

First: The Notion of an Arbitration Agreement

1. General Overview

The laws of the Arab countries that form the subject matter of this research regulating arbitration provisions are at least in format divided into two categories: The first group regulated these provisions in their respective Laws of Civil Procedures, while the other regulated them in a separate Law altogether. The first group of countries comprises Syria (Chapter 4, Articles 506 – 534), Lebanon (Vol. 2, Chapter 1, Articles 762 – 821), the United Arab Emirates (Chapter 4, Articles 203 – 218) and Qatar (Chapter 13 of the Law of Civil and Commercial Pleadings, Articles 190 – 210). While the second group, comprises Egypt (Law no. 27 of 1994), Jordan (Law no. 31 of 2001), Oman (Sultanate Decree no. 47 of 1997) and Palestine (Law no. 3 of 2000).

It is to be noted that these Laws, and specially those of countries that have legislated separate Laws for Arbitration, are so similar and are almost identical to each other in many respects. In form, this similarity is essentially attributed to the source, i.e. the Model Law, which was adopted by the (UNCITRAL) United Nations Commission on International Trade Law in 1985.¹ The bulk of the Egyptian Law is derived from and based on the Model Law,² while the Laws of the other Arab countries (Oman, Palestine and Jordan) are derived mainly from the Egyptian Law. While, substantively, the similarity is attributed to the fact that all the laws of the Arab countries that are covered in this paper, in addition to the UNCITRAL, have given wide and primary powers to the parties' will in the arbitration process.³ All these Laws underscore that the source of

¹ This Law could be consulted by referring to Annex 1, A/40/17, of the United Nations Documents.

² The Interpretive Memoranda and Preparatory Works of the Egyptian Law of Arbitration, the Egyptian Ministry of Justice, Cairo, 1995, p. 50. For a comparison between the Model Law and the Egyptian Law, see Hamzeh Haddad, "The Egyptian Law of Arbitration and the extent of it being regarded as a model for Arab Legislations", a position paper presented before the Conference on Egyptian Law of Arbitration, held in Cairo, 12-13/9/1994. This paper is available on website (lac.com.jo).

³ See Hamzeh Haddad, "Modern Trends of Commercial Arbitration in Arab Countries", a paper presented at the Conference on the Attributes of an Arbitrator in Mediterranean Countries – Cairo, 24-25/3/2001. This Paper is available on the aforementioned website.

arbitration is the intention of the parties, the absence of which bars any referral to arbitration. As a general rule, they all agree on the right of the parties to constitute the arbitration tribunal, by mutual agreement, either directly or indirectly; just as the parties' rights to decide on the arbitration procedures to be followed. The parties' agreement could also influence the shape and form of the arbitral award, such as, for instance, whether they wish the award to be reached unanimously, rather than be a majority, or to agree not to challenge the award once rendered, at least with regard to certain types of challenges, (not all).

However, in return, Arab countries' Laws differ on the details, which necessarily reflect on the application in the various countries. An example is that Egyptian Law, just as the Omani, Palestinian and Jordanian, expressly stipulate the independence of the arbitration clause from the contract in which it is contained, which we shall elucidate hereinafter. These countries' Laws are similar on this doctrine, which is also reflected in their respective case law. Nonetheless, there are other Laws, such as Syria's, the Emirates' and Qatar's, which do not provide for this doctrine, hence entailing the application of the general rules, that do not uphold the doctrine of the non-independence of the arbitration clause.⁴ Furthermore, all these countries' Laws stipulate that the arbitration agreement must be in writing; however, some countries, such as Egypt, Oman, Palestine and Jordan, stipulate that the arbitration agreement must be in writing, otherwise the agreement is void. Whereas other countries, such as Syria, Lebanon, the Emirates and Qatar, have stipulated that the arbitration agreement be in writing for evidentiary purposes.⁵

2. Legal Provisions

The Syrian, Emirate, and Qatari legislature did not define the arbitration agreement, but were content with stipulating the right of the parties to agree to submit a dispute or

⁴ However, there are judicial decisions in Dubai and Qatar, which underscored the independence of the arbitration clause, notwithstanding the Law's silence on this point, as we shall explain hereinafter.

⁵ See Hamzeh Haddad, "The Drafting of the Arbitration Agreement, and its Interpretation in Arab Laws (Egypt, Jordan and the Emirates)", Dubai International Arbitration Centre's Journal, No. 1, Vol. 1, 2004, p. 18.

certain disputes to arbitration. In this regard, Article 506 of the Syrian Law provides that “Parties to a contract may generally stipulate to refer any dispute arising out of a contract to a sole arbitrator or more; and they may agree to submit a certain dispute to arbitration, subject to certain provisions”. Whereas Article 190 of the Qatari Law provides that “Parties may agree to refer a certain dispute to arbitration by a special arbitration document; and they may agree to submit to arbitration all disputes arising out a certain contract”. Also, Article 203/1 of the Emirates Law provides that “Parties, generally, may agree in the original contract between them, or in any other subsequent agreement, to refer any dispute that may arise between them in connection with a certain contract to a sole arbitrator or more; and they may agree to submit to arbitration a certain dispute and subject to special provisions”. Similarly, Jordanian Law did not define the arbitration agreement or arbitration *per se*, but provided in Article 3 the possibility of submitting to arbitration civil and commercial disputes “between parties of public or private law persons whatever the nature of the legal relationship to which the dispute is connected, whether contractual or not”. However, Lebanese Law distinguished between an arbitration clause, which it refers to as arbitral article, and arbitration stipulation, which Lebanese Law refers to as arbitral contract. With regard to the arbitration clause, (arbitral article), Article 762 of the said law provides that parties to a contract may include a article, in the commercial or civil contract between them, stipulating that all *amiable compositeur* disputes arising out of a contract or its interpretation are to be submitted to arbitration. However, with regard to an arbitral contract (arbitration stipulation), Article 765 of the same Law defined it as a contract whereby parties thereto agree to resolve an *amiable compositeur* dispute between them through arbitration by a sole or multiple arbitrators. We shall present hereinafter the difference between arbitration clause (arbitral article) and arbitration stipulation (arbitral contract).

