

*Arbitration Agreement
In Banking Transactions*

"A study under the Egyptian Law"

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Introduction

Banking has grown into an important international industry with globally recognized practices, hence the need to clear every obstacle out of the way, namely disputes between banks and customers or among banks themselves.

Any such potential disputes should be promptly resolved in order to ensure banking and economic stability for both banks and customers. This would yield positive effects on the development of banking activity, and help prevent obstacles that might affect the banking sector. Banking disputes are increasingly emerging as one of the most complicated disputes, in light of the expansion witnessed in banking activity.

In addition, it is well recognized that litigation before courts can be slow and time consuming, which could have significant repercussions on the banks' activities. The time element is obviously a very important element for the changing values of money. The bank pays interest on the deposits, and credit freezes by reason of delay in collection would be harmful for banks.

As most banking disputes involve technical issues, settling such disputes require less judge intervention than a specialized expert or arbitrator's opinion. Experts and arbitrators can settle a dispute while maintaining the level of confidentiality sought after by both the bank and client.

This applies even more now that banking activity is associated with many international trades, technology exchange contracts or patent exploitation licenses and the relevant industrial and technical secrets. Hence the need to resort to arbitration to avoid public court hearings and slow proceedings and to allow for the exercise of freedoms pertaining to the selection of arbitration procedures and seat of arbitration, as well as the governing law.

Arbitration can therefore be established as a system that is equivalent and complementary to the judicial system, permitting

final, definitive decisions strengthened by courts through enforcement.

The Egyptian Arbitration Law No. 27 of 1994 came about to promote the role of commercial arbitration to pave the way for the parties to get a decision that is not subject to any form of challenge, with the possibility of filing actions for annulment of awards depending on the circumstances.

Also, the said law allowed the parties the option to resort to arbitration and offered several incentives for the selection of arbitration method. These include the expansion of the commercialism concept so as to cover economic relationships, irrespective of the parties, be they public or private entities and the consideration of international arbitration and the parties' right to select the applicable law, and to acknowledge the Arbitration function as having the authority to decide on defenses that fall beyond its jurisdiction and to consider the arbitration clause as separate and independent of the other conditions of the contract.

A number of Egyptian legislations concerning banks and banking operations have been put in place. Nevertheless, owing to the absence of competent commercial jurisdiction to understand banking disputes, resort to arbitration for banking disputes appears to be successful in settling these conflicts.

Banking operations are varied and have numerous characteristics. Banking operations can be either traditional or nontraditional. Most countries have laws that regulate banking operations. Some countries may rely on banking practices and administrative solutions to regulate these operations.

While resort to court is the most natural way for the settlement of banking disputes, arbitration began to gain ground when it comes to the settlement of banking disputes, especially at the international scale. Also it started to gain popularity internally, for saving time, effort and money.

Hence, the importance of this study in which we discuss arbitration agreement as the base on which banking arbitration is established. We will explain the types, terms and effects of arbitration agreements. But before that we will highlight the importance of arbitration agreement in banking transactions in an introductory chapter, addressing its advantages and disadvantages in separate sections and, before that, we will explain what is meant by Banking Arbitration Agreement.

Introductory Chapter

Definition of Banking Arbitration

Agreement and its Importance

In this chapter, we address the Definition of Banking Arbitration Agreement and its Importance, as follows:

First Section

Definition of Banking Arbitration Agreement

An arbitration agreement is the arbitration foundation and the source of arbitrators' powers. An Arbitration agreement prevents courts from having jurisdiction over the dispute, subject-matter of the arbitration¹. This provides the arbitrator with the power of dispute settlement by a binding decision².

The Banking Arbitration Agreement serves as a starting point in the banking arbitration process. Arbitration is recognized as a means agreed upon by the concerned parties for the settlement of disputes that may arise between them and concerning this contract.

A Banking Arbitration Agreement is necessarily subject to the contract's general rules set by the legislator in the civil code, in addition to its own rules and conditions. That being said, an arbitration agreement, just like other agreements, should rely on a particular law which grants it the essential binding status and regulates its existence, validity, effects and fate. For this agreement comes as a consequence of a relationship that precedes it, with its own ruling law which may not be the law of arbitration itself. Moreover, the subject-matter of such agreement relates to the performance of a main government function, i.e. judicial function, thus the difference in the various countries' positions towards it. Therefore, the law which the arbitrator undertakes to

¹ Dr. Aktham Amin Al Khouli, Drafting Arbitration Agreements, Gulf Commercial Arbitration

Newsletter, the GCC Commercial Arbitration Center, Bahrain, Vol. 7, December 1997, P. 6.

² Dr. Ahmed Khalil, Arbitration Rules, Al Halabi Legal Publications, Beirut, Lebanon, 2003, P. 27.

implement should be determined, whether in terms of applicable procedure or objective rules whereby the dispute should be settled.

A Banking Arbitration Agreement can be defined as “a contract whereby the parties (a bank should be one of them) agree to refer an existing or potential dispute (should be relating to banking transactions) to persons of their choice, who should act as arbitrators in such conflict and their decision should be binding upon the parties”.

Pursuant to the provisions of paragraph 1 of Article 10 of the Egyptian Arbitration Law: “The arbitration agreement is an agreement by which the two parties agree to submit to arbitration in order to resolve all or certain disputes which have arisen or which may arise between them in connection with a defined legal relationship, whether contractual or not.”

According to popular belief, arbitration is a judicial method of conflict resolution, whereby the parties to the contractual relationship agree to resort to arbitration. Should this agreement take place, and be followed by a difference as to its interpretation, cancellation or termination, a final decision as to this matter should be issued.

In the event that the arbitration agreement serves as the basis for the arbitration system and the starting point of arbitration, such agreement should be clear and non-ambiguous to validate its consequences¹.

Each arbitration that is based on a mutual agreement concluded between the two parties of the dispute out of their free

¹¹ Dr. Samiha Al Qalyoubi, Arbitration Agreement, Lectures given in the Second Specialized International Arbitrators Course, the International Arbitration Center of the African and International :Lawyers Union and the Arab Arbitration Center, Cairo, January 2006 Session, P. 4.

will should be necessarily subject to the provisions of the Arbitration Law No. 27 of 1994, irrespective of the nature of the parties of the dispute and the nature of legal relationships associated with such dispute. In other words, the mere existence of an agreement entered into voluntarily by the parties to the disputes to resort to arbitration is enough for the arbitration law to apply, irrespective of whether the parties are public or private law persons and irrespective of the nature of legal relationship governing the dispute.¹

Having reviewed the meaning of Banking Arbitration Agreement, we move to highlight the importance of arbitration agreement in banking dealings, indicating its advantages and disadvantages in separate sections.

Second Section

Advantages and Disadvantages of

Agreement to Arbitration in Banking Transactions

In this section, we address the Advantages and Disadvantages of

¹(Arbitration Case No. 105 of 1997, Session of 10/12/1998) a ruling issued by Cairo Regional Arbitration Center during 1999, Arab Arbitration Journal, 2nd edition, January 2000, P. 222.

Banking Arbitration Agreement as follows:

First Subject

Advantages of Agreement to Arbitration in Banking Transactions

Agreement on arbitration in banking transactions has numerous advantages, as follows:

First: Flexibility and Speed

The commercial law provides for the observance of flexibility and speed considerations. Agreement on arbitration allows for a prompt solution to the dispute, through the adoption of more flexible procedures that help reduce cost. Flexibility in arbitration can be translated into simple litigation proceedings, especially when it comes to notices, management of sessions and submission of details and communication with the parties to the dispute. Court proceedings however, can be complicated and extend over long periods of time, Also, they tend to stick to the texts pertaining to the proceedings at the expense of the dispute subject-matter.

Flexibility in proceedings allows the arbitrators to select the procedures required for a quick arbitration, whether with respect to holding sessions, hearing witnesses, or obtaining evidence or otherwise flexibility in the provision of the original copies of documents or review of documents in their original language or other language as may be decided by the arbitration panel. The parties to arbitration may agree on the procedures to be followed by the panel, without observing the law of pleadings, except with respect to the public order or law. The parties may also subject such procedures to the applicable regulations and rules in

force in any permanent arbitration organization or center inside or outside Egypt. Without such an agreement, the arbitration panel, may, while observing the provisions of this law- select the arbitration procedures, as it may deem appropriate.

There is no question that flexibility in proceedings leads to prompt acquisition of rights, and thus savings in expenditures and achievement of financial benefits in the long run.

Flexibility can be evidenced even when legislative texts are being implemented. In fact, this is being carried out in a flexible manner, despite the possibility that it might lead to the instability of legal rules. Flexibility is also apparent in the selection of the applicable law governing the dispute. Courts, nevertheless may only implement the laws of their respective countries.

The arbitration law allowed the parties to the arbitration the freedom to choose the law that the arbitration panel should implement in the resolution of the dispute, the exclusion of an applicable law serves as a reason for considering the arbitration decision to be null and void. Flexibility in law is translated by the freedom to select the seat of arbitration and the selection of arbitration language. This benefit allows the Islamic banks the possibility to implement the Islamic Shariah rules, whereas a judge can only implement positive laws.

It is evident that the parties prefer the inclusion of an express clause that reflects their selection of a specific law to govern the contract and arbitration process in order to ensure the speed of transaction completion and non preoccupation with the interpretation of the autonomy of will principle in the identification of the applicable law.

In addition to the above, the speed of bank dispute resolution helps promote the effectiveness of collection of financial entitlements, in addition to preventing losses resulting from long-term disputes, and the depreciation of disputed financial entitlements in the long run, owing to the increase in

inflation rates. Litigation proceedings can be slow and may extend over several years, which results in the exhaustion of the financial institutions' resources, funds, time and energy¹. Pursuant to the commercial law, a delay in payment will result in the creditor's delay in settlement of debts and the bank will suffer negative effects due to the change in currency exchange rates, interests or commodities. On the other hand, resort to arbitration contributes to a rapid solution, as the delay in acquiring a right and the slow pace of proceedings can be regarded as a form of injustice. A judgment may be rendered, appealed and challenged and when it comes to enforcement the creditor may end up with nothing worth enforcement.

