forms that will be discussed here the chain of transactions and the series of contracts.

The chain of transactions in France has been viewed as a means by which the arbitration agreement propagates, where the arbitration “rights and duties will follow the cause of action itself as a derivative from agreements in earlier “chains” of property transfers.”²⁴⁷ In this type of transaction a series of contracts are formed (that concern the same matter) in a vertical formation.²⁴⁸

For a long period of time the French courts refused to accept the theory that an arbitration clause was transferred in a chain of contracts of this type,²⁴⁹ theoreticians refused this stance, as they saw that a distinction was being made between the transfer of normal contractual rights in a series of ownership transferring contracts; and the transfer of the arbitration clause.²⁵⁰ This stance by the Court of cassation was overturned in the Peavey case where the French Court of cassation found that the arbitration clause present in a contractual claim, that concerns a series of similar contracts, concerning the transfer of ownership of goods; was transferable, so long as reasonable lack of knowledge of the clause was not evidenced.²⁵¹ This approach by the French court of cassation was yet again amended in 2007, where the court ruled that in a series of ownership transferring contracts, the arbitration clause is transferred automatically, as it is subsidiary to the claim; which is in turn subsidiary to the right

²⁴⁷ PIERRE MAYER, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 17 (Permanent Court Of Arbitration ed., OXFORD UNIVERSITY PRESS 2009)

²⁴⁸ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 286 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

²⁴⁹ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 290 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

²⁵⁰ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 291 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

²⁵¹ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 293 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

that was transferred; and this occurs irrespective of whether the series of contracts are of an identical or different nature.²⁵²

The second type of groups of contracts; is where a number of contracts (between different parties) aim to reach a goal that is common between them, or a group of contracts that strive for a common purpose.²⁵³ It has been found that there are two opinions on this type of transfer of the arbitration agreement before the Paris Court of Appeal, the first is based on a case by case analysis of the facts of each case in order to determine whether the arbitration agreement will follow the transaction; the other opinion is based on the opinion that the transfer of the international arbitration agreement, is necessary, due to the fact that arbitration is the correct and most efficient means in international contracts; so long as it can be concluded from the contractual position, the type of business and the normal commercial relationships of the parties, that they were aware of the agreement to arbitrate and its content, and accepted it.²⁵⁴ The French court of cassation has not accepted the latter view, but has upheld the opinions of the Paris Court of Appeal in many cases; while changing the legal basis on which they stand in order to permit the transfer of the agreement to arbitrate to parties that had not signed it.²⁵⁵

²⁵² AL TRAD[□]Y K'ASAS L'ATFAQ AL TH[□]KYM, DALY-A 'BD AL M'T[□]□Y, 298 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

²⁵³ AL TH[□]KYM FY AL 'LAQAT AL KHAS[□]-A AL DWLY-A W AL DAKHLY-A, DR. MS[□]T[□]□FĀ MH[□]MD AL GMAL & DR. 'KASH-A MH[□]MD 'BD AL 'AL, 494 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁵⁴ AL TRAD[□]Y K'ASAS L'ATFAQ AL TH[□]KYM, DALY-A 'BD AL M'T[□]□Y, 224 (unpublished Ph.D, Faculty of Law, Cairo University, 2007) from ARBITRAGE ET GROUPE DE CONTRATS, D. COHEN, REV. ARB. 1997 page 495

²⁵⁵ AL TRAD[□]Y K'ASAS L'ATFAQ AL TH[□]KYM, DALY-A 'BD AL M'T[□]□Y, 225 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

It is evident from the viewpoint of the French courts that whether the groups of contracts are between the same parties or different ones,²⁵⁶ that the important factor in these types of cases, is

That the judgments pertaining to the group of contract theory, are not based only on the concept of the group of contracts, but aim to analyze the degree to which a party has adhered himself to the initial contract; that contains the arbitration clause, and this in my point of view is based on the knowledge of who is party to the contract and who is a third party; as the party who is required to be bound by the arbitration clause, was not a party to the contract that contained the arbitration clause, but he joined the contract thus becoming a party to the result of the contract due to his actions prior to the conclusion of the initial contract; and his acceptance thereof.²⁵⁷

