ASSIGNMENT OF CONTRACT UNDER THE UNIDROIT PRINCIPLES 2016. THE POSITION OF ARAB NATIONAL LAWS

NISREEN MAHASNEH

Qatar University- Faculty of Law
E-mail: nmahasneh@qu.edu.qa

Abstract - Assignment of contract is regulated in detail under the UNIROIT Principles 2016. This approach is not found under the vast majority of national laws all around the world. Nevertheless, waiver of contract is known under Arab Civil Codes, however, waiver is provided for as mere few applications under some contracts, but not a theory. Under the Principles, formation of assignment of contract, effects and other legal issues are discussed. This study concluded the importance of regulating assignment of contract as a doctrine and not merely providing for some applications within the Civil Code.

Keywords: Assignee, Assignor, Assignment of contract, Waiver of contract.

INTRODUCTION

Assignment is a legal mechanism that is found in all laws with slight differences from one law to another. Traditionally, assignment is divided into two types; assignment of right and assignment of obligation or debt. However, the UNIDROIT Principles regulate the assignment of contract, where this kind of assignment is not found under national laws. This paper claims the importance of adopting such assignment by Arab national laws. The importance of which is to facilitate dealings, besides being in line with the position of international instruments.

This paper is divided into three sections and a conclusion; the first of which deals with the notion of assignment of contract and its counterpart under Arab national laws. The second section discusses the formation of assignment of contract, finally the legal effect of the assignment of contract is dealt with.Reference is made in this study to the Qatari Civil Code 2004, Egyptian Civil Code 1948, and Jordanian Civil Code 1976.

The Notion of Assignment of Contract

Only few national laws recognize the assignment of contract such as the Italic, Portugal, and Dutch laws. The Principles followed the same approach of these laws by not limiting assignment to rights and obligations, but creating a special regimefor assigning both rights and obligations, naming it assignment of contract.

Whereas the assignment of right concerns onlythe transfer of rights, and assignment of obligation concerns only the transfer of obligations, assignment of contract concerns the transfer of both through one legal process. Within this mechanism, the assignor does not assign rights or obligations one by one, instead he assigns the whole contract including all rights and obligations.

The parties of this legal process are three; the assignor who is the original party in a contract who enjoys rights and incurs obligations emerging out of the contract. The second party is the assignee who is the person who replaces the assignor in the contract. Finally, the other party who is the original contractor with the assignor, he is in turn a creditor for some rights that emerge out of the contract and a debtor for some obligations.

As a result of the contract assignment, the rights of the assignor become for the assignee, and the latter incurs the obligations of the assignor. As for the other party, he becomes a debtorand a creditor for the assignee instead of being so for the assignor. Therefore, the other party is authorized to claim those rights from the assignee instead of the assignor, although, he contracted with the assignor not the assignee.

The said legal notion is not recognized the same way under Arab laws. However, Arab laws recognize waiver of contract. What is more, waiver of contract is provided for as applications under some contracts such as, lease and agency. Waiver of construction contract is well known in legal practice as well.

As for lease contract, Article 620 of the Qatari Civil Law provides for the tenant right to waive the lease contract unless otherwise agreed. This provision constitutes an application toassignment of contract, by which the tenant is replaced by another party who is the new tenant, the old one is no longer existed, he can no longer claim rights from the landlord, besides he is not anymore liable for any obligation emergedout of the lease contract. The waiver creates a direct relationship between the landlord and the new tenant, by which rights and obligations are born between those two.

As for agency contract, Article 728 of the Qatari Civil Lawpermits the agent to delegate his own agency to another provided that the principal approves such delegation. In which a situation, the new agent replaces the old one, he will be responsible for conducting the work which is the subject matter of the agency contract, giving the required care, providing the principal with information, and handing over any money he receives as an agent. On the other

hand, he is eligible for claiming fees as agreed upon in the contract between the original agent and the principal. In sum a direct relationship is created between them as a result of this waiver, and the old agent becomes outside the sphere of this legal relationship.

The said are the most important applications for waiver of contract.

However, waiver is also foreseen in other instances even where there is no specific provision allows such waiver. The clearest example is waiver of construction contracts, which takes place frequently in commercial practice. Here, since there is no provision allows such a process, judiciary and jurisprudence apply the rules of assignment; in other words, as far as the rights are concerned, it is an assignment of right, and where obligations are concerned, it is an assignment of obligation.

Now, the differences and similarities between the situation under the Principles and the Arab laws can be summarized. Under both the same contract transfers to another person, without being amended. Besides, the assignment of contract as well as waiver of contract creates a direct legal relationship between the assignee and the other party, as the assignor is no longer a party.