Furthermore, in arbitration, a case is examined by one arbitrator while in courts a case is examined by many judges. Also, in courts, the case may be referred to several judges in the same competent court, which goes against the interests of the litigants.

The speed of proceedings is particularly important in banking transactions like current accounts, funding operations and credits. The nature of these transactions might cause harmful effects upon the bank or any of its customers, owing to the sudden change in currency exchange rates or commodity prices and interests. Harm may occur as a result of non observance of the credit format. This leads to further expenses, which results in an increase in cost and difficulty in selling goods and services².

¹ Dr. Hani Sari El - Ddin, Arbitration Importance for the Banking Sector, an article published in the Symposium on "Ways to "Solve Disputes in Banking Transactions, Sunday June 21, 1998, Cairo Regional Center for International Commercial Arbitration.

² Dr. Hisham Sadeq, Compromise and Reconciliation, Symposium on "Ways to Solve Disputes in Banking Transactions, Sunday June 21, 1998, Cairo Regional Center for International Commercial Arbitration.

Nevertheless, if the arbitrators responsible for settling the dispute are not adequately competent, negative impacts associated with slow proceedings cannot be averted.

Second: Guarantee of Neutrality, Expertise and Specialization

Agreement on arbitration allows for the referral of the dispute to a neutral arbitration panel. Some state-owned banks might not accept to refer their disputes to courts in other countries. Also, litigants might prefer to appoint an independent arbitrator from an independent country or panel for fear that the judge will be biased for the citizens of his country or law. Thus, the parties to the litigation may opt to raise the dispute in a country that neither party belongs to, in order to ensure the neutrality of arbitrators and the law in the seat of arbitration. This is attributed to the plurality of cases examined by specialized centers where internationally reputed arbitrators not belonging to any of the litigants' countries are involved and where the seat of arbitration is not located in any of the litigants' countries¹.

Banking activities are growing at a rapid pace, especially when it comes to e-banking. Very few bankers are able to keep pace with this development. Few judges are specialized in the banking field, owing to the fact that banking activities are highly technical or modern, like in foreign sector transactions, deposits, assets and unified customs for documentary credits, or the calculation method of debit interests and credit interests. If the conflict has been referred to the judges, they will in turn refer such dispute to a specialized expert. However, by resorting to arbitration, a technical or specialized arbitrator having the ability to express a technical opinion and solve the dispute can be selected, based on certain rules relevant to his/her assignment, as is the case in disputes pertaining to documentary credits.

¹ Dr. Mohamed Salim Al Awa, Arbitration in Electronic Banking Operations, Conference of Electronic Banking Operation between Sharia and Law, United Arab of Emirates University, 10 -12 May 2003, p. 2383.

Furthermore, a specialized arbitrator keeps pace with the latest developments and technologies in the banking field, as well as the national and international legislations.¹

As the documentary credit-related disputes require high technical experience and specialization, banks started to realize the importance of arbitration.²

The well established norms in the field of international trade have resulted in limiting legal dispute areas to the extent that some began to believe that a common international private law is about to emerge.³

There is no question that resort to arbitration when it comes to such contracts help settle such disputes easily and within the shortest time possible. If such disputes were however referred to courts, settlement procedures would be slow and complicated and involve expert engagement and challenge of judgments. In such a

1 Nariman Abdel Kadir, Arbitration Agreement and its Exemplary Form, Dar Al Arabeya, 1st ed. 1996, P. 15.

2 As is the case in the agreement between the National Bank of Egypt, the group of approved banks, the head of the syndicate, Barclays bank to resort to arbitration for the settlement of disputes associated with letters of credit. The credit value amounted to 202 million US dollars. According to experience, arbitration has proven successful in the US in the settlement of such disputes resulting from banking transactions. This trend has been adopted and advocated by numerous leading US banks.

Dr. Hani Salah Sari El-Ddin, Arbitration Effectiveness as a Tool to Settle Disputes of Financing Agreements and banking Transactions, op cit, pp. 2- 6.

³ Dr. Issam El-Ddin Al Qasabi, Peculiarity of Arbitration in Banking Operations, a paper submitted to the Arbitrator Qualifying Course, Ain Shams Arbitration Center, 2000, p. 7.

context, the preparation of tables of specialized arbitrators would help facilitate the selection of a specialized arbitrator.

It may appropriate to refer here to the privacy of Islamic banking transactions, and mention that arbitration observe such privacy. To explain that, we can say that the Islamic banking activities are relatively a hot topic. This creates difficulties for the courts when examining Islamic banking disputes that are recognized as specialized disputes.

In addition, ordinary courts stick to the provisions of the positive laws, which may be inconsistent with the provisions of the Islamic Shariah. This poses further challenges to the courts while examining Islamic banking disputes among banks or between banks and customers.

That being said, it appears that arbitration is more convenient than courts for the settlement of such disputes, especially when the parties agree to implement the provisions of the Islamic Shariah and compel the arbitrators to abide by them.¹

The Egyptian Arbitration Law No. 27 of 1994 allowed the parties the freedom to identify the applicable law and provided for the annulment of arbitral awards where arbitration panels should fail to abide by the law selected by the parties when rendering their award. If the parties have agreed to the implementation of the provisions of Islamic Shariah, the panel should observe such agreement and demonstrate the jurisprudential and doctrinal/theoretical bases of its award, otherwise it shall be deemed to be null and void.

¹ Mohamed Ibrahim Awad Sharif, Shifting from Normal Judicial System to Arbitration – The Necessity of Arbitration for Islamic banks, Symposium on “Ways to Solve Disputes in Banking Transactions, Sunday June 21, 1998, Cairo Regional Center for International Commercial Arbitration, pp. 5-6.

However, as most men of law are not acquainted with the Shariah rules and provisions, the framework governing the procedural rules of arbitration should be identified for the settlement of disputes across Islamic banks. It is thus paramount that a competent Islamic Shariah scholar should be a member of the arbitral panel, and to ensure that the award doesn't go against the opinion of this Shariah scholar as far as resorting to the Shariah rules is concerned. In such case, the award that was not grounded on the Shariah rules should be annulled whether it was a jurisprudential opinion or a doctrinal one. The implementation of the positive law should be consistent with the Islamic Shariah. This can be consolidated by establishing Islamic arbitration centers and a supreme control body should approve the award of the arbitrators when it comes to the Shariah and law aspects, prior to submitting the award for execution.

Third: Maintaining the Confidentiality of the Parties' Secrets and Continuation of the Relationship between them

Agreement on arbitration helps maintain the confidentiality of the parties' secrets. Only arbitrators and lawyers defending the parties are allowed to review the details of the case, unlike ordinary courts where everyone is authorized to examine the subject-matter of the dispute due to the public status of proceedings. Therefore, the parties involved in international commercial relationships are always keen on resorting to specialized arbitration centers like the International Chamber of Commerce in Paris and other centers that are engaged in the settlement of the case in a confidential manner. These centers do not publish any decision, except the general principles, without mentioning the names of the parties.

With respect to banks, the public nature of litigation harms the reputation of both the bank and the client. That is what the arbitration system, especially conciliation arbitration, attempts to avoid. Sessions can be held secretly and are only attended by the parties or their representatives, arbitrators and any such other

persons whose attendance is necessary. Therefore, businessmen are able to hide the nature of their disputes and litigation proceedings.

Confidentiality is well suited to banking transactions generally, and electronic transactions, technology transfer contracts and patent exploitation licenses specifically that require confidentiality and non disclosure. Therefore arbitration sessions remain secret and confidential unless the parties agree otherwise.

Some types of transactions require, by their very nature or by reason of a person's belonging to a country that prohibits such person's involvement in such transaction, confidentiality and secrecy. Should a dispute arise, it should be settled amicably by way of arbitration. However, it can be observed that confidential matters can turn into public matters where a party loses the case and in case of the other party's desire to resort to court for compulsory execution. In such instances, the case is presented to the court, and confidentiality ceases to exist.¹

Thus, arbitration is usually some sort of understanding between the parties when there are different views as to the proper performance of the contract. The parties agree to refer the dispute to arbitration, to ensure the continuation of the amicable relationship between them in the future following dispute resolution. In ordinary courts, however, the parties may employ vexatious methods, resulting eventually in their relationship being ended because they do not look forward to the continuation of their relationship in the future. Rather, they are concerned by settling scores and taking revenge. Therefore, the parties resort to

¹ Dr. Hamza Haddad, Arbitration in Banking Disputes, Symposium on "Arbitration in Banking Disputes and Its Effects on Dispute Settlement" Amman 21/03/2000, P. 6.

ordinary courts by looking backward and to arbitration by looking forward.¹

This advantage is attributed to the parties' selection of competent arbitrators and the committee often manages to settle the differences between the parties to dispute or arrive at a conciliation, which often leads to the implementation of the decision by the litigant willingly, because the arbitrator draws his powers from the litigants' will, as opposed to the judge's mandate that is based on element of enforcement.

Fourth: Absolute Finality and Enforceability of Arbitral Awards

Appeals of court judgments are recurrent, making dispute examination and settlement more time-consuming. Arbitration awards, however, in most recent laws, cannot be contested. Even if such text does not exist, parties may agree not to allow any challenge.

Arbitration laws state that arbitral awards are not subject to any challenge actions. Nevertheless, an action for annulment of arbitral awards may be filed.

This, however, does not restrict the finality of arbitral awards, because the reasons mentioned in the articles pertaining to annulment actions or filing of such actions relate to the panel's authority and competence and litigation guarantees, as well as the observance of the public order in the seat of arbitration or decision enforcement country. Failure to observe the foregoing, the award

¹ Dr. Mohieddine Ismail Alamuddin, International Commercial Arbitration, Arab Nationalism House for Culture & Publishing, P. 9.

should be deemed to be unenforceable and lacking the validity of the final decision.¹

An arbitral award acquires its binding force as a judicial action and does not draw such force from the execution order, because the execution order is not considered a judicial action. The execution judge's role is reduced to the mere examination of the arbitral award and determining whether it contravenes the requirements of the public international law or international public order. In so doing, the judge acts as a representative of the country's public authority and not as a judicial entity responding to dispute settlement. The executive force of the award that results from its execution order is therefore different from the binding force of the decision rendered in the arbitral award, being a judicial act. Also, the execution order is a must in such decisions owing to the absence of an authority dominating the countries, which can issue the order to execute such decisions.