According to the English law it is possible for a “defendant to join a third party to the proceedings,”²⁵⁸ the problem is that no such mechanism exists for arbitration “even when each contract in the chain or series is governed by an arbitration clause, and consolidated or concurrent hearings can be achieved only if the parties so agree.”²⁵⁹

The matter here has been the recurring problem of party autonomy,²⁶⁰ and it is a rare occurrence where the solution in cases has extended the arbitration agreement along the grounds present in France, as the English courts have been more restrictive in their approach on the matter.²⁶¹ In light of the Egyptian court cases on group of companies theory, I would believe that the courts will view the chain of contracts

²⁵⁶ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 201-226 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

²⁵⁷ AL TRAD□Y K’ASAS L’ATFAQ AL TH□KYM, DALY-A ‘BD AL M’T□□Y, 226 (unpublished Ph.D, Faculty of Law, Cairo University, 2007), as cited in text same meaning D.Cohen “Arbitrage et groupe de contrats” Rev. Arb. 1997 page 502

²⁵⁸ ROBERT MERKIN, ARBITRATION LAW, 645 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

²⁵⁹ ROBERT MERKIN, ARBITRATION LAW, 645 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

²⁶⁰ ROBERT MERKIN, ARBITRATION LAW, 646-647 (LLOYD’S COMMERCIAL LAW LIBRARY, 2004)

²⁶¹ JEAN-FRANCOIS POUURET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 225-227 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

theories with the same restricted approach, and with similar requirements as those required for an extension to the group of companies.

D. The guarantor

In the event that a party has guaranteed “the obligations of another party under a contract that the guaranteeing party does not itself execute. When this occurs, questions may arise as to the extent to which the guarantor is bound by the provisions of the underlying contract.”²⁶² The Fourth, Second and Sixth circuits of the United States Court of Appeals (in certain instances) in addition to the Paris Cour d’appel,²⁶³ have found that the “guarantors are bound by arbitration clauses in the guaranteed contracts.”²⁶⁴ In other cases the Sixth and Third circuits of the United States Court of Appeals in addition to the French Cour de cassation have found that the guarantor was not party to the arbitration agreement, the refusal was founded upon the matter of it not being party to the agreement containing the arbitration clause or that this was not the general norm.²⁶⁵

The approach envisioned, is that an analysis is required of the relationships between the various parties and the wording of the contract; in order to ascertain whether the parties’ intention was for the guarantor to be bound by the arbitration clause.²⁶⁶

It has been noted that the courts in the United States “rarely reason in terms of groups of contracts,”²⁶⁷ as they

²⁶² GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1181 (WOLTERS KLUWER LAW & BUSINESS, 2009)

²⁶³ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1181 (WOLTERS KLUWER LAW & BUSINESS, 2009)

²⁶⁴ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1181 (WOLTERS KLUWER LAW & BUSINESS, 2009)

²⁶⁵ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1182 (WOLTERS KLUWER LAW & BUSINESS, 2009)

²⁶⁶ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1182 (WOLTERS KLUWER LAW & BUSINESS, 2009)

Tend to decide the case –whenever appropriate- in terms of arbitrability (that is, according to American terminology, whether the relevant arbitration clause is wide enough to encompass all the disputes arising from various connected agreements) or in terms of whether non-signatories to one or more connected agreements may be authorized, or must be compelled, to arbitrate with the signatories.²⁶⁸

The matter is approached along the lines of “consolidation,”²⁶⁹ by posing the question of whether all the proceeding of the disputes “arising from various connected agreements,”²⁷⁰ may be consolidated into one.²⁷¹

According to Egyptian scholars the arbitration clause in an agreement between a creditor and a debtor, is not enforceable against the guarantor, as the obligation of the guarantor emanates from a contract between him and the debtor not the creditor.²⁷² The guarantee also concerns a different matter as it does not concern the guaranteed contract’s subject; but its value, therefore the guarantor is not a party to the contract between the creditor and debtor; but is a third party to it.²⁷³ Therefore neither the guarantor nor the creditor may raise the matter of the arbitration clause in the guaranteed contract against each other.²⁷⁴