However, under the Principles there is a specific legal regulation for the whole process, which mixes the rules of assignment of right and assignment of obligation, whereas under the Arab laws, the process is found as few legal applications for some contracts. They are named waiver of contract, and no specific rules are designed to apply on them, and no reference is made to the rules of assignment.

The question of regulating the assignment of contract under the Principles was subject for debate. Some members did not support this approach claiming that the rules on the two types of assignment are adequate, and that mixing themto regulate rules for assignment of contract may constitute a repetition.

Nonetheless, the final decision was to regulate assignment of contract in addition to assignment of right and assignment of obligation, the reason behind which is to facilitate understanding and applying the legal rules.

It is noted that the Principles avoid repetition, it makes references to the rules of assignment of right or obligation, and only draft the rules that are distinct from the rules of both assignments.

Formation of Assignment of Contract

Under the Principles, the other party must give his full consentto the assignment of contract. The reasoning of this rule is that the other party has rights and owes obligations towards the assignee. As far as he is a creditor, he has the right to choose his debtor and decide whether, or notthis particular debtor is in a good financial position that allows him to perform. Therefore, no assignment of contract without his consent.

The Principles allow also the advance consent of the other party, this is likely to take place whenever, the main contract includes a term that allows one party to assign the contract even without specifying or naming this person in the contract.

As for the Arb laws, the consent of the other party is provided for in relation to waiving agency contract, however, no mention to this condition under the lease contract. As for lease contract, waiver is possible and allowed generally, unless otherwise agreed. Moreover, the requirement of consent is vaguewhenever, waiver is made with no provision under the law, which constitutes a gap.

The said situation under Arab laws creates uncertainty in legal dealings. To illustrate; the few rules of waiver of contract provided for are inconsistent, what is more, whenever, waiver is made with no legal provision, reference is made to the rules of assignment of rights and obligations. The said mentioned results in applying different legal rules on same presumptions and facts.

Legal Effect of Assignment of Contract

The most important legal effect of assignment of contract is the discharge of the assignor. However, the Principles give several choices to the other party; on the one hand, he can discharge the assignorfully from the contract, in such a case, he loses any right to claim his rights from the assignor, he only can call upon the assignee. Alternatively, he can retain a claimagainst the assignor incase the assignee does not perform properly. Finally, and whenever there is no agreement on all this, the general rule is that both the assignor and the assignee are jointly liable towards the other party.

Indeed, this legal rule is important and it does make the application of the rules fairly easier, as it determines the legal position of the assignor. It is noted that no such rule is provided for under the rules of waiver of contract under Arab laws, meaning that waiver releases the assignorfully from the contract as a general rule. However, under the rules of assignment, there are some legal rules that deal with discharging the assignor; in the assignment of right, the assignor is discharged unless otherwise agreed, whereas in the assignment of debt, the assignor is not discharged unless otherwise agreed.

Another legal effect is that the assignee and the other party can use the same defenses that were available in the relationship between the assignor and the other party before the assignment. This effect is unclear as well under the Arab laws, however, one can well say that waiving a contract should include this effect except defenses that are of personal nature.

All characteristics and features of rights and obligations preserve their nature. That is to say, the same rate of interest applies, the conditions of the contract remain the same, such as time of delivery,

method of payment.Besides, the securities of the obligations continue,however, the Principles stipulate the approval of the guarantor whenever the security of the obligation is a personal guarantee.
No such rules within the provisions that regulate waiver of contract under the Arab law. Therefore, this situation constitutes another legal gap.

CONCLUSION

Arab laws recognize waiver of contract within a limited scope, meanwhile, they regulate assignment of right and assignment of debt. Waiver of contract is by default a mixture between both types of assignments. It is recommended that Arab laws regulate assignment of contract and abolish waiver of contract to create a consistent legal frame for the process.

REFERENCES

[1] M. Fontaine, Position Paper, Working Group for the Preparation of Principles of International Commercial Contracts, Assignment of Contractual Rights and Duties, 1999
[2] Abed AL Razak AL Sanhori, AL Waseet in explaining the New Civil Code, Part 6, AL Halabi Publishers, Biuret, 2011
[3] Official Commentary on the UNIDROIT Principles 2010
[4] Stefan Vogenauer& Jan Kleinheisterkamp (editors), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), Oxford: Oxford University Press, 2009
[5] UNIDROIT Principles 2016
[6] Qatari Civil Code No. 22 for the year 2004
[7] Egyptian Civil Code No. 121 for the year 1948
[8] Jordanian Civil Code No. 43 for the year 1976.

★★★