Furthermore, the significance of the execution order appears to be minimal, since most arbitral awards are executed voluntarily. In fact, the non-execution of arbitral awards results in stringent penalties on the part of the defaulting party. These include prohibiting such party from entering in the future into commercial relationships or publishing such penalties. Hence, arbitral awards are compulsorily executed, just like the execution of court decisions. The international commercial arbitration award is no longer dependent upon the execution judge. Rather, international trade considerations are now being taken into account².

Fifth: Encouragement of Investment

¹ See Abu Zaid Radwan, the General Bases of International Commercial Arbitration, Al Fikr Al Arabi House, 1981, pp. 42-43.

² Dr. Abu Zaid Radwan, op cit, pp.47-49.

In light of the consolidation of economic growth rates, the majority of the countries are now employing an economic policy geared towards encouraging foreign investments. This would yield several benefits and incentives that pave the way for a safe economic climate for those wishing to invest in the country.

Nevertheless, investors are not as concerned about legal benefits and incentives as they are about the legal environment where disputes resulting from such investment will be settled.

Upon selecting the method of arbitration, the litigants have the freedom to adopt whatever rules they deem appropriate to regulate the arbitration process, so long as such rules do not contravene the public order. They may choose between several methods. They may either establish the arbitration procedures or rely on the arbitration regulations adopted by arbitration institutions or any other laws, given that all contracts are subject to the law selected by the parties, in accordance with the principle of free will.

Second Subject

Disadvantages of Agreement to

Arbitration in Banking Transactions

While agreement on arbitration in banking transactions offers several benefits, it has, on the other side, some disadvantages, including:

First: High Expenses

Parties to arbitration assume arbitration costs, as well as the arbitrators' fees which are usually paid prior to settling the dispute. On the other hand, when the parties refer their dispute to the courts, they do not incur court fees but only simple judicial fees and the losing party bears the case-related fees following the end of litigation. High expenses are particularly associated with international arbitration. These expenses include arbitrators' fees, administrative expenses, witnesses' expenses, transport fees of the arbitration panel, particularly when the panel includes members of different nationalities or living in several countries.

Second: Arbitrators' Lack of Judge Powers

Arbitrators do not enjoy the powers of judges. They are therefore compelled to resort to national courts to obtain seizure or any insistent decision issued by court owing to its binding capacity. According to the Egyptian arbitration law, the arbitration panel may opt for the engagement of technical experts or listen to witnesses. The arbitration panel, however, may not have a take on the witnesses who fail to appear or abstain from appearing, nor may it take any decision with respect to judicial commission. Where there is a need for taking a precautionary measure, the parties seeking arbitration may consult with the judge of summary proceedings (urgent matters) whether prior to, or during, the arbitration procedures. In arbitration, a dispute may be divided into other disputes or extend to other parties that can only be involved with their own consent. On the other hand, litigation before courts can involve other parties without their consent.

Third: Lack of Expertise

While arbitration often helps select competent arbitrators, sometimes people lacking the experience and competence required are engaged in the case, by reason of the parties' selection of arbitrators based on their personal relationships, for fear of non-neutrality, while professional judges are in charge of the country's court affairs. That being so, arbitral awards are contested on many occasions, by reason of selecting arbitrators lacking expertise or legal knowledge. Therefore, appeals are made against the proceedings of the arbitral cases or arbitral awards.

Fourth: Consensual Solution in Arbitration

Some believe that arbitrators seek to reach a consensual solution, in accordance with the provisions of applicable law. In other words, arbitrators tend to distribute losses or profits in a consensual manner to secure the principles of justice. This might, however, entail a loss of rights for the banks and financial institutions.

As a matter of fact, the arbitrators' desire to settle the dispute consensually without implementing the applicable law can be associated with the arbitrator's neutrality.

Nevertheless, the banks' fear that the arbitration panel would opt for the implementation of the principles of justice and equity can be overcome through an express declaration of the applicable law. The Egyptian legislator's position is also clearly geared towards respecting the will of the parties and implementing the agreed-upon rules. Also, the arbitration panel's authority to rely on another law that is linked to the subject-matter of the dispute is limited if no agreement has been reached as to a particular law. In addition, the arbitration panel possesses the authority to resort to justice and equity rules if the panel is entrusted with conciliation arbitration.

The arbitration law provides for the annulment of the arbitral award in the event of non-observance of the parties' agreement on the applicable law.

Moreover, arbitral awards are issued in accordance with the arbitration law and are incontestable. However, actions for annulment may be filed with respect to such awards, unlike court rulings which can be challenged by way of appeal or cassation, providing litigants with some guarantees that might result in a fair judgment.

Fifth: Parties' Procrastination

Delays or procrastination by either party in appointing its arbitrator or failure of the parties to agree on the appointment of the sole arbitrator, or otherwise failure to agree on the appointment of the Head of Panel or procrastination owing to insisting on the annulment of the agreement or its inconclusiveness of the issues of the disputes at hand or its limitation to the parties that agreed on it are all among the reasons that might result in the prolongation of arbitration procedures.

When the need arises to include new parties, the arbitrators do not possess the authority to add arbitral files or include another person in the arbitral case, for the arbitration is reduced only to its parties.

Banking contracts include several parties. Arbitration is only valid when it involves all parties, like the credit-opening bank, the correspondent, the commanding client and beneficiary client. Thus, there must be regulations allowing multi-party arbitration and the incorporation of several arbitral cases.

First Chapter

Types, Drafting and Validity

Conditions for Banking Arbitration Agreements

In this chapter, we address the different types and drafting of Banking Arbitration Agreements in the first section, and the validity conditions for Arbitration Agreement in Banking Disputes in the second section, as follows:

First Section

Types and Drafting of Banking Arbitration Agreements

This section is divided into two subjects, the first deals with the Types of Banking Arbitration Agreements, while the second deals with Drafting of Banking Arbitration Agreements as follows:

First Subject

Types of Banking Arbitration Agreements

A Banking Arbitration Agreement is a mutual agreement to choose arbitration as a means of settling a banking dispute. A Banking Arbitration Agreement is an agreement whereby the parties to the banking relationship agree to submit to arbitration the existing or potential disputes that may arise between them with respect to such relationship.

Banking arbitration is a special way of settling banking disputes, by avoiding ordinary court proceedings. In banking arbitration, the parties to the dispute chose their judges, rather than resorting to the local judicial system.

Based on the foregoing definition of the Banking Arbitration Agreement, it can be noted that there are two types of arbitration agreements. Resort to arbitration in a bank contract might take place by an agreement between the two parties to the dispute that actually took place upon conclusion of the arbitration agreement, and such agreement shall be recorded in a separate document from the original contract tying the parties up before the dispute occurred. In this case, the agreement is called “banking arbitration accord”. An arbitration agreement may be concluded through a clause included by the contractual parties in the original

contract tying them up or in a separate contract prior to the occurrence of the dispute. Such clause shall provide for the two parties' obligation to resort to arbitration for the settlement of any dispute that may arise between them in the future with respect to its performance or interpretation. In this case, it is referred to as "banking arbitration clause".

In addition to these two traditional types of Banking Arbitration Agreements, one other type is the arbitration clause by reference, which means resorting to arbitration through an agreement whereby reference is made to a certain contract, model contract or document that includes an arbitration clause.

In its definition of the arbitration agreement, the Egyptian legislator insisted on this fact. The first paragraph of Article 10 of the Egyptian Arbitration Law No. 27 of 1994 states that "The arbitration agreement is an agreement by which the two parties agree to submit to arbitration in order to resolve all or certain disputes which have arisen or which may arise between them in connection with a defined legal relationship, whether contractual or not".

The second paragraph of the same article indicates that the arbitration agreement may be concluded before the dispute has arisen either in the form of a separate agreement or as a clause in a given contract concerning all or certain disputes which may arise between the two parties. In the latter case, the subject matter of the dispute must be determined in the Request for Arbitration referred to in paragraph 1 of Article 30 hereof. The arbitration agreement may also be concluded after the dispute has arisen, even if an action has already been brought before a judicial court, and in such case, the agreement must indicate the issues subject to arbitration, on penalty of nullity.

The third paragraph of the same article stipulates that "the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that such

reference is such as to make that clause an integral part of the contract “.

By the same token, article 7 of the UNCITRAL Model Law on international Commercial Arbitration defined the arbitration agreement as “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.

Based on the foregoing, we will address the concept of Banking Arbitration Agreement through the following points:

First Requirement: Banking Arbitration Clause

Second Requirement: Banking Arbitration Accord

Third Requirement: Banking Arbitration Clause by Reference

First Requirement

Banking Arbitration Clause

An arbitration clause is an agreement between the parties to submit to arbitration any dispute that might arise out of the contract. It can be defined as “an agreement made prior to the occurrence of the dispute and is contained in a contract”. Pursuant to such arbitration clause, the parties undertake to submit any disputes between them with respect to the implementation of the contract to one or more arbitrators of their choice, rather than referring the dispute to the courts.

On the other hand, others¹ have defined the arbitration clause as “an agreement made upon conclusion of the contract and

¹ Dr. Mohsen Shafeeq, International Commercial Arbitration, Dar Al Nahda Al Arabeya, Cairo 1997P.171, Dr. Nariman Abdul Qader, Arbitration Agreement and its Exemplary Form, P.204

prior to the occurrence of dispute". The parties to the legal relationship do not wait until the dispute has arisen, but rather anticipate incidents and include an arbitration clause in advance in the contract so concluded or in a separate agreement that serves as an annex to the contract. At all events, the arbitration clause is concluded prior to the occurrence of dispute. Hence the prevalence and spread of arbitration clauses in commercial transactions, unlike arbitration accords that are concluded following the occurrence of dispute, thus, some parties find difficulty in concluding such arbitration agreements.