²⁶⁷ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 162 (KLUWER INTERNATIONAL LAW, 2005)

²⁶⁸ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 162 (KLUWER INTERNATIONAL LAW, 2005)

²⁶⁹ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 162 (KLUWER INTERNATIONAL LAW, 2005)

²⁷⁰ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 162 (KLUWER INTERNATIONAL LAW, 2005)

²⁷¹ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 162 (KLUWER INTERNATIONAL LAW, 2005)

²⁷² AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 462 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁷³ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 462 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

²⁷⁴ AL TH◻KYM FY AL ‘LAQAT AL KHAS◻-A AL DWLY-A W AL DAKHLY-A, DR. MS◻T◻◻FĀ MH◻MD AL GMAL & DR. ‘KASH-A MH◻MD ‘BD AL ‘AL, 462 (PART ONE, FIRST EDITION, 1998, publishing rights reserved by authors)

On the matter of bank guarantees the position under French law is that

The creditor under the main agreement may not in principle invoke the arbitration clause (contained in said agreement) against the surety. It is also agreed that the surety may not invoke the arbitration clause against the creditor. On the other hand, if the surety pays the creditor under the suretyship agreement, he is subrogated in his rights against the main debtor and any dispute between the main debtor and the surety will therefore be submitted to arbitration under the clause contained in the main agreement.²⁷⁵

The same principle was used in ICC case no. 5721 of 1990, where the tribunal found that it lacked jurisdiction to “give orders to either of the banks,”²⁷⁶ but had jurisdiction “to rule whether the beneficiary of the letters of guarantee, X, is entitled, with respect to the applicant, to take advantage of the guarantees.”²⁷⁷ This aspect of the case, concerned a party attempting to “call several first demand guarantees,”²⁷⁸ that had been supplied to it, by another party; that had expelled it from a site, due to non-performance of obligations.²⁷⁹

The approach under Egyptian law, concerning invoking an arbitration clause in a contract between parties, against a bank that has issued a letter of guarantee to one of them, and is not party to the arbitration clause nor the agreement between those parties; according to Egyptian scholars will be the same as the position (mentioned above) under French law.²⁸⁰

E. The group of companies

²⁷⁵ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 131 (KLUWER INTERNATIONAL LAW, 2005)

²⁷⁶ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 132 (KLUWER INTERNATIONAL LAW, 2005)

²⁷⁷ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 132 (KLUWER INTERNATIONAL LAW, 2005)

²⁷⁸ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 131 (KLUWER INTERNATIONAL LAW, 2005)

²⁷⁹ BERNARD HANOTIAU, COMPLEX ARBITRATIONS MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, 131 (KLUWER INTERNATIONAL LAW, 2005)

²⁸⁰ DR. FTHAY WALY, QANŪN AL THAKYM FY AL NZRY-A W AL TTBYQ, 172 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007)

The doctrine of the group of companies was “developed specifically in the arbitration context and is not typically invoked outside that context,”²⁸¹ this doctrine is where

Non-signatories of a contract may be deemed parties to the associated arbitration clause based on factors which are often roughly comparable to those related to alter ego analysis. In particular, where a company is part of a corporate group, is subject to the control of (or controls) a corporate affiliate that has executed a contract and is involved in the negotiation or performance of that contract, then it may in some circumstances invoke or be subject to an arbitration clause contained in that contract, notwithstanding the fact that it has not executed the contract.²⁸²

The theory of the group of companies was mainly French²⁸³, one of the cases that strongly influenced later developments in the group of companies theory was the *Dow Chemical* decision,²⁸⁴ the arbitral tribunal that granted the award that “upheld the right of Dow and its subsidiaries to invoke the arbitration clause,”²⁸⁵ had “applied what it referred to as general principles of international arbitration law,”²⁸⁶ the reasoning behind the decision by the tribunal was based on the fact that