As for the Egyptian Law of Arbitration, Article 10/1 of said Law defines an arbitration agreement as “an agreement between the parties to refer to arbitration all or certain disputes which have arisen or may arise between them in respect of directly defined

relationship, whether contractual or not”.⁶ This stipulation corresponds to Article 10/1 of the Omani Law,⁷ and Article 5/1 of the Palestinian Law.⁸

3. Elements of the Agreement

A thorough examination of Arab Laws referred to above, reveals that they conform with the general principles and basic elements of the arbitration agreement, in terms of the requirement that there be a current or future dispute, and an agreement to refer it to arbitration. That the dispute be, broadly speaking, a civil one, whereby it includes commercial disputes, or vice versa, where the dispute is, broadly speaking, commercial, whereby it includes civil disputes. Certain countries’ Laws, such as Jordan’s, also sanctions arbitration in administrative contracts, whereas other countries also sanctions it, but subject to the concerned Minister’s approval, as is the case with the Egyptian Law. All these laws are unanimous on the requirement that parties to an arbitration agreement must enjoy legal capacity, for the agreement to be valid; and that only *amiable compositeur* matters could be referred to arbitration. They all provide that an arbitration agreement could be either in the form of a stipulation in the contract, or in an altogether separate document; and that the subject matter of the dispute be one which is referable to arbitration; and that the legal relationship, or relationships, from which the dispute has arisen, is defined. Moreover, they agree that an arbitration could be either *ad hoc* or institutional, and on the parties’ right to relive the Arbitral Tribunal from abiding by procedural rules customarily followed by the courts. Furthermore, they all stipulate that the arbitration agreement must be in writing (noting that in certain jurisdictions the requirement that the agreement be in writing is a condition precedent for its very

⁶ This stipulation is derived from Article 7/1 of the Model Law which provides the following: “Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not ...”.

⁷ This Article provides that an arbitration agreement is “an agreement whereby parties thereto decide to resort to arbitration to settle all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not”.

⁸ This Article stipulates that an arbitration agreement is “an agreement between two parties or more to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not ...”.

formation, while in others it is for evidentiary purposes. As for the interpretation of an arbitration agreement, case law in these countries underscore that arbitration is an exceptional form of dispute resolution, and accordingly, they accord the arbitration agreement narrow interpretation.

4. Arbitration Defined

Arbitration, in its most simple form, is an agreement by parties to a defined legal relationship within the context of private law, to submit their financial dispute to a person or more, to be appointed, directly or indirectly,⁹ by the parties, and for that person(s) to issue a final (binding) award in relation to the dispute in lieu of the official judicial system.¹⁰ The enforcement of Arbitral Awards follows the same path as court judgments, provided that the legal requirements are met. An example is where there is a contract between (A) and (B), which stipulates that any dispute related to the contract is to be settled by a referral to arbitration, and that (C) is the sole arbitrator with the task of settling such dispute.¹¹ Alternatively, there could be no such agreement, however, after a dispute has arisen (A) and (B) agree to refer said dispute to (C), an arbitrator, to settle it, as opposed to resorting to the courts. Such agreement is binding on both (A) and (B) in that they are obliged to settle their dispute through (C) and not through the courts, which are expected to dismiss the case in form. Should the dispute be referred to (C), he is expected to handle the matter as if it was a court case, whereby he should listen to both parties' claims, requests, pleas, defences and evidences with neutrality and impartiality,

⁹ An example of indirect appointment is where the parties agree on an appointing authority, such as the Cairo Centre for International Commercial Arbitration, or the Dubai International Arbitration Centre, whereby these institutions appoint arbitrators when the parties fail to directly appoint them.

¹⁰ For more definitions of arbitration and arbitration agreements, see Fouchard, Gillard and Goldman on International Commercial Arbitration, Kluwer, 1999, Paras. 7 and 385. In an Egyptian ruling, the Court held that arbitration is a stipulation between the contracting parties, i.e. mutual and corresponding obligations appertaining to the arbitrators' award. Court of Cassation (Civil), Technical Bureau, 5 O, p. 658.

¹¹ It was held in Syria that an agreement to refer a dispute to a named arbitrator does not denote an agreement to settle a dispute through arbitration, since should said arbitrator resign, jurisdiction shall revert back to ordinary courts (Challenge 1774/1998, Al-Muhamoon, 1965, p. 411). In a similar finding, a Syrian court held that parties' agreement to refer their dispute to three named arbitrators to settle said dispute does not amount to settling their dispute through arbitration through other arbitrators (Challenge 134/244, Al-Muhamoon, 1982, p. 125). See also Challenge 729/1091, Al-Muhamoon, 1976, p. 20).

and then issue his finding as if it was a judicial decision.¹² Following its endorsement by the competent department, the Award is enforceable just as any other judicial ruling.

5. Arbitration Removes the Courts' Judicial Jurisdiction

Accordingly, such notion of an arbitration agreement removes, in principle, the courts' jurisdiction,¹³ and bestows the jurisdiction to decide the dispute to another person.¹⁴ If such an agreement exists, then resorting to arbitration is deemed to be the right of both parties, or either, depending on the circumstances, while by the same token, it is also an obligation. Hence, according to our erstwhile example, should a dispute arise between (A) and (B), with (A) being the Claimant, he should have the right to resort to arbitration, and (B), being the Respondent (Defendant), should consent to such referral, and vice versa. Put differently, (A) is obliged to resort to arbitration, as opposed to resorting to the courts, as this is (B's) right. If (A) is to resort to the courts *in lieu* of arbitration, (B) shall be entitled to put up the challenge of the existence of an arbitration agreement. In such instance, the court is obliged to refuse to hear the case, and dismiss the claim in form.¹⁵

¹² In Qatar, it was held that the essence of arbitration is in the arbitrator acting as a judge, with the task of settling the dispute by way of a binding decision (Challenge No. 348/2002, Appeals, Al-Mustashar Al-Qada'i, op. cit); it was also held that arbitration is one of methods of litigation, and that an agreement to resort to arbitration is an exceptional method of litigation (Challenge No. 93/92, Al-Mustashar Al-Qada'i – op. cit.).