Based on the foregoing, it can be established that a banking arbitration clause is an agreement between the parties to the banking relationship, in the form of an express text in the contract between them, to submit the disputes that are likely to occur between them in the future to arbitration. This form of arbitration is the most commonly used form of arbitration from a practical perspective in modern contracts. It was found that the vast majority of the international trade contracts include an arbitration clause. In fact, arbitration clauses are concluded in an amicable manner, unlike arbitration accords which are concluded upon occurrence of a dispute, hence the difficulty in concluding an arbitration agreement along with it.

The agreement between the parties under an arbitration clause might be either full or partial agreement. In other words, the parties may agree to the arbitration in some or all disputes that arise, and may opt to refer the other disputes to the courts, as they may deem convenient, whether the dispute relates to the interpretation or performance of the contract, and irrespective of its nature, be it legal, technical, financial or otherwise.

A partial agreement in an arbitration clause is like when the customer enters into contract with a bank and divides the contract into two parts: one pertaining to the performance of credit and the other to the warranties of credit after completion. An arbitration clause is included under the first or second section, indicating that

it corresponds to that section only. Therefore, arbitration is only reduced to the dispute which the parties agreed willingly to submit to arbitration.

When the parties express such intent in the form provided for by law, the litigants undertake to settle the dispute by means of arbitrations. They will be therefore bound by the arbitral decision and they will abide by it. Therefore, the litigants must express their intent to settle the dispute through arbitration¹. If the goal is to submit all disputes to arbitration, this shall be expressly provided for and the parties shall agree in advance on it. The litigant's intent shall be clear and obvious.

The arbitration clause is recognized as being among the most important banking arbitration sources. One or more arbitrators will have jurisdiction over the banking dispute or such dispute may be referred to the procedures of an arbitration body.

If the arbitration clause is required to be included within the original contract regulating the trade relationship, because it is agreed upon conclusion of the contract and prior to the occurrence of the dispute, this however does not prevent the inclusion of the arbitration clause preceding the occurrence of dispute in a separate written document from the original contract concluded between the parties, as an annex to the contract. This does not affect its recognition as an arbitration clause, as long as the agreement took place prior to the occurrence of the dispute between the parties to arbitration agreement.

The Egyptian Arbitration law No. 27 of 1994 made reference to this matter when it stipulated that an arbitration agreement can precede a dispute, irrespective of whether it is independent in the form of a separate agreement or included in a certain contract.

¹ Dr. Nasser Nagi Mohamed Jumaan, Arbitration Clause in Commercial Contracts- Comparative Study, Dar Al Fath, Alexandria, 2008, P.68

The scholars justified the possibility of including the arbitration clause in a separate document, by the fact that the parties to the legal relationship may not be able, upon signature of the contract, to find a way of settling disputes that might arise between them, hence making no reference to arbitration. The parties may forget to identify the competent entity having jurisdiction over the disputes that might take place between them in the future. They may therefore remedy the situation after concluding the contract, through an agreement as to how to settle the disputes that will arise regarding the contract. The original contract may be of a short duration. Then, the parties will agree to extend the term of contract for additional periods. They thus expect the potential occurrence of disputes between them in the future. It is advisable to settle these potential disputes by means of arbitration and not through courts. Therefore, they enter into an independent agreement, whereby they express their intent to settle their future disputes by means of arbitration.

On the other hand, some scholars believe that an arbitration clause can be entered into even after the occurrence of dispute and prior to the conclusion of the arbitration document or accord ¹. However, we tend to think the opposite. In fact, if the agreement to arbitration is entered into prior to the occurrence of dispute, we speak of an arbitration accord and not an arbitration clause, as it will be indicated. Also, this opinion is inconsistent with the provisions set forth in Article 10 of the Egyptian Arbitration Law No. 27 of 1994, which differentiates between the arbitration clause and arbitration accord and which indicates expressly the period when the two forms of arbitration have been entered into. An arbitration clause is entered into prior to the occurrence of

¹Dr. Mustafa Al Jamal and Dr. Okasha Abdul A'al, Arbitration in International and Internal Private Relationships, Al Fath Publications, Alexandria, First Edition, 1998, PP.247 Ff.

dispute, while the agreement that is concluded following the occurrence of dispute is considered an arbitration accord.

It can be observed that the bank arbitration clause may not be included in the original contract, but the contract may refer to a document that contains the arbitration clause; this reference is enough even if the document is issued by a third party. We will be addressing this issue in detail in the third requirement of this subject.

Second Requirement

Banking Arbitration Accord

Banking arbitration accords constitute the primary type of arbitration agreements. An arbitration accord can be defined as an agreement that takes place in a separate contract¹, after the occurrence of the dispute between the parties to the banking relationships, to submit to arbitration all disputes that have actually taken place.

The occurrence of the dispute is a requirement to ensure the validity of the arbitration accord. Given that arbitration accords are separate agreements, which are often concluded following the occurrence of the dispute, they often include more clear and

¹ Dr. Hussam Fathi Nassif, Applicable Law for the Transfer of Arbitration Agreement to Third Parties, Legal and Economic Science Magazine, Ain Shams University, Faculty of Law, Year 44, Issue 1, January 2002, P. 155

detailed regulations concerning the arbitral process 1. An arbitration accord may not be concluded prior to the occurrence of the dispute; otherwise it would be recognized as an “arbitration clause”.

An arbitration accord can be concluded without an arbitration clause preceding it. Also, an arbitration clause may precede such accord. The conclusion of the accord does not contribute to the cancellation of the previously established arbitration clause, unless the parties shall agree otherwise².

An arbitration accord is recognized as a separate contract that contains the subject-matter of an existing dispute between the parties to the arbitration contract³, as well as the names of the arbitrators and arbitral procedures.

An arbitration accord may be concluded with respect to all or some of the disputes that may arise between the parties. If the subject-matter of the arbitration is not included in such accord, such arbitration shall be deemed to be invalid.

Such agreement to arbitration, so long as it takes place following the occurrence of the dispute, should specify all substantial matters, including the points of dispute between the parties, as well the allegations and requests of the litigants. The arbitration accord is recognized as a separate agreement from the original contract, hence the independence of the arbitration

¹ Dr. Abu Al Ula Al Nemr, Analytical Study of Practical and Legal Issues in the field of International Commercial Arbitration, Abu Al Majid House, First Edition, no Publication Date, P. 35

² Dr. Fathi Wali, Arbitration Law between Theory and Practice, Community Knowledge Library, Alexandria, First Edition, 2007, P. 103

³ Dr. Mahmoud Al Sayyid Omar Al Teyhyawi, Arbitration in Civil and Commercial Articles, House of University Publications, Alexandria, 2006, P. 27

agreement which is not affected by the defects in the original contract that might lead to its nullity.

The Egyptian legislator also established that, when a dispute exists, an arbitration accord can be concluded, whether the original dispute has been raised or not before the country's courts

1. If the dispute is raised before the courts, an arbitration accord may be concluded irrespective of the case and the court level. An arbitration accord may be concluded if the case is under deliberation, so long as no final judgment has been issued with respect to such case
- 2.

If an agreement to arbitration has been reached and the dispute is raised before the country's courts, this implies that the litigation before court shall cease and that the previous judgments shall be waived in favor of one of the litigants, prior to executing the arbitration accord., unless the litigants established limiting conditions and the agreement provided for insisting on the judgments issued in their favor prior to the conclusion of the arbitration agreement.

While the Banking Arbitration Agreement takes one of the two previous forms, national laws and international conventions on arbitration often refer to such agreements as "arbitration agreements" which involve both forms of arbitration, without distinguishing between them in terms of legal procedures. This is particularly recognized in the definitions established under the different legislations.

The Model Law of 1985 on International Commercial Arbitration defined the arbitration agreement in paragraph 1 of Article 7 as follows: "an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which

¹ Article 10/2 Egypt Arbitration Law

² Dr. Fathi Wali, Arbitration Law between Theory and Practice, op cit, P. 103, Dr. Nariman Abdel Kadir, Arbitration Agreement and its Exemplary Form op cit, P. 210

have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

According to paragraph 1 of Article 10 of the Egyptian Arbitration Law No. 27 of 1994: “the arbitration agreement is an agreement by which the two parties agree to submit to arbitration in order to resolve all or certain disputes which have arisen or which may arise between them in connection with a defined legal relationship, whether contractual or not.

Also, the international conventions on arbitration emphasized the unity of legal procedures of each of the arbitration clause and arbitration accord”. Paragraph 1 of Article 2 of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards stated that “each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any 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”.

Based on the foregoing, it can be observed that the national legislations and international conventions on arbitration observe the unity of legal procedures of the two forms of arbitration, i.e. arbitration clause and arbitration accord, by referring to them collectively as “arbitration agreements”.

Third Requirement
Banking Arbitration Clause by Reference

Paragraph 3 of article 10 of the Egyptian Arbitration Law No. 27 of 1994, stipulates that “the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that such reference is such as to make that clause an integral part of the contract”.

In the light of this provision, it can be said that arbitration by reference is “an agreement to arbitration that does not include the formal framework whereby the parties have expressed their intent (i.e. the contract), but is rather included in other separate documents containing an explicit or implicit reference by the parties and recognized as part of the contract¹ .

¹ Dr. Nagi Abdul Mu'men, Permissibility of Arbitration Agreement by Reference in National Law and International Commercial relationship, Legal and Economic Sciences Journal, Faculty of Law, Ain Shams University, Issue 1, Year 44, January 2002, Margin P. 408,

This is particularly the case in the bank credit contracts (letters of guarantee and documentary credits), where the original contract entered into between the parties and in respect of which the dispute has arisen does not include an agreement to arbitration. Nevertheless, this contract makes reference to another existing contract between the parties which includes an arbitration clause, i.e. credit contract. In such case, the reference must be included so as to make the clause an integral part of the contract.

Arbitration by reference is the latest form of banking arbitration agreements in light of the spread of model contracts phenomenon and arbitration bodies pertaining to some international commercial activities.