Dow Chemical France at the time of signature of the 1965 contracts as well as the negotiations which led to the 1968 contract, appeared to be at the center of the organization of the contractual relationship with the companies succeeded by the present Defendant. Moreover, this relationship could not have been formed without the approval of the American parent company, which owned the trademarks under which the relevant products were to be marketed in France...[I]t is indisputable...that Dow Chemical Company has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like Cow Chemical France, effectively

²⁸¹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1167 (WOLTERSKLUWER LAW & BUSINESS, 2009)

²⁸² GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1167 (WOLTERSKLUWER LAW & BUSINESS, 2009)

²⁸³ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1167 (WOLTERSKLUWER LAW & BUSINESS, 2009)

²⁸⁴ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1167 (WOLTERSKLUWER LAW & BUSINESS, 2009)

²⁸⁵ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1168 (WOLTERSKLUWER LAW & BUSINESS, 2009)

²⁸⁶ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1168 (WOLTERSKLUWER LAW & BUSINESS, 2009)

and individually participated in their conclusion, their performance, and their termination.²⁸⁷

The tribunal in its own words had concluded that previous awards had over time created “case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated, should respond.”²⁸⁸

The main instances where the

Relationships between parties might...justify “extension” to a non-signatory company: 1) A vertical relationship between a subsidiary or a public company with legal personality and the parent company or state on which they depend; where the arbitration clause was signed by the former generally the claimant who will invoke it against the latter, particularly to obtain a more solvent respondent. Exceptionally it will be invoked by a parent company wishing to act together with its subsidiary or subsidiaries. 2) Conversely, where the arbitration clause was agreed by the parent company or companies, it has sometimes been successfully claimed that it or they were acting also for their subsidiaries or as representative thereof. Similar reasoning was attempted, without success, to bring a petroleum company into proceedings alongside the signatory country which controlled it, although the company had only played a role in an addendum to the contract. 3) a horizontal relationship, for example between companies which are members of a consortium or a group and of which only one concluded a contract containing the arbitration clause while the other took part in its performance....²⁸⁹

Again the important element authors have agreed on for the extension to occur,²⁹⁰ is that an extension of the arbitration clause to a non-signatory; should correspond “to the mutual intention of the parties.”²⁹¹

²⁸⁷ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1168 (WOLTERS KLUWER LAW & BUSINESS, 2009) also IX Y.B Comm. Arb. At 135

²⁸⁸ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1168 (WOLTERS KLUWER LAW & BUSINESS, 2009) also IX Y.B Comm. Arb. At 136

²⁸⁹ JEAN-FRANCOIS PLOUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 213 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET & MAXWELL 2007)

²⁹⁰ JEAN-FRANCOIS PLOUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 214 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET & MAXWELL 2007)

In the case of the companies forming a consortium, the Paris cour d'appel found that an arbitration clause in an agreement signed by a member of a consortium, was binding to the other members of the consortium.²⁹² The basis for this decision was that the will of the other members of the consortium was to become a part of all the agreements that any one of those companies might sign, even if the other members have not signed it.²⁹³ The court also added that the arbitration clause extended to the other members of the consortium; as they had participated in the performance of the contract (that they had not signed), that contained the arbitration clause, in a manner, that evidenced that they had accepted to be bound by the arbitration clause; and that those companies had known of the existence of that arbitration clause.²⁹⁴ This same approach was adopted in ICC case no. 4357 on 16th September 1983

This same approach, was adopted by the arbitral tribunal at the Cairo regional center for international commercial arbitration, in case no. 109 for the year 1998 issued on 11/3/1999, where it found that an arbitration clause, present in one contract shall bind all the members of a consortium, even if the other members of the consortium did not sign the contract containing the arbitration clause; on the condition the other members had participated in the negotiation, performance and completion of the said contract.²⁹⁵

On the other hand, an arbitral tribunal at the Cairo regional center for international commercial arbitration, found that the above approach in the case of companies that