¹³ Dubai Cassation (Civil), Challenge 293, Al-Qada' wa Al-Tashree', 1991, p. 486; No. 337, Al-Qada' wa Al-Tashree', 1991, p. 257; Nos. 129 and 170, Al-Qada' wa Al-Tashree', 1994, p. 47; No. 399, Al-Qada' wa Al-Tashree', 1994, p. 396; No. 89, Al-Qada' wa Al-Tashree', 1995, p. 27; and No. 282, Al-Qada' wa Al-Tashree', 1993, p. 176.

¹⁴ However, deciding summary matters shall remain the exclusive jurisdiction of the courts. From Qatar, vide Challenge No. 152, dated 3/2/1997, Al-Mustashar Al-Qada'i, (Computer Info); also, Civil (Grand), Nos. 723/96 and 751/95, op. cit.

¹⁵ It was held that whereas the arbitration clause had stipulated that the dispute between the parties is to be resolved by way of arbitration, and both parties to the contract had consented thereto, neither party could unilaterally the arbitration stage, since opting for arbitration is not repugnant to public order. (Dubai Cassation, Civil Challenge 79 and 84 of 1988, 11/3/1989 Session, p. 186; and Challenge 230 of 1990, 7/4/1991 Session, p. 285; and Challenge 293 of 1991, 10/11/1991 Session, p. 486. And from Qatar, see Ruling on p. 4, Civil Appeal 577/2001, Al-Mustashar Al-Qada'i, op. cit, and Civil (Grand), 543/97, op. cit.

It is worthwhile noting that removing the jurisdiction is preliminary and not permanent,¹⁶ just as it is partial and not total. Competence to hear the dispute shall revert back to ordinary courts should the arbitration agreement be extinguished for whatever reason, be it nullity, voidance, rescission or express or implied relinquishment. Moreover, ordinary courts enjoy wide powers in overseeing the arbitration process, such as appointing the Arbitral Tribunal or a sole arbitrator, if the parties so wished, or if either party refused to nominate an arbitrator; and in the eventuality of a removal, challenge, or replacement of an arbitrator; and in assisting the Arbitral Tribunal in serving notices, and summoning witnesses, should the need arise. Most crucially, the Arbitral Award is unenforceable unless endorsed by the competent court.

6. Arbitration is a Contract

Arbitration, as described above, is a contract just like any other, whether came about in the form of an arbitration clause in the original contract, or as an agreement independent of the contract, and whether this independent agreement is made prior to or after the dispute. This leads us to state that an arbitration agreement, being a contract, is subject to the general provisions of Contract,¹⁷ in terms of formation, consequences, effects and extinguishment, unless governed by any other special law, where the latter would prevail in terms of application.¹⁸

¹⁶ In Syria, it was held that an agreement to submit a dispute to arbitration has the effect of temporarily suspending the ordinary courts jurisdiction to hear the case (Challenge 55/526, Al-Muhamoon, 1973, p. 15).

¹⁷ In Lebanon, it was held that an arbitration clause, just like a contract, is subject to the provisions of Article 166 of the Law of Obligations and Contract, which render contracts and the articles contained therein, in whole or in part, binding on the parties, provided they are not repugnant to public decency and morals, public order, or enforceable laws. (Civil Appeal, 14/6/1973, Al-Adl, 1974, p. 58). It was also held in Lebanon that an arbitration agreement is subject to the general principles contained in the Law of Contract and Obligations, save for certain stipulated exceptions (Civil (sole), 28/7/1953, Justice, 1954, p. 454).

¹⁸ An example is that the legislature in the various laws have stipulated requirement that the arbitration agreement be in writing, whether for evidentiary purposes (as in the laws of Syria, Lebanon, Emirates and Qatar), or for its actual formation (as in the laws of Egypt, Jordan and Palestine). In this regard, it was held in Lebanon that an arbitration agreement cannot be proved by way of personal testimony; just as an arbitration agreement cannot be inferred by presentation of an arbitration agreement that is not signed by both parties (Court of First Instance, 27/8/1947, Al-Adl, 1948, p. 102).

However, an arbitration agreement is to be distinguished from other contracts in that it does not stand independently and is always linked to a defined legal relationship, usually by way of a contract of sorts. But this relationship may be non-contractual, in that it may emanate from a unilateral disposition (unilateral act) or an injurious act (a tort) or a beneficial act (unjust enrichment), or Law, being one of the direct sources of obligations.¹⁹ It is hard to imagine an arbitration agreement in the absence of such relationship, otherwise the contract, i.e. the arbitration agreement, would be rendered without a subject matter or cause, and accordingly, void. When we talk of the existence of a relationship, we do not necessarily mean a legal relationship, suffice it that it be material, as it need not be legal. Since as we shall see later an arbitration agreement could still be upheld, notwithstanding the nullification or rescission of the contract to which it is attached. This is referred to as the separability doctrine, a doctrine adopted by a various Arab Laws that form the subject matter of this paper.

7. The Nature of the Arbitration Agreement

By virtue of the nature of an arbitration agreement, being a legal act, we find that the laws of the Arab countries that form the subject matter of this paper have divided legal acts into administrative acts and disposition acts, in terms of a person's capacity, and specially the natural person. Administrative acts denote those acts whose aim is to administer and invest funds, or safekeeping it, while ownership thereof remains with the original owner, i.e. he continues to have the title for it. Such acts include lending the funds or depositing them at a bank in return for interest, if it were monies, or depositing it with an honest party for safekeeping, or to enter into agreement with someone to utilize it and invest it in whatever manner. As for disposition acts, they cover activities that result in the funds moving from the owner to another, whether by way of proceeds from sale, or without return as in the case of a gift, or the likelihood of it moving from the owner, as in the case of mortgage. Such dispositions are in turn divided into absolute benefits, as in accepting a gift or a guarantee of a loan without return, or to absolute detriments, such as

¹⁹ See Hamzeh Haddad, "The Arbitration Agreement in International Commercial Arbitration". Cairo, 28/1/2000, Electronic Website, op. cit.

bequeathing a gift or lending monies or offering a guarantee for no return. It is worth noting that there exists a middle ground that varies between benefit and detriment, such as sale, barter and partnership. Such division of legal acts has a major impact on the minor in Arab laws, especially in connection with acts of dispositions. These laws void all dispositions by an undiscerning minor, and those dispositions made by a discerning minor, which result in an absolute detriment to him. As for dispositions that confer absolute benefit on him, they are upheld. With respect to dispositions that fall between the two, they are considered valid but subject to certain conditions and provisions that fall beyond the scope of this paper.