Based on the previous definition, it can be established that this form applies if the parties to the original contract did not include an express arbitration clause in their contract- but rather made reference to a previous contract concluded between them or otherwise to a model contract or general conditions applicable in their dealing with each other., or other documents that may be prepared by a specialized organization, professional groupings or any of the parties, to complete the missing information in the contract. Among the clauses of this previous contract, model contract, or general conditions is a clause providing for the settlement of disputes that arise in respect of such contract by means of arbitration. In such case, the contractual parties express their intent to settle their disputes through arbitration, whose clause is included in the previous contract, model contract or general conditions referred to in the original contract. The parties to this last contract may not evade this obligation under the pretext of the independence of the original contract from the previous contract, model contract of general conditions referred to and containing the arbitration clause.

This form of arbitration agreement is particularly seen in international contracts concluded by telex and fax, which do not contain an arbitration clause. In such contracts, reference is often

made to other annexed documents such as model contracts. Also, this form of arbitration applies to interrelated contracts that aim at achieving one single objective, such as letters of guarantee. Reference may be made from a contract that does not contain an arbitration clause to a contract including an arbitration clause. In this case, the first contract shall be deemed to be including an arbitration clause by reference.

Second Subject

Drafting of the Banking Arbitration Agreement

Shedding light on the drafting of arbitration agreements in banking transactions demands that we address the major subjects to be included in the arbitration agreement, in order for such agreement to highlight the real intention of the parties and create the intended legal effects.

Noteworthy is that there is no unified model for the drafting of arbitration agreement that is adjusted to the particularity of each international contract and that meets the needs of the parties thereof and matches their positions. In addition to the different positions of the countries towards arbitration rules, their positions also differ in terms of the requirements of the public policy with respect to each subject. Therefore, the drafting of the provisions of Banking Arbitration Agreements is identified based on the specifics of the contractual relationship and the conditions of the concerned parties.¹

Subjects to be included in the Banking Arbitration Agreement

We will present the practical subjects to be included in the Banking Arbitration Agreement, while making reference to some hindrances to be avoided by those drafting the Banking Arbitration Agreement.

1- Settlement of Dispute by means of Arbitration

¹ Dr. Ahmed Sharaf El-Ddin, Studies in Arbitration in International Contracts Disputes, No
Publisher, 1993, P. 25

The Banking Arbitration Agreement must grant the arbitrators the power to definitely settle the dispute; the dispute must be referred to arbitration with the exclusion of any other means of settlement.

The bank arbitration clause may establish that disputes “may” be submitted to arbitration. In this case, it is difficult to find out about the intention of the parties. This leaves room for interpreting whether it is a question of choosing between the countries’ courts and arbitration? Or the parties’ approval on arbitration is required? To settle this difference, the matter must be raised with the court where arbitration is taking place to interpret such condition. Therefore, arbitration is either accepted or excluded. Oftentimes, the court’s decision depends upon its general position towards arbitration? Is it for or against arbitration? This always results in a waste of time and money. 1

Therefore, a Banking Arbitration Agreement must be made in writing in an express, clear manner, in such a way that the arbitrator(s) must be granted the power to definitely settle the existing or potential disputes between the parties.

2- Identification of the Scope of the Subject-Matter of Dispute:

The drafting of the Banking Arbitration Agreement differs, at this point, depending on whether a specific subject is to be determined to raise it with the arbitral panel or the parties’ intention is to submit all disputes related to the contract to arbitration. With such identification, the arbitral panel will be able to get acquainted with the limit of its competence, otherwise its award will be null and void.

¹ Dr. Nariman Abdul Qader, Arbitration Agreement and its Exemplary Form, op cit, P.249

It is, however, preferred that disputes are identified in broad terms for fear that some disputes will not be subjected to arbitration. Based on the foregoing, the text must be as follows: “all disputes related to this contract shall be subject to arbitration”, in order to encompass all disputes, whether related to the interpretation, performance or non performance generally, or even the disputes pertaining to the original contract itself.¹

3- Type of the Selected Arbitration

The Banking Arbitration Agreement is made upon selection by the parties to the dispute of the Ad hoc arbitration or institutional arbitration method. In the former case, the arbitration agreement shall be made in such a way as to reflect the parties to the dispute’s intention as to how to reach a settlement. Therefore, the details of such agreement differ from one case to another, depending on the specifics of each dispute and the different intentions of the parties thereof. In the institutional arbitration, however, the submission of a dispute to institutional arbitration allows for not responding to all the details of the arbitration agreement and for simply resorting to what has been included in the selected institutional arbitration policy in this respect. There can be no doubt that the institutional arbitration policy differs from the ad hoc arbitration in that the agreement to the latter may omit the regulation of some specific matters. The first policy established a beforehand, detailed regulation for most arbitration matters. In addition, institutional arbitration provides specialized services in the monitoring of the progress of proceedings.

1. Dr. Ahmed Sharaf El-Ddine, Studies in Arbitration in International Contracts Disputes, op cit, p.426, Dr. Nariman Abdul Qader, Arbitration Agreement and its Exemplary Form, op cit, pp.254-255

It can be observed that submission to institutional arbitration required the observance of the provisions contained in its legal policy, with respect to the method of selection of arbitrators and application legal rules, unless otherwise agreed.

The most dangerous type of arbitration clauses in the banking field is defined as a “blank arbitration clause” or “blank clause”. Blank arbitration clauses provide for the settlement of dispute by means of arbitration, without any identification of the arbitration provisions. This type of clauses creates numerous problems, given the differences that may arise between the parties later on, with respect to the appointment of arbitrators or regulation of procedures, etc.

4- Formation of the Arbitration Panel

The major issues associated with this subject are represented by the number of arbitrators, the method of their selection and their conditions. In order to ensure the effective performance of arbitral procedures and facilitate the decision-making process, it is preferred that an individual number of arbitrators be fixed. The selection of a sole arbitrator helps reduce expenses. But this does not ensure the representation of the cultural backgrounds of the parties to the dispute, if they are numerous. Therefore, work is being conducted for the formation of an arbitration panel consisting of three arbitrators, with each party selecting the arbitrator thereof and agreement is to be reached as to the appointment of the third arbitrator, who normally acts as the chairman of the panel. Also, agreement must be reached as to the nationality of the sole arbitrator or third arbitrator. In fact, the latter plays a critical role in the settlement process in the event of a tie vote in the arbitration panel.

5- Arbitral Procedures

A good Banking Arbitration Agreement must regulate the arbitral proceedings, i.e. the detailed rules that apply to the procedures of the dispute, from the time of submission of application until the issuance of the award. ¹

The procedures followed by arbitrators differ by the type of arbitration. In other words, the arbitral procedures differ depending on whether the selected arbitration is an ad hoc arbitration or institutional arbitration.

Regarding to institutional arbitration, when the parties select a specific institution to run the arbitral process, the pre-established regulations of such institution apply with force of law. Therefore, there would be no problem because, by selecting a specific institution, this means that the parties have agreed to implement its regulations relating to the arbitral procedures.

With respect to ad hoc arbitration, the parties may choose between two solutions: First: they may themselves identify the necessary procedures and let the arbitrators decided on the other procedures; or Second: they may select the procedures established by either a national law or a permanent arbitration institution.

6- The Applicable Law to the Subject-Matter of the Dispute:

¹ Dr. Ahmed Sharaf El -Ddin, Studies in Arbitration in International Contracts Disputes, op cit, P.428. Dr. Nariman Abdul Qader, Arbitration Agreement and its Exemplary Form, op cit, PP.260-262.

First, we want to note that we are not addressing here the applicable law to the subject-matter of dispute in banking contracts, but rather we will address the drafting of the provisions of arbitration and how should it be drafted.

In ad hoc arbitration, the applicable law to the subject-matter of the dispute shall be identified through the contractual parties' selection of a relevant law. The parties may select such law directly or reference may be made to the conflicts of laws rules in a specific country. It must be noted that while some banks are keen on selecting their internal law to govern potential disputes with their customers, but the drafting of the applicable law clause may appear in a form that allows the application of other rules, like the international law, in specific cases or suspend the application of internal law provided that it conforms to the international law principles.

The contractual parties may authorize the arbitration panel to select the suitable law. If the provision is drafted in this way, the arbitration panel selects the applicable law, in light of the particularities and indicators of the contract. Usually, the arbitration panel selects the law that is most relevant to the subject-matter of the dispute. This law can be identified by resorting to the conflict-of-laws rules in the seat-of-arbitration law. ¹

In the event that the dispute is referred to an institutional arbitration panel, the parties may opt for the application of law of this panel.

Finally, upon drafting the provision of the applicable law to the subject-matter of dispute, it must be clarified that

¹ Dr. Ahmed Sharaf El -Ddin, Studies in Arbitration in International Contracts Disputes, op cit, P.21.

the objective rules shall apply and not the conflicts of laws rules in the law.

7- Seat of Arbitration

This provision can be drafted either by determining the location of arbitration directly by any agreement of the parties, or by authorizing the arbitration panel to determine such location.

In some cases, the determination of the seat of arbitration affects the law applicable to the dispute proceedings and subject, which requires a thorough selection. ¹

The parties may find that it is appropriate to select a place where the arbitration law provides a suitable legal framework for the settlement of the banking disputes in accordance with the rules thereof. The parties may agree that the arbitration shall take place in the country of the party against which the claim is filed. In fact, the implementation of award issued against the latter in the country thereof will not be subject to the issued encountered in the implementation of a foreign award.

8- Language of Arbitration

The parties often disregard the identification of arbitration language, whilst believing that the arbitration language will be the contract language. This is a huge mistake. In fact, the language of the contract may be taken into account, but the arbitration language may be different.

¹ Dr. Ahmed Sharaf El -Ddin, Studies in Arbitration in International Contracts Disputes, op cit, P.22

One language to be used across all stages of bank arbitration, including the issuance of award, shall be selected, such as the language of the contract, subject-matter of the dispute. Also, the parties shall determine the types of documents or correspondence to be submitted in a specific language or translated, as the case may be. ¹

Failure to select the arbitration language in the bank agreement, the arbitrators shall select such language, provided that their choice may sometimes be unexpected by the parties.