²⁹¹ JEAN-FRANCOIS POUURET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 214 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

²⁹² KANOUN DR. FTH□Y WALY, QANŪN AL TH□KYM FY AL NZ□RY-A W AL TT□□BYQ, 173 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007), case mentioned, Paris cour d'appel issued on 21st October 1983

²⁹³ DR. FTH□Y WALY, QANŪN AL TH□KYM FY AL NZ□RY-A W AL TT□□BYQ, 173 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007)

²⁹⁴ DR. FTH□Y WALY, QANŪN AL TH□KYM FY AL NZ□RY-A W AL TT□□BYQ, 173 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007)

²⁹⁵ DR. FTH□Y WALY, QANŪN AL TH□KYM FY AL NZ□RY-A W AL TT□□BYQ, 173 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007)

formed a unified economic group, if those companies had separate legal identities, contradicted articles 145 and 152 of the Egyptian civil code, that set out the specific cases where the effects of a contract could be extended to third parties.²⁹⁶ This approach was upheld by the Cairo court of appeals, where it vacated an arbitral award that had enjoined a company that had not signed an arbitration award to the arbitral proceedings, and had granted its award against that company; on the grounds that the said company had not signed the arbitration agreement.²⁹⁷

In the case of parent companies and their subsidiaries in the cases 7604 and 7610 of 1996 before the ICC where the French law was applicable the tribunal found that French law accepted the extension of the arbitration clause to parties that have not signed the contract, if it is evident that those parties had accepted to be subject to the arbitration clause.²⁹⁸ The facts of the case were that A company had sought arbitration against B company and its parent company.²⁹⁹ Again the tribunal stated that although the group of companies doctrine, was one of the foremost reasons for subjecting a third party to the arbitration clause; it alone was not sufficient, as the joint and true will of the parties to be bound must be present.³⁰⁰

In Egypt an arbitral tribunal at the Cairo regional center in case no. 109 for the year 1998 found that the parent company of the signatory was bound by the arbitration clause, as the parent company was in fact directly dealing with the claimant, and that

²⁹⁶ DR. FTH◻Y WALY, QANŪN AL TH◻KYM FY AL NZ◻RY-A W AL TT◻◻BYQ, 174 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007)

²⁹⁷ DR. FTH◻Y WALY, QANŪN AL TH◻KYM FY AL NZ◻RY-A W AL TT◻◻BYQ, 174 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007)

²⁹⁸ AL TRAD◻Y K'ASAS L'ATFAQ AL TH◻KYM, DALY-A 'BD AL M'T◻◻Y, 169 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

²⁹⁹ AL TRAD◻Y K'ASAS L'ATFAQ AL TH◻KYM, DALY-A 'BD AL M'T◻◻Y, 169 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

³⁰⁰ AL TRAD◻Y K'ASAS L'ATFAQ AL TH◻KYM, DALY-A 'BD AL M'T◻◻Y, 169 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

furthermore the notification of the termination of the contract between the claimant and the signatory, had actually been sent from the parent company.³⁰¹

On the other hand the Egyptian court of cassation ruled that the mere fact that a parent company has a stake in the capital of a company (that is one of a group of companies); is not sufficient evidence that the parent company, is bound by the arbitration agreement that the latter enters into; so long as it is not evidenced that the parent company intervened in the performance of the contract or caused confusion as to the real party to the contract, whereby the parents company's will is commingled with the will of the company that signed the arbitration agreement.³⁰²

The framework set out by the Egyptian court of cassation³⁰³ for them to accept the extension of the arbitration clause to the group of companies: that the party to whom the extension is required is party to the agreement or intervened in the negotiation of the contract or its performance. It is worthy to note here that a proportion of the verdict, addressed the matter of arbitration being an exceptional means of dispute resolution; that the law allowed to usurp the jurisdiction of the courts, and that party autonomy is what brings arbitration into existence and determines its scope, and determines the formation and powers of the tribunal, and that in the event of there being no agreement to arbitrate the claim to arbitrate becomes unfounded, and therefore the arbitration agreement may not be invoked against a non-signatory (it then went on to say what is mentioned previously in this paragraph and in the paragraph above).³⁰⁴