A question arises surrounding the nature of an arbitration agreement as a legal act, and the extent one could regard it as falling under one of the aforementioned legal acts. The courts, in a number of Arab countries, have provided us with answers to this question by holding that this agreement falls within the range of actions that fall between the two – the middle ground. Whereby if one of the parties is a discerning minor, the agreement is voidable for the benefit of the minor,²⁰ however, we do not necessarily subscribe to this position, for following any examination of an arbitration agreement we would discover that its subject matter and aim is to settle a certain dispute connected to one of those acts (or others), away from ordinary courts, and assigning such task to a person agreed to by both parties (as was mentioned above). Accordingly, it is not an act that falls under administration, since it is not linked to administering of funds through investments or otherwise. Similarly, it is not disposition, since its subject matter is not dealing with a certain money. Hence, it has its own distinct nature, and accordingly, cannot be placed under any of the aforementioned legal acts.

²⁰ Dubai Court of Cassation, No. 460, Majmoat Al-Ahkam, Vol. 10, p. 247.

Second: Types of Arbitration Agreement

8. Arbitration Clause

An arbitration agreement could be in the form of a clause in the original contract that regulates the legal relationship between the parties, which is the most commonplace and practical form, and is customarily referred to as an “arbitration clause”.²¹ Usually, the clause is mentioned in an abridged and brief format, merely referring a dispute to arbitration, such as “any dispute that may arise between the parties shall be submitted to arbitration”. It happens at times that parties tend to expand the clause by including certain extra provisions, such as the place of arbitration, the applicable law, the attributes and qualifications of all or some of the prospective arbitrators to be appointed to the Arbitral Tribunal, such as a requirement that the Chairman be an engineer, a lawyer or an auditor, or that two of the arbitrators be legally qualified, with the Chairman being an engineer. Parties may also specify the nationality, sex and age of all or some of the prospective arbitrators, although in practical terms it is a rarity. If the arbitration is institutional,²² it is common for the concerned arbitration institution to lay down a formula advising the parties to include it in their respective contracts should their desire be to submit their disputes before it. In this event, rules and procedures of the concerned institutions are followed, including the mechanism for the appointment of arbitrators.

Once an arbitration clause is included in the contract – be it at the beginning, end, or anywhere in the contract – any dispute that may arise from or in connection with the said contract shall be referred to arbitration, unless the contract, either expressly or impliedly, stipulates otherwise. One such example is when there is a contract for sale containing a clause stipulating that the vendor provides a performance bond issued by a bank, and the contract stipulates that any dispute over the warranty be referred to arbitration. Or for the contract to be divided into two independent parts: the first deals with construction works

²¹ Lebanese Law refers to it as Arbitration Article (Article 762).

²² An arbitration is institutional where it is regulated and administered by an arbitration institution or centre, such as the International Chamber of Commerce, the Cairo Centre, the Dubai Centre. The other type is called *ad hoc*.

and appertains to regulating the rights and obligations of the parties; while the second deals with warranties that the contractor is obliged to submit in favour of the works, such as loan warranty, or performance and maintenance bond, and the arbitration clause is mentioned in the first part, thus insinuating that it applies only to the first and not the second. In other words, it is a matter of interpretation of the arbitration clause, which is a matter for the judge or the Arbitral Tribunal to decide, as the case may be.

9. Independent Agreement

An agreement to submit a dispute to arbitration may not be contained in the contract altogether, but in a separate agreement, independent of the original contract. As is the case with the arbitration clause, such agreement may have been made prior to the dispute. One such example is when the contract makes no mention of a referral to arbitration, but the parties enter into another independent agreement to submit any future disputes appertaining to the original contract to arbitration. This agreement could be either attached to the original contract in the form of an addendum, or could have been entered into subsequent to the original contract, but before any dispute has arisen. These two types of an arbitration agreement, i.e. arbitration clause, and other arbitration agreements made prior to the arising of a dispute have been stipulated in some Arab countries' laws covered in this paper, such as the Egyptian and Jordanian laws.²³ While other Laws, such as Qatar's, do not provide for these two types of an arbitration agreement, but it could be argued that the general rules do not prescribe for a specific form of an arbitration agreement, or for a defined time. Accordingly, Qatari Law does not bar either of the forms mentioned above.

We do not necessarily find any cause for distinguishing between an arbitration clause and other forms of arbitration agreements concluded prior to the arising of the dispute. However, it is to be noted that laws in Arab countries and case law have underscored the independence of the arbitration clause from the original contract, in which it is contained, as shall be elucidated hereunder. It could be gleaned that this independence is confined

²³ Article 11 of the Jordanian Law and Article 10/2 of the Egyptian Law.

to the arbitration clause and does not cover other arbitration agreements, which are deemed to be part of the original contracts, with the various legal effects that we shall discuss thereafter. Nonetheless, we do not agree with such understanding, as we subscribe to the viewpoint that the applicability of the independence principle on the arbitration clause should also include arbitration agreements made subsequent to the original contract, including an arbitration stipulation, for unity of purpose in all forms of arbitration agreements.

10. The Clause and Agreement Combined

On the other hand, we may face a situation where we have an arbitration clause and the subsequent arbitration agreement, which is still made prior to the dispute. One such example is when the contract contains an arbitration clause, and subsequent to the conclusion of the contract, the parties agree on the conditions, provisions and rules of arbitration, primarily based on the arbitration clause, such as the place, language and procedures to be followed. In all cases, the parties are not compelled to conclude an arbitration agreement to that effect. However, they may agree otherwise in the original contract, such as wording the arbitration clause in the following manner: all contractual disputes are to be submitted to arbitration in accordance with the conditions, provisions and rules that are to be decided in due course. If they agree on such arrangement, then this agreement would apply and shall be binding on them. In this instance, the vacuum in the arbitration clause shall be filled in accordance with the provisions of the Law, which deals with such matters, such as appointment of arbitrators, the procedures before the Arbitral Tribunal and the requirements of the Arbitral Award, and other provisions, unless it was inferred from the intention of the parties that the operation of the arbitration clause is contingent upon the conclusion of a more detailed subsequent agreement. In such instance, failure to agree shall render the arbitration clause, in effect, void, and again this is a matter of interpretation and construction.

If the arbitration agreement and arbitration clause are joined together as indicated above, and the first was dependent upon the existence of the second, it is deemed that the

arbitration agreement is subservient to the arbitration clause, in terms of non-existence, not existence. In other words, if the arbitration clause is void, or has been terminated for whatever reason, such as mutual rescission, the arbitration agreement shall, in turn, be voided; but the reverse is not true, in that the arbitration clause may be proper and valid, while the arbitration agreement may be void. Since both parties may be in full capacity at the time of the conclusion of the arbitration clause, while at the time of the conclusion of the arbitration agreement one of them may have been rendered incapacitated, in that case the first is valid, while the latter is void. This nullification does not affect the arbitration clause, since it is subservient to the clause and not vice versa. Nevertheless, one could state that the relationship between the arbitration clause and the subsequent arbitration agreement is a matter of interpretation of the intention of the parties, according to the circumstances. It could be that the purpose of the subsequent agreement that is for it to be subservient to the arbitration clause as shown above; also, it may be that the intention of the parties was to abrogate the arbitration clause and replace it with a new agreement. In such instance, the arbitration clause is rendered extinguished, while the arbitration agreement is valid, and arbitration is accordingly based on the latter, not the former.

11. The Arbitration Stipulation

An arbitration agreement may have been made after the dispute had arisen, whereby both parties agree to refer this dispute, which has in fact arisen, to arbitration. This type of agreement is jurisprudentially and judicially referred to as an arbitration stipulation in order to distinguish it from an arbitration clause.²⁴ Accordingly, the difference between an arbitration stipulation and other arbitration agreements, is whether the arbitration agreement was made prior or after the dispute had arisen. In the case of the latter, it is deemed an arbitration stipulation, while the former falls within the ambit of other arbitration agreements. The laws of Syria, the Emirates and Qatar do not accord this

²⁴ Case law bears out this view. In this regard, see Syria's Civil Cassation No. 678, Al-Qanun, 1963, p. 314.

distinction much attention,²⁵ but rather stipulate the requirement of defining the subject matter of the dispute, either in a document or in the arbitration agreement,²⁶ or at the pleadings stage, as enshrined in Syria's and Qatar's laws, or during the hearing of the case, according to the Emirates' law. Nonetheless, it is to be noted that it is somewhat difficult, not to say impossible, to define the subject matter of the dispute in the arbitration clause as long as it is contingent upon a potential future event, which may or may not occur. Hence, the stipulation in both Laws, for the requirement to define the subject matter of the dispute in the arbitration document, appertains to the arbitration stipulation, not the arbitration clause. However, it is not imperative to define the subject matter of the dispute in the arbitration stipulation for it to be valid, since the parties may lay out the subject matter of the dispute *a priori* at the pleadings stage before the Arbitral Tribunal. Since it is rather awkward for one of the parties to initiate arbitration proceedings without laying out the subject matter of the dispute, just as it is impossible for the Arbitral Tribunal to hear a case and decide it without having the dispute defined and laid out; otherwise the entire arbitration proceedings is deemed void.

12. Terms of Reference

It is also worthwhile distinguishing between an arbitration stipulation and what the International Chamber of Commerce refers to as the Terms of Reference. The Arbitral Tribunal, following receipt of the arbitration file from the ICC, drafts this document. The file at this stage generally contains the request for arbitration by the claimant, the reply thereto and the counter-claim, if any, by the respondent, and the claimant's reply to the counter-claim. These documents contain various primary and basic elements of the arbitration case, such as the names of the parties, the facts of the claim, evidences and requests, which have the effect of enabling the Arbitral Tribunal to form a preliminary idea of the nature of the dispute. At this stage, the Arbitral Tribunal prepares a draft of

²⁵ However, Egypt's, Jordan's, Oman's and Palestine's Laws stipulate that if the arbitration agreement is in the form of a stipulation, it is incumbent that the subject matter of the dispute be defined, otherwise the agreement is rendered void. (Article 10/2 of the Egyptian and Omani Laws, Article 11 of the Jordanian Law, and Article 5/4 of the Palestinian Law).

²⁶ Article 510 of the Syrian Law, Article 203 of the Emirates' Law, and Article 190 of the Qatari Law.

the Terms of Reference, which includes a summary of the facts, the parties requests and the issues to be ultimately decided by the Tribunal. The Terms of reference is subsequently sent to the parties for their comments and observations. Once the Terms of Reference is drafted in a final form, the Arbitral Tribunal sends it to the parties for their signature and then the Arbitral Tribunal signs it. When all the signatures are obtained, the Terms of Reference is sent to the ICC Court for endorsement. Once the endorsement is given, the Arbitral Tribunal begins the arbitration proceedings aimed at settling the dispute.²⁷

Accordingly, it becomes abundantly clear that the Terms of Reference complement the arbitration stipulation in that both have been prepared and drafted before the dispute has arisen, and not after. However, there remain basic differences between them. The stipulation is the arbitration agreement itself, hence, both parties' signature is required, otherwise there is no referral to arbitration, whereas the Terms of Reference is invariably prepared on the assumption that an arbitration agreement is in existence, whether in the form of clause, a stipulation, or an independent agreement. It also assumes that a referral to arbitration is made on the strength of an arbitration agreement. In form, it is to be noted that an arbitration stipulation is prepared by the parties themselves, whereas the Terms of Reference is prepared by the Arbitral Tribunal, with or without the parties' participation. Accordingly, it could be adopted and applied on the parties even without their consent should they refuse to sign it.

13. Agreement on Arbitration Before the Court

It happens quite frequently that parties to a dispute may agree to submit their dispute to arbitration while their case is being heard before the courts, and in the absence of an arbitration agreement. One such example is when there is a contract between (A) and (B) that does not contain an arbitration clause. Should a dispute arise which prompts (A) to resort to court, both parties may still agree – either before the court or on their own – to

²⁷ Article 18 of the Rules of Arbitration of the International Chamber of Commerce. The Terms of Reference is sent to the Court for its endorsement even if either or both parties refused to sign it.

settle that very dispute through arbitration.²⁸ In that event, the court, upon the request of either or both parties, must dismiss the case and refer the dispute to arbitration. Such agreement is permissible, whether the case is being heard before the Court of First Instance, the Court of Appeal, and even before the Court of Cassation, provided it has not rendered its decision yet.²⁹ However, there is a difference between an arbitration agreement made while the case is being heard by the court, and an original arbitration agreement made before lodging a case before the court. This difference relates to the court where the Arbitral Award and other arbitration documents are to be deposited, and to the authority, which is expected to handle the notification of the Arbitral Award to the parties. Naturally, this appertains to countries that adopt such procedures, as Egypt, Oman, Syria, Qatar and the Emirates, which is beyond the scope of this paper.

It is to be noted that various Arab laws require an arbitration agreement to be in writing. Accordingly, entering the parties agreement to refer their dispute to arbitration in the hearing's minutes, and issuing a court decision to dismiss the case and refer the dispute to arbitration, is tantamount to a written arbitration agreement, even where the court's minutes are not signed by the parties.³⁰

14. Reference to a Document Containing an Arbitration Clause

It frequently happens that parties do not directly agree to arbitration in the original contract between them, but make reference in the contract to stipulations contained in another document that are applicable, but which are not provided for in the original contract. This other document may contain a stipulation for the settlement of disputes through arbitration. An example is when the contract between the parties is one for the

²⁸ It was held in Syria that an arbitration agreement needs not take a specific form, suffice it that it is made in writing, and is entered in the hearing's minutes when made before the court. (Challenge 265/320, Al-Muhamoon, 1953, p. 266).

²⁹ In Lebanon, Article 767 provides that parties may agree to settle their dispute through arbitration, even if a case is being heard by the courts.

³⁰ An example is Article 10 (c) of the Jordanian Law, which provides that if the parties agree to arbitration while the court is hearing the dispute, the court shall refer the dispute to arbitration, and this decision shall be deemed to be a written arbitration agreement.

carriage of goods by sea between the shipper (A) and the consignee (B), and the Bill of Lading stipulates the application of the provisions contained in the vessel's hiring contract between (A) and the hirer (C), which are not contained in the Bill of Lading. If we are to assume that the Bill of lading does not contain a dispute resolution clause, while the vessel's hiring contract provides for the settlement of any dispute between (A) and (C) through arbitration, in such event, general rules necessitate the application of the arbitration clause to the relationship between (A) and (B) as long as the contract governs the relationship between the contracting parties.³¹

However, we do not necessarily subscribe to the position that general rules should not enjoy blanket application, save when they are in conformity with arbitration rules. There is a consensus in Arab countries that arbitration is an exceptional method of dispute resolution, a view asserted and confirmed by case law in various Arab jurisdictions. And owing to the significance of an arbitration clause, we find that many modern arbitration laws have stressed the requirement that reference to arbitration be expressly and clearly stated, inasmuch as making it part of the agreement. In fact, this is the stipulation contained in Article 7(2) of the Model Law, which provides that reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.³²

One such example is when the contract between (A) and (B) expressly stipulates the applicability of an arbitration clause in the following manner: "including the arbitration clause contained in the vessel's hiring contract". As we see, a vague or ambiguous referral to an arbitration clause is inadequate, such as saying "including the dispute resolution clause", since the latter does not necessarily denote that the clause is an

³¹ This was a finding by the courts in Egypt before the new Egyptian Law of Arbitration No. 47 of 1994 came into force, Civil Cassation No. 406, Technical Bureau 16, p. 781. However, it was also held that a contract for the carriage of goods by sea must contain all special provisions appertaining to the carriage operation; and if the parties agreed to resort to arbitration, such desire should be expressly mentioned in the contract, as it is insufficient to make a mere reference in the contract for the carriage of goods to the arbitration clause contained in the vessel's hiring contract, (No. 2267, Technical Bureau 43, p. 932).

³² Compare with Article 763 of the Lebanese Law which sanctions the inclusion of an arbitration clause in a document referred to by the original contract.

arbitration clause. It goes without saying that it is not a requirement that reference to an arbitration clause be made in the original contract between (A) and (B), but could be made subsequent to it. This view is expressly adopted by Egyptian Law when stating in Article 10/3 that every reference in a contract to a document containing an arbitration clause is deemed an arbitration agreement, provided the reference is clear as to make that clause a part of the contract. Both Omani and Jordanian Laws have adopted identical provisions.³³

³³ Article 10/3 of the Omani Law, and Article 10/b of the Jordanian Law.

Third: Independence of the Arbitration Clause

15. The Orthodox and Modern Principles

At times, we are faced with a situation where an arbitration clause is contained in an original contract that is rendered void for whatever reason, or in a contract that has been rescinded with the mutual consent of the parties, or unilaterally, or frustrated due to a *force majeure*. According to the orthodox theory, the arbitration clause is subservient to the contract, which means that the termination of the contract for whatever reason, leads to the extinguishment of the clause contained therein. Accordingly, should any dispute arise between the parties in connection with the contract and its monetary implications, such dispute may not be referred to arbitration, but rather to the courts, since the clause is no longer operative (no longer in existence), since according to jurisprudential rules, the subservient shall be deemed as such, and under the law it shall not be treated separately, and if the dominant (the principal) is extinguished, the subservient shall do so accordingly.

Departing from this orthodox principle, the International Chamber of Commerce has adopted a totally novel view of this and that is the survival of the arbitration clause as long as the contract's nullification did not impact it *per se*. In such instance, any disputes arising out of the contract would be settled by arbitration in spite of the original contract's nullification; and this is called the independence of the arbitration clause from the contract it is contained in.

16. The Justification and Importance of this Independence

The justification behind the independence of the arbitration clause is clear. As a rule, the dispute shall in all events be referred to a defined authority to decide it, namely, the courts. Hence, there is no bar to the preservation of the arbitration clause and for the referral of the dispute to an Arbitral Tribunal to decide it, just as the court are expected to do, in accordance with the provisions of the Law. Consequently, its decision, shall be

subject to the courts' scrutiny. Adopting such principle is in conformity with the parties' intention, especially in international arbitration, in as much as many international commercial contracts, if not the majority thereof, provide for the settlement of disputes through arbitration. When the parties to a contract agree on referral to arbitration, they do not expect anything other than adopting what they had agreed on, namely referring their dispute to arbitration, not the courts. Furthermore, contractual disputes are not necessarily confined to the parties' performance of their respective contractual obligations, but may also include their monetary entitlements and claims arising from the contract's termination for whatever reason. If one is to contend that this termination necessarily results in the extinguishment of the arbitration clause, then this clearly runs against the parties' intention by compelling them to resort to litigation (the courts) contrary to their intentions, which has the effect of rocking the very foundations of the arbitration agreement, especially in international contracts.

On the other hand, it may be within the competence of the Arbitral Tribunal to terminate the contract which contains the arbitration clause through rescinding it, or declaring it frustrated, should the circumstances so dictate. One such example is when (A) and (B) agree to refer their dispute to arbitration pursuant to an arbitration clause which gives wide powers to the Arbitral Tribunal to decide on all matters connected with the contract, such as its validity, execution, rescission, frustration, claim for damages, and any other matter arising out of it.³⁴ The contract may also contain a provision to the effect that the contract shall automatically be rendered rescinded without the need for notice or a judicial or arbitral decision, if either party breached its obligations, and (A) may fail to perform his obligations on time causing a dispute between the parties. Should (A) request from (B) to perform his side of the obligations, (B) could contend that the

³⁴ It was held in Qatar that an arbitrator, just as a judge, enjoys the competence to decide on the validity or invalidity of the arbitration agreement (Challenge 1550/2001, Civil (Grand), dated 29/5/2002, Al-Mustashar Al-Qada'i, op. cit.). In Lebanon, it was held that matters leading to the termination of the contract and the rights and obligations arising from it fall within the ambit of disputes connected with the contract's execution, interpretation, revocation or rescission, which are matters that fall within the competence of the arbitrators (Civil Cassation, 23/6/1958, Al-Adala, 1958, p. 707). However, earlier, it was held in Lebanon that an arbitration clause contained in the company's contract is inoperable vis-à-vis the dispute over the validity of the contract, as long as the arbitrator's competence is derived from the said contract, and accordingly, he has no right to adjudicate that contract (Civil Appeal, 24/6/1947, Al-Adala, 1947, p. 497; also see the Court of First Instance decision, dated 19/3/1947, Al-Adala, 1947, p. 178).

contract has been automatically rescinded. Alternatively, the contract may not contain an automatic rescission clause, and (A) breached his obligations. In that event, (B) has the right to demand the contract's rescission through the court or through arbitration. Under those two hypotheses, the contract's rescission is made pursuant to the provisions of the law, or by a rescissory decision issued by the Arbitral Tribunal pursuant to the parties express agreement. Should the Arbitral Tribunal find or hold either way, this entails the extinguishing of the arbitration clause contained in the contract, if we fail to uphold its independence from the contract, while the Arbitral Tribunal has exercised its competence on the strength of, and pursuant to, that clause; the clause gave the Tribunal its *raison d'être*.

The importance of adopting the principle of the independence of the arbitration clause arises most prominently when an Arbitral Award is challenged. If either party challenged the competence of the Arbitral Tribunal to hear the dispute before the very Tribunal on grounds of the extinguishment of the arbitration clause, because the contract has been rescinded for instance, the Tribunal would dismiss such challenge on grounds of the independence of the arbitration clause, albeit the contract was properly rescinded. In such instance, such finding will not be subject to challenge on ground of the non-existence of an arbitration agreement or that the decision has entertained matters not covered by the agreement, or had exceeded its jurisdiction and had acted *ultra vires*. This stance runs contrary to maintaining that a rescission of the contract necessarily results in an automatic rescission of the arbitration clause contained therein, since under that scenario the Award would be subject to challenge on ground of the non-existence of an arbitration agreement, since the rescission of the contract had extinguished it.

17. Independence & Extinguishment of the Clause

The independence of the arbitration clause does not mean that said clause cannot be voided or rescinded, all it means is that it is not rendered void or rescinded due to the voidance or rescission of the original contract. However, should the arbitration clause itself be voided or rescinded, not due to its subservience to the contract, it is to be

regarded as void or rescinded irrespective of the original contract, and notwithstanding that the contract is valid and in force vis-à-vis both parties. The following are instances in which the arbitration clause is rendered extinguished due to its voidance or rescission:

1. Where the subject matter of the arbitration clause is one that cannot be referred to arbitration. There is unanimity in Arab Laws that matter that are not *amiable compositeur* cannot be submitted to arbitration, including matters related to inheritance. Heirs may agree to divide the deceased's estate amongst themselves in accordance with the provisions of the law with a stipulation that should any dispute arise between them as to their respective shares, said dispute is to be submitted to *amiable compositeur* arbitration before a named arbitrator. In such instance, the original agreement is upheld, while the arbitration clause is void.
2. Where one of the parties was incapacitated at the time of the conclusion of the contract containing the arbitration clause. In such instance, the clause is void *per se*.
3. Where the subject matter is grossly vague or ambiguous, as when one of the parties sends a letter to the other inviting him to submit the matter to arbitration, and the recipient party agrees, without laying out what that matter is. Or when the wording of referral to arbitration is drafted in vague language, where it is hard to apply and enforce, such as agreeing to submit any dispute to arbitration before the competent arbitration court, without linking the dispute to any legal relationship, and without elucidating the purpose behind the last statement.
4. Where the subject matter of the (void) contract and the arbitration clause are one, such as when the contract and the arbitration clause are mentioned in one statement as saying that (D's) heirs, (A), (B) and (C), have agreed to appoint (E) as an *amiable compositeur* arbitrator in connection with their shares in the estate. Or where there is a stipulation in the contract between (A) and (B), a divorced couple with a minor child, and (C) and (D), who are unrelated to (A) and (B), to

- appoint an arbitrator, (E), to award the child's custody to either of them. In those two scenarios, we find a mixing (an overlap) of the subject matter of the dispute, which is void, with the arbitration clause, hence resulting in the pair's nullification.
5. Where the parties to a contract agree to rescind it, i.e. by also expressly stating that such rescission covers the arbitration clause. In this case, the arbitration clause is no longer in existence.
 6. Where there is a referral to a non-existent arbitration institution, such as agreeing to refer the dispute to the Arab Centre for Arbitration in Syria, where no such Centre exists, either in Syria or elsewhere. However, if there is an error or vagueness in the name of the arbitration institution, which could be clarified, then this is a matter of interpretation to be conducted by the Arbitral Tribunal or the competent court, whatever the case may be. An example would be an agreement to submit to arbitration in accordance with the rules of the Dubai International Commercial Arbitration Centre, while the centre's name is Dubai International Arbitration Centre, not "International Commercial"; or in accordance with the rules of Egypt Regional Centre for International Commercial Arbitration, while the centre's name is "Cairo", not "Egypt"; or in accordance with the rules of the International Chamber of Commerce in Geneva, while the International Chamber of Commerce is headquartered in Paris, not Geneva.³⁵
 7. Where the referral is to an institution that is not engaged in arbitration, and has no set rules of its own, such as referral to the rules of the League of Arab States, or to the University of the Emirates, or to the University of Jordan.

³⁵ In an Arbitral Award, it was held that a clause stipulating that the dispute is to be settled in accordance with the International Chamber of Commerce in Geneva, means that the rules of the International Chamber of Commerce in Paris are to be applied, with Geneva, according to said clause, being the place of arbitration. See ICC case no. 7920/993, ICCA Yearbook, Vol. 23, 1998, p. 80.

8. Where there is an impossibility to apply the arbitration agreement, such as a referral to an institution whose corporate personality ceased to exist at the time of the agreement; or to agree to refer the dispute to a specific natural person, as an arbitrator, then it transpired that he was already deceased at the time of the agreement.
9. Where the arbitration agreement provides that the arbitrator be one of the parties to the dispute, hence making him judge and jury.
10. In insurance contracts, Arab Laws generally stipulate that an arbitration clause is void if not incorporated in a special agreement separate from the general conditions printed in the insurance policy.
11. With respect to an arbitration clause contained in Bills of Lading, it was held in Dubai that such clause is to be rendered void and unenforceable on the parties if it is illegible and printed in very fine print that average sighted persons cannot read it.³⁶

18. Independence of the Clause and the Separate Agreement

Countries that have adopted the principle of independence, have expressly stipulated that such independence relates to the arbitration clause, and not the arbitration agreement generally. The literal meaning of the above is that where the agreement to resort to arbitration is contained in a subsequent document to the contract, and not a clause in the original contract, whether before or after the dispute had arisen, the principle of independence does not apply. However, we do not necessarily agree with such literal interpretation, as we are in favour of a wider interpretation of an arbitration clause, which includes every arbitration agreement, whether in the narrow form of an arbitration clause or a subsequent arbitration agreement, for unity of purpose and the justifications marshalled for safeguarding the independence principle.

³⁶ Civil Challenge 140, 1989, 17/3/1990 Hearing, p. 186.

19. Independence in Arab Countries' Laws

The principle of the independence of the arbitration clause has become one of the general principles adopted by modern arbitration laws in various countries. The basic and primary source of all these laws is the UNCITRAL's Model Law, which also adopted this principle. Amongst the Arab countries that have adopted and incorporated the principle of independence of an arbitration clause in their legislations, are Egypt, Oman, Palestine and Jordan.³⁷

Other countries, such as Qatar, the Emirates, Lebanon and Syria, their respective legislations do not provide for this independence, which entails the application of the general rules. These general rules do not contain any provision that may be construed as upholding the principle that the arbitration clause is independent of the contract it is contained in. In fact, the contrary is the case, since these general rules underscore that the subservient shall be deemed as such, and under the law it shall not be treated separately, and if the dominant (the principal) is extinguished, the subservient shall do so accordingly, and if a thing shall become void, its content shall become void.³⁸ This entails that if the contract is terminated, voided, rescinded, or frustration for whatever reason, the arbitration clause would accordingly be voided. This principle was asserted by a decision of the Supreme Federal Court in Abu Dhabi which held that the voidance of the original contract necessarily voids the arbitration clause contained therein, and accordingly the courts shall enjoy exclusive competence to hear the dispute as they have the general (default) jurisdiction.³⁹ However, Dubai's Court of Cassation has adopted a totally opposite opinion when holding that the voidance, rescission or termination of the original contract containing an arbitration clause, does not bar the continued operation and enforceability of the arbitration clause, on ground that the latter has its own subject

³⁷ Article 16 of the Model Law, Article 23 of the Egyptian and Omani Laws, Article 5/5 of the Palestinian Law and Article 22 of the Jordanian Law.

³⁸ It was held in Lebanon that the arbitration clause contained in the contract is void as the basic contract is void. (Court of First Instance, 1/8/1983, Al-Adl, 1985, p. 600).

³⁹ Challenge 209, Majmouat Al-Mabadi' Al-Qadai'yya, (Al-Adala) 16, p. 63.

matter, namely, removing the courts' jurisdiction to hear the dispute.⁴⁰ Judicial decisions in Qatar have also upheld the independence principle as demonstrated by more than a single decisions passed by the Court of Appeal in which it was held that the arbitration clause enjoys autonomy, and accordingly is not affected by the voidance or likely rescission of the original contract in which it is contained.⁴¹ It is clear that these two judicial decisions are in conformity with modern trends appertaining to arbitration, and have superseded any future special arbitration legislation that may be promulgated in these two countries, which are likely to adopt and uphold this independence as other modern legislations have done.

⁴⁰ Civil Cassation 167, *Majmouat Al-Mabadi'* 13, p. 486.

⁴¹ Challenge 152 and no. 170/96, dated 3/2/1997; and Challenge 1550/2001, dated 29/5/2005 (*Al-Mustashar Al-Qada'i*, op. cit.).