At all events, if the parties shall fail to reach agreement as to the arbitration language, each party shall at least assume the respective translation fees. Also, the determination of arbitration language in the arbitration agreement helps select arbitrators who are well-acquainted with this language. It should also be noted that the Arabic language is rarely used in international banking arbitration cases.

9- Arbitration Expenses

Arbitration expenses include the arbitrators' fees and procedures fees. Each party shall assume its share, according to the agreement. It may be agreed to authorize the arbitration panel to distribute these expenses, which the panel can distribute it equally between the two parties, providing that each party shall assume the fees of its own

¹ Dr. Nariman Abdul Qader, Arbitration Agreement and its Exemplary Form op cit, P.259; Dr. Ahmed Sharaf El-Ddine, Studies in Arbitration in International Contracts Disputes, op cit, P.22

arbitrator. Also, the losing party may be compelled to bear such expenses.¹

Based on the foregoing, it can be established that the bank arbitration agreement, whether a clause or accord, constitutes a basis for the arbitration panels' work, hence the importance of the proper drafting of the provisions of the Banking Arbitration Agreement, in such a way as to ensure the impossibility of evading such provisions or interpreting them in a conflicting manner, on the one hand, and establishing the arbitration ruling on a legal reference recognized by the two disputing parties on the other. Thus, the provisions of the Banking Arbitration Agreement shall be drafted in a proper manner, while highlighting the importance of each provision in such a way as to ensure the effectiveness of arbitration in the field of banking transactions.

Interpretation of Banking Arbitration Agreement

In its interpretation, a Banking Arbitration Agreement is subject to the interpretation rules decided for the other contracts, being a consensual contract, even if it shall be made in writing in order to be executed and proved.

Moreover, the Banking Arbitration Agreement falls outside the scope of general rules or resorting to courts, which requires an individual wishing to claim his rights to resort to the country's courts according to the rules laid out in this respect. By agreeing to arbitration, an individual may resort to other solutions than the

¹ Dr Ahmed Sharaf El-Ddin, Studies in Arbitration in International Contracts Disputes, op cit, P.22; Dr. Nariman Abdul Qader, Arbitration Agreement and its Exemplary Form op cit, P. 262

courts in order to claim the rights thereof. Therefore, while interpreting this agreement, judges shall exert due diligence in order to find out about the real intention of the parties to such agreement. Also, the litigants' agreement may under no circumstance be interpreted as an arbitration contract, unless the parties' intention to resort to arbitration to settle their disputes is totally clear.

For instance, if the international banking contract contained a provision stating that "arbitration, if any, shall take place in London, in accordance with the British law" without including an arbitration clause, such provision shall not be interpreted as an arbitration clause, but rather as a condition related to arbitration if the parties shall later agree to settle the disputes arising out of the contract by means of arbitration.

In this respect, the judge shall stick to the principle of restrictive interpretation in identifying the dispute subject-matter of the banking arbitration and to limit himself to the definition of the disputing parties of this subject matter. Then, it is not allowed to expand on the same or to take it as a benchmark. Therefore, if there was an agreement on arbitration about the interpretation of a certain contract, arbitration will not extend to disputes arising from the execution of this contract.

Second Section
Validity Conditions for
Banking Arbitration Agreements

An arbitration agreement in banking disputes is recognized as a contract just like any other contract, whereby the parties to such contract are bound to fulfill their obligations. Therefore, the general conditions for the validity of such commitment should be satisfied. Nevertheless, arbitration regulations and comparative laws did not simply bow to the need for the general conditions of arbitration agreement to be satisfied, but rather required a special

condition to be satisfied in such agreement, otherwise it would be deemed to be invalid.

We will address each type of these conditions apart in a separate requirement, as follows:

First Subject: Objective Conditions for the Validity of the Arbitration Agreement in Banking Disputes

Second Subject: Formal Condition for the Validity of Arbitration Agreement in Banking Disputes

First Subject

Objective Conditions for the Validity of Arbitration Agreement in Banking Disputes

To ensure the validity of an arbitration agreement in banking disputes, the same objective conditions which apply to all contracts apply to arbitration agreements. A Banking Arbitration Agreement is based on the will of the parties, i.e. the mutual agreement between the parties (the bank and the client) enjoying legal capacity to enter into the agreement, with the presence of a subject-matter which is the dispute being arbitrated.

The will of the parties must be directed towards a legitimate objective achieved through this commitment. This is the motive, and as the motive doesn't involve any obstacles in this

respect, we will address hereafter the condition of consent and affirmation, then the legal capacity to enter into a contract, as well as the subject-matter of the contract. These conditions constitute part of the validity conditions of any contract generally. The remaining conditions required for the validity of a contract generally will be examined under the civil law. For our part, we will address the aforementioned conditions, as follows:

First Requirement: Consent

Second Requirement: Legal Capacity to Enter into an Arbitration Agreement in Banking Disputes

Third Requirement: Subject Matter of the Arbitration Agreement in Banking Disputes

First Requirement

Consent

Consent to enter into arbitration agreement in banking disputes is a mutual consent by the two parties to such agreement to use arbitration as a means of settling the disputes that have arisen between them, or otherwise that are likely to arise in the future. Such consent is prerequisite condition for the Banking Arbitration Agreement, which can only be valid upon satisfaction of such condition. Consent to enter into an arbitration agreement is a required condition even if a public or private natural or moral person enjoys legal capacity.

Given that the Banking Arbitration Agreement is a contract, it must be based on the satisfaction and agreement of the parties to settle the dispute that will arise between them by means of arbitration. Such will must be expressly expressed without any

vices of consent¹. Once a party expresses a serious desire to use arbitration as a means of settling disputes, and the other party expresses a similar desire, we can then speak of a mutual consent to enter into an arbitration contract. While the country's judiciary system is the natural way of settling disputes, resorting to other methods of dispute settlement must be clearly identified. If either party expresses its intent to settle the dispute by means of arbitration, the other party's acceptance must be definite and effective in shifting the point of reference or jurisdiction from the country's courts and transferring it to the arbitration's jurisdiction. Only then could it be said that there is a mutual acceptance and agreement between the parties to the arbitration².

If arbitration agreement in banking disputes takes the form of an arbitration clause in the original contract, consent as to the arbitration clause is also recognized as a mutual agreement between the parties to the original contract, based on the negotiations that took place between the parties to the contract. Thus, the bank arbitration clause does not require special agreement.

Nevertheless, if arbitration agreement in banking disputes takes the form of an arbitration accord, it is recognized as a special contract between the two parties, outside the scope of the original contract. In this case, consent and acceptance is required with respect to the principle of resort to arbitration as a subject matter of the accord, and such agreement must be evidenced in

¹Dr. Samiha Al Qalyubi, Arbitration Agreement, conferences given in the second specialized course on international arbitration, International Arbitration Center for the African and International Lawyers Union and the Arab Arbitration Center, Cairo, Session held on January 2006, P. 12, Dr. Fayez Naim Radwan, Arbitration Agreement according to the UNCITRAL Rules on International Commercial Arbitration, Security and Law Journal, Dubai Police Academy, year 15, Issue 1, January 2007. P. 83

² Dr. Ahmed Abdul Karim Salameh, International and Internal Arbitration law, Dar Al Nahda Al Arabeya, Cairo, 1st edition, 2000-2001, P.379

writing, and the bank arbitration accord must be signed by the parties.

The agreement of the parties to the arbitration agreement in banking disputes must take place over substantial matters pertaining to arbitration, i.e. all the subjects mentioned before, especially the identification of the subject matter that the arbitration panel will decide upon.

The identification of the subject-matter of bank arbitration depends upon whether the arbitration agreement takes the form of an arbitration clause or arbitration accord; if arbitration is resorted to through an arbitration clause, the subject-matter of the dispute is not specified in detail such subject-matter will not be required to be specified prior to the commencement of arbitral procedures. However, if the arbitration agreement takes the form of an arbitration accord, the identification of the subject-matter of arbitration must be an easy process, for the dispute has already taken place. Therefore, the subject of agreement must be specified.

Often, the expression of the will is explicit. The two parties enter into a Banking Arbitration Agreement or provide in the original contract for resorting to arbitration upon occurrence of a dispute. ¹ But the question arises: can the expression of will regarding the arbitration agreement be implicit?

Consent to arbitrate requires evidence of such agreement. In the context of banking transactions and associated documents, or methods of dealing whereby an arbitration agreement may be agreed upon. Can such agreement apply to all subsequent transactions? If we assumed there was previous dealings between the customer and the bank to include the arbitration clause in the documentary credit concluded between them earlier, then they entered into a documentary credit that did not contain an arbitration agreement and clause, is it possible to depend on the

¹ Dr. Muhssen Shafeeq, International Commercial Arbitration, op cit, P. 174

frequency of dealings between them to settle disputes by means of arbitration, assuming that there is an implicit agreement.

Some scholars believe this is possible, unless it has been established under the new letter that the two parties have intentionally made no mention of such agreement, on the one hand. On the other, others believe that the Egyptian legislator, through Articles 4 and 10 Egyptian Arbitration, stipulated that the parties' will to use arbitration as a means of settling disputes must be explicit.¹ As consent and acceptance are recognized as a key condition in the arbitration agreement, the arbitral body's jurisdiction over the conflict, although primarily based on the law that allowed for the transfer of jurisdiction from the courts, is based directly, and in each case apart, on the agreement of the two parties. This agreement and acceptance couldn't just be presumed, but requires evidence of such agreement.² They grounded their argument by stating that an arbitration agreement falls outside the scope of the general litigation procedures; therefore it shall not be presumed but expressed in an express manner, being an exceptional system. It must be referred to specifically.

However, this leads to a more thorough question: when the bank includes an arbitration clause in its documents, or a clause referring to a special regulation of the bank for the settlement of disputes, arbitration is established as the sole means of settling disputes between the bank and the other parties to the contract. Is the customer's consent presumed?

To answer this question, we must first start to distinguish between two cases; the first being the awareness of the party

¹Nariman Abdul Qader, Arbitration Agreement and its Exemplary Form, op cit, O. 219, Dr. Mohamed Al Tehywai, Agreement to Arbitration can not be presumed but requires evidence of such agreement, House of University Publications, Alexandria, 2000, P. 128

² Appeal No. 67 of 31, Hearing of 24/5/1966, Technical Office Group Y 17, O.1223

dealing with the bank of the existence of an arbitration clause and the associated effects and the relevant acceptance thereof with their own freedom, and in such case the clause is deemed to be effective owing to the existence of the express will between the parties to the relationship, which is represented in the acceptance and affirmation.

The second, however, is when the bank imposes arbitration as a means of settling banking disputes that arise between the bank and its customers. In this case, the agreement and acceptance can be compared to a vice of consent and resort to arbitration is compulsory, meaning that the party may be deprived of a constitutional right. Therefore, the arbitration clause may not be taken into account if the other party rejected arbitration and wished to refer the dispute to the courts for the settlement of disputes between such party and the bank.

This opinion was adopted by the Supreme Constitutional Court of Egypt in its famous judgment in the case of Faisal Islamic Bank of Egypt. The court established the non constitutionality of paragraph 2 of Article 18 of the Law No. 48 of 1977 with respect to the establishment of Faisal Islamic Bank, which provides for submitting all disputes arising between the bank and its customers to arbitration, while confirming that the legislator may not impose arbitration on the persons not wishing to use it. Therefore, any arbitration imposed on the parties to the litigation must be recognized as arbitration without consent. It has been also indicated that “arbitration is founded upon the submission of a specific dispute between two parties to a third-party arbitrator, which shall be appointed by the parties or in light of the conditions established by the parties for the arbitrator to decide upon such dispute, by a decision that has no trace of bias or favoritism. Arbitration may under no circumstances be compulsory and imposed on either party. Arbitration is an agreement-based voluntary solution, whereby the parties indicate the scope of disputed rights between them, or other conflicts between them. By agreeing to submit the dispute to arbitration, the

parties undertake to abide by the arbitral decision and implement it in full.

Second Requirement

Legal Capacity Required for Entering into an Arbitration Agreement in Banking Disputes

Legal capacity, here, means the capacity required for agreeing on settling the banking disputes arising out of a particular contract by means of arbitration. Such capacity is required in order to allow for the commencement of legal actions. Prior to entering into a contract, one must know whether the relevant positive law directly authorizes or prohibits such action, in addition to knowing whether the other party to the contract has the capacity required to assume the rights and obligations provided for under the contract¹

A bank agreement to arbitration is a legal action. Therefore, the parties' will is to create a specific legal effect, i.e. depriving the court of its jurisdiction and using arbitration as an alternative solution. For a Banking Arbitration Agreement to be concluded, the two parties to such agreement shall have the capacity required to dispose of the rights, subject-matter of the arbitration. This means that the party should have reached the legal age. Every person authorized to dispose of his financial rights whether originally, by permission of the court, or under the rule of law shall possess the capacity required to enter into an arbitration agreement. In the event of a lack of capacity, an arbitration

¹ Dr. Mahmoud Al Sayed al Tehyawi, Conditions and Validity Criteria of Arbitration

Agreement, House of University Publications, Alexandria, no publication date, P.232-233

agreement shall be deemed to be null and void or cancellable, with no effect whatsoever.¹

The Egyptian Law established that the two parties to the arbitration agreement shall possess the capacity of disposition. Article 11 of the Egyptian Arbitration Law No. 27 of 1994 stated:” Arbitration agreements may only be concluded by natural or juridical persons having the capacity to dispose of their rights”.

Based on the foregoing, if a natural person satisfying the criteria provided for by law may use and agree on arbitration, the question arises whether a juridical person is entitled to enter into such agreement?

A juridical person may agree to arbitrate according to an express legal text, which established equal rights for both natural and juridical persons to use arbitration as a means of settling disputes. Article 1 of the Egyptian Arbitration Law stipulates the following: “Subject to the provisions of international conventions applicable in the Arab Republic of Egypt, the provisions of this Law shall apply to all arbitrations between public or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an arbitration is conducted in Egypt, or when an international commercial arbitration is conducted abroad and its parties agree to submit it to the provisions of this Law”.

As our study is centered on banks, our focus will be on banks as juridical persons. Banks are entitled to resort to arbitration, if they satisfy the criteria provided for by law, in order for such banks to be recognized as juridical persons, by registering in the commercial register after satisfying the criteria required for such registration. Once registered in the commercial register, they acquire their juridical personality. Thus, juridical personality

¹ Dr. Ahmed Abdul Kareem Salameh, International and Internal Commercial Arbitration Law, op cit, P.349

requirements must be met upon conclusion of an arbitration agreement”.

Banks are registered in a special register prepared for this purpose at the Central Bank. A bank must satisfy all the criteria required by law, according to the provisions set forth in Article 31 of the Bank Law.

It may appropriate to mention here that in addition to the conditions for acquisition of juridical personality by joint stock companies, the Bank Law No. 88 of 2003 established some conditions and procedures that banks should adhere to and satisfy, in order to register with the central bank. The Bank law regulated this matter in chapter 2 of Section 1. Articles 31 and 32 of the said law stated: “Any establishment desiring to exercise bank business shall be registered in a special register prepared for this purpose at the Central Bank, following the approval of its Board of Directors, upon the following conditions:

1- the bank shall assume one of the following forms: (a) an Egyptian joint stock company, all shares thereof being nominal (b) a public legal person, comprising within its purposes the exercise of bank business (c) a branch of a foreign bank, the head office of which enjoys a defined nationality, and is subject to supervision by a monetary authority in the country where its head office is situated;

2- the issued and fully paid-up capital shall not be less than five hundred million Egyptian pounds, and the capital appropriated for the activities of the branches of foreign banks in the Arab Republic of Egypt shall not be less than fifty million US dollars or their equivalent in free currencies;

3- The Governor of the Central Bank, following consent of the Board of Directors, shall approve the statute of the bank, and the management contracts to be concluded with any party entrusted with its management. This provision shall apply to any renewal or modification of the statutes or management contracts.

The branches and agencies of the licensed bank shall be recorded in the above mentioned register. The approval of the Board of Directors of the Central Bank shall be obtained before starting the establishment of the branch or agency, and before opening it for dealing.

Article 33 established the mechanism for registration application: “the registration application shall be submitted to the Central Bank, according to the terms and conditions indicated in the Executive Regulations of this Law, after paying a fee of ten thousand Egyptian pounds for the head office, and of seven thousand Egyptian pounds for every branch or agency. The proceeds of these fees shall be deposited in the Regulation and Supervision Fees Account at the Central Bank. A decision of the Board of directors of the Central Bank shall be issued, regulating this account and the rules of spending the reform. The applicant shall be notified of the approval decision, or of the documents and data (s) he is required to fulfill, by a registered letter with acknowledgement of receipt, within thirty days from submitting the application. If the applicant does not fulfill the said requirements within ninety days from the date of the said notification, (s) he shall forfeit his/her right to this application. The decisions issued by the Board of Directors of the Central Bank, approving the registration applications, shall be published in the Egyptian Journal at the expense of the licensed party.

Nevertheless, the question arises as to the impact of non-registration on the arbitration agreement?

According to the jurisprudence, the non-registration of a bank in the banks’ register has no impact whatsoever on its acquisition of legal personality as a joint-stock company, as long as such bank satisfies the legal criteria required under the Companies Law. Registration is just an administrative authorization to embark on the work. Thus, non registration has nothing to do with the conclusion of arbitration agreement by the

bank. In fact, the validity or nullity of such agreement depends upon its conformity or inconsistency with the legal provisions regulating it, and registration has no effect in this respect. 1

By possessing legal personality, banks enjoy an independent financial trust from their members. Therefore, banks assume rights and obligations and possess all the benefits associated with legal personality, which grant such banks the right to initiate all works to achieve the intended goals. Hence, the question arises whether banks, as legal persons, possess the capacity to agree on arbitration?

Banks are joint-stock companies enjoying legal personality. This personality is only revealed when such banks satisfy all the criteria for their legal existence and possess an independent financial trust from their members and have met all legal incorporation procedures. Then, and only then, would the arbitration agreement concluded by such banks be deemed to be valid. Failure to satisfy these procedures, this personality remains available among partners only. It can't be used as evidence against third parties.²

Nevertheless, third parties may insist on the legal personality of the company, even if the legal incorporation procedures referred to have not been satisfied. Third parties shall be notified upon satisfaction of the legal incorporation procedures provided for by the legislation.

¹Dr. Rida Al Sayed Abd El Hamid, Banking System and Bank Transactions, Dar Al Nahda Al Arabeya, 2006, P.38, Dr. Ali Jamal el dine Awad, Bank Transactions from a Legal

Perspective, Dar Al Nahda Al Arabeya, 3ed., 2002, P.20

² Dr. Samiha Al Qalyubi; Commercial Companies, Second Edition, Dar Al Nahda Al Arabeya, 1992, P.96

Based on the foregoing, it can be established that once the banks possess full capacity, they are entitled to enter into an arbitration agreement with any local or foreign party, whether the relationship is contractual or not, according to Article 11 of the Egyptian Arbitration Law which states that: “Arbitration agreements may only be concluded by natural or juridical persons having the capacity to dispose of their rights”.

If an arbitration agreement has been concluded by a person not having the capacity to dispose of their rights, such agreement shall be deemed to be invalid. Article 53/1 (b) of the Egyptian Arbitration Law stipulates that “1. an arbitral award may be annulled only: b) If either party to the arbitration agreement at the time of the conclusion of the arbitration agreement fully or partially incapacitated according to the law governing its legal capacity”

Pursuant to New York Arbitration Convention, a lack of capacity shall result in the decision not being recognized and implemented.

Bank's Power to Enter into an Arbitration Agreement

The question that may arise here is this: since banks, as legal persons, are entitled to enter into an arbitration agreement, who is authorized to conclude such agreement?

The authority of the person who signs the arbitration agreement on behalf of the banks is of special importance, given the effects and outcomes of such signature. As is well known, the chairman of the bank's board of directors or general manager possesses the authority to run the bank and perform all acts that fall within the scope of their mandate, in line with the strategies established by the General Assembly. Thus, the matter regarding whether such person is entitled to enter into an arbitration agreement is regulated under the bank's regulations or by an authorization of the General Assembly authorizing such person to enter into such agreement.

The bank's chairman of the board or general manager who was empowered to run the bank is entitled to enter into an arbitration agreement on behalf of the bank, although not entrusted with this work by appointment. As a matter of fact, arbitration has become a basic requirement for running banks, especially when it comes to international commercial relationships and the settlement of relevant disputes with third parties. ¹

Article 32 of the Egyptian Bank Law No. 88 of 2003 established the conditions that banks shall meet in order to register in a special register at the Central Bank, following the approval of the their boards of directors. Among these conditions: the bank shall assume one of the following forms:

- A. An Egyptian joint stock company, all shares thereof being nominal
- B. A public legal person, comprising within its purposes the exercise of bank business, or
- C. A branch of a foreign bank, the head office of which enjoys a defined nationality, and is subject to supervision by a monetary authority in the country where its head office is situated". Pursuant to this article, banks may assume the form of a joint-stock company.

Therefore, the Egyptian legislator has, under article 53 of the Companies Law No. 159 of 1981, granted the bank's general assembly and board of directors and the employees or the deputies appointed by these bodies, the authority of affecting the legal disposals on behalf of the bank, within the limits of law and the company's articles of association and bylaws. Therefore, the bank is responsible for any act or disposal performed by them during the exercise of management duties. The Egyptian legislator also empowered the board of directors to run the company (i.e. the bank in our field of study) in order to achieve its intended goals.

¹Dr. Mohsen Shafeeq, International Commercial Arbitration, op cit, P. 178

Articles 54 states that: “the Board of directors has all powers concerning the management of the company and may undertake all the business necessary for fulfilling its object”. According to the said article, Any action or disposal emanating from the General Assembly or the board of directors or any of its committees, or its representatives in the management, will be binding upon the company in the ordinary way. 1

Given the importance of signature of arbitration agreement, the authority of signature shall be reduced to some bank employees of a specific grade, or a number of employees collectively such appointment shall be recognized in the bank’s bylaws and the regulations and newsletters announced by the bank from time to time. Then, signature shall be issued by a person having certain authority, otherwise the clause shall be deemed to be invalid.² Nevertheless, third parties of good intention may insist on it.

Signature of Arbitration Agreement by an Unauthorized Person

As we have previously indicated, the authority of the person who signs on behalf of the bank is of special importance, given the effects of such signature. Often, the bank’s board of directors identifies the authorities and powers of the different administrative levels when it comes to signing on behalf of the bank. This does not create any problems, but the problem emerges when an arbitration agreement is signed by a person unauthorized to sign and conclude such agreement. Therefore, we must address this matter, given its significance in the practical life in the field of banks and dealing with others.

¹ Dr Samiha Al Qalyubi, Commercial Companies, Part II, Third Edition, 1993, Dar Al Nahda Al Arabeya, P. 463

² See Dr. Ali Jamal el dine Awad, Bank Transactions from a Legal Perspective, op cit, P. 549

The Egyptian courts have necessitated that a party verify the powers granted to the other party. Otherwise such party shall assume the consequences of such default, unless the director or the signatory had given the false impression that he possesses such authorities, making the other party believe that the person who signed is authorized to conclude an arbitration agreement.

Keen on protecting bona fide third parties dealing with the company's representative, the Egyptian legislator has expressly provided for the ability of third parties to protest on the actions performed by any representatives of the company in confrontation of the company, even if such actions exceed the powers granted thereto.¹

Articles 55 of the Companies Law No. 159 of 1981 states that: "Any action or disposal emanating from the General Assembly or the board of Directors or any of its committees, or its representatives in the management, in course of exercise of the business of management, will be binding upon the company in the ordinary way. Third parties, of good faith, may protest on such action in confrontation of the Company, even if the disposal is in excess of the authority of an issue organ, or if the legally prescribed formalities have not been observed in it. In all cases, the Company is not allowed to take on its responsibility any works or activities practiced by it effectively while its statutes do not allow it to undertake such works or actions.

The legislator protected bona fide third parties that concluded the arbitration agreement with the bank's representative who exceeded their powers. Thus, the bank is bound by this agreement and may not evade its responsibility in this respect, under the pretext that the bank's bylaws do not authorize the signatory to enter into an arbitration agreement.

¹ Dr. Samiha Al Qalyubi, Commercial Companies, Part II, op cit, P.463

However, article 58 states that: “whoever effectively knows or is in a position to know through his situation in the company or relationship with the company, the defects or deficiencies in the action to be insisted upon, in confrontation of the company, cannot be well-intentioned, under the provisions of the preceding articles”.

Whenever such third party’s awareness has been established or if such party was able to know that the person who concluded the arbitration agreement does not possess the authority to enter into agreement owing to such person’s relationship with the bank or position in the bank, such third party’s good faith no longer exists and the agreement shall be deemed to be null and void, for it was concluded by a person not possessing the authority to enter into such agreement.

Third Requirement

Subject –Matter of Arbitration

Agreement in Banking Disputes

In this requirement, we shall firstly address the scope of application of the Egyptian Arbitration Law No. 27 of 1994 to the banking disputes, and then we shall demonstrate the nature and characteristics of banking transactions that are subject to arbitration, as follows:

First: scope of application of the Egyptian Arbitration Law to the banking disputes

The subject-matter of an arbitration agreement in banking disputes is the subject-matter of banking disputes arising or that are likely to arise in the future out of the contract and where the parties to the disputes have agreed to settle such dispute by means of arbitration.

The subject-matter of the dispute has to be specified, whether such dispute resulted in the case of an arbitration clause or that is likely to arise in the future in the case of an arbitration accord. Also, the subject-matter of the dispute must fall within the sphere of matters that may be subject to arbitration. In fact, there are some matters that may not be subject to arbitration.

When it comes to the identification of the subject-matter of arbitration agreement, i.e. the identification of the subject-matter of dispute (s) that the arbitrator(s) will decide upon, things depend upon the type of the arbitration agreement (arbitration clause or arbitration accord).

The issues associated with the identification of the dispute(s) to be referred to arbitration are not raised upon conclusion of the Banking Arbitration Agreement in the form of an arbitration accord. In arbitration accords, the dispute has taken place prior to the conclusion of the accord, thus it is easy to identify the dispute and the mission of the arbitrator(s), unlike Banking Arbitration Agreements that take the form of an arbitration clause. In the latter case, it is not paramount that the arbitration clause includes the disputed matters, for it is entered into prior to the occurrence of the dispute between parties that do not expect any dispute at all to take place between them. Therefore, they do not lay great importance on the conclusion of such arbitration clause, which is concluded in the form of a general text that does not adequately specify the dispute.

Nevertheless, the most commonly used type of arbitration agreements is the arbitration clause. Such clause is a form of arbitration agreement. And, just like any other agreement, it shall contain a subject-matter which shall be specified; otherwise the clause would be deemed to be null and void ¹. In the event that a thorough identification of the dispute is difficult in the arbitration clause, it may not be agreed to submit all disputes arising between the parties in the future in respect of their relationship and generally to arbitration. Disputes over which an agreement to arbitration has been reached relate to specific banking relationships (e.g., documentary credit or letter of guarantee, etc.), no agreement on arbitration may be reached with respect to non-specified banking relationships or banking relationships that do not yet exist.

The subject-matter of an arbitration agreement necessarily exists upon existence of the dispute itself. Therefore, the arbitrator, upon conclusion of the arbitration agreement and commencement of dispute examination when it comes to a banking arbitration clause, must incite the parties to issue an accord, or issues the accord himself, and causes them to sign such accord. The accord must specify the disputed matters that can be recognized as subject-matter of the arbitration.

Also, the arbitrator must specify the dispute and his authorities in this respect and the rules pertaining to arbitral procedures, in addition to identifying the applicable law and other data that facilitate the arbitral process. If the bank arbitration accord did not determine the disputed matter, such accord shall be deemed to be null and void. ² Arbitration must be based on a valid arbitration agreement and the arbitrator may only settle disputes that the parties agreed to submit to such arbitration. Therefore, an arbitral award that issued without mentioning the subject-matter of arbitration agreement or ruling on something that exceeds the

¹ Dr. Fathi Wali, Arbitration Law between Theory and Practice, op cit, P.131

² Dr. Fathi Wali, Ibid, P.134

parties demands or on something different from their demands shall be annulled or not recognized and may not be implemented.

With respect to the identification of the scope of matters where arbitration can be resorted to and where parties may agree on submitting such matters to arbitration, it can be said that arbitration can be resorted to in all matters that fall outside a specific exemption. Article 11 of the Egyptian Arbitration Law established the matters that may not be referred to arbitration: “arbitration is not permitted in matters which cannot be subject to reconciliation”

Article 551 of the Egyptian Civil Code identified the matters which cannot be subject to reconciliation. The said article states that “reconciliation cannot be made on any question touching the status of individuals or public policy, but a compromise may be made with regard to proprietary interests arising out of the status of individuals or out of a penal offence”

While the matters referred to above may not be the subject of an arbitration agreement, because they relate to the status of individuals and their status in the family, arbitration can be however used with respect to the resulting financial matters and interests.

In regard to the matters pertaining to public order, public order is a flexible and relative idea that differs from one country to another and from one era to another. Examples include: disputes pertaining to the acquisition or loss of nationality and disputes pertaining to sovereignty acts.

The conventions tried to identify the subject matter of arbitration in commercial matters, including Geneva Protocol 1923, which does not compel a country to recognize the validity of an arbitration agreement unless it relates to matters that can be settled through arbitration. Such Protocol granted countries the

right to limit their recognition of arbitral awards to commercial matters.

Also, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provided for the recognition of arbitration agreements, unless the subject-matter of these agreements relates to disputes that may arise, i.e. The applicable law in terms of the subject-matter of the dispute does not prohibit