³⁰¹ AL TRAD[□]Y K'ASAS L'ATFAQ AL TH[□]KYM, DALY-A 'BD AL M'T^{□□}Y, 171-172 (unpublished Ph.D, Faculty of Law, Cairo University, 2007)

³⁰² DR. FTH[□]Y WALY, QANŪN AL TH[□]KYM FY AL NZ[□]RY-A W AL TT^{□□}BYQ, 175 (MNSH'A-A AL M'ARF AL 'ASKNDRY-A, FIRST EDITION 2007) case no. 4729 and 4730 for the year 2004 on 22/6/2004 commercial cassation

³⁰³ case no. 4729 and 4730 for the year 2004 on 22/6/2004 commercial cassation

³⁰⁴ case no. 4729 and 4730 for the year 2004 on 22/6/2004 commercial cassation

The above verdict was issued in a case that involved “a group of companies setting,”³⁰⁵ in addition to that “the dispute involved a group of contracts, only one of which contained an arbitration clause,”³⁰⁶ in addition to matters of “consolidation of claims arising under three related contracts.”³⁰⁷

It is worthy to note here that in the field of the group of companies doctrine, the French courts have adopted an even more expansive formula, whereby

An arbitration clause contained in an international contract has its own validity and effectiveness which require its extension to all parties directly involved in the performance of the contract and in the disputes which may arise therefrom, once it has been established that their situation and their activities enable to presume that they were aware of the existence and the scope of the arbitration clause, even if they were not signatories of the contract containing it.³⁰⁸

This same formula was taken a further step in the *Cotunav* case where the Paris court of appeal found that a carrier was bound by an agreement to arbitrate that was reached “between two public agencies,”³⁰⁹ to which *Cotunav* was not party, the reason given was that “by accepting to intervene in the performance of the contract as carrier appointed by one of the parties in the framework of the contract, *Cotunav* necessarily assumed the obligations defined by the contract with regard to the carrier and accepted its modalities, including the arbitration agreement.”³¹⁰ This approach

³⁰⁵ Karim Y. Youssef. "The Reception of the Groups of Companies Doctrine in Egyptian Law? A Case Commentary." *Stockholm International Arbitration Review* 2007.3 (2007): 103-113.

³⁰⁶ Karim Y. Youssef. "The Reception of the Groups of Companies Doctrine in Egyptian Law? A Case Commentary." *Stockholm International Arbitration Review* 2007.3 (2007): 103-113.

³⁰⁷ Karim Y. Youssef. "The Reception of the Groups of Companies Doctrine in Egyptian Law? A Case Commentary." *Stockholm International Arbitration Review* 2007.3 (2007): 103-113.

³⁰⁸ JEAN-FRANCOIS POUURET, SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 219 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

³⁰⁹ JEAN-FRANCOIS POUURET, SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 219 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

³¹⁰ JEAN-FRANCOIS POUURET, SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 219 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

has caused quite a stir as the extension in this case was to a member outside the group of companies, along the grounds of tacit acceptance.³¹¹

³¹¹ JEAN-FRANCOIS POUDRET, SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 220 (Translated by STEPHEN V. BERTI & ANNETTE PONTI, second edition, THOMSON SWEET& MAXWELL 2007)

V. CONCLUSION

The conclusion I have reached is that Egyptian scholars welcome arbitration, and moreover, welcome foreign theories that expand the scope of the arbitration agreement to non-signatories; on the other hand Egyptian courts are wary of arbitration as a whole, and are not very clear on the reasons why.

Whether this trend will continue, is an open ended question; but more likely the weight behind international business and commerce, will wear the opposition down over time. The important factor is that the courts, should at least, try, in their judgments, to set out and define the areas where their objections lie, and the reasons behind them; as it would shed light on an area that needs, the scholars, practitioners and judges to reach a compromise over, instead of a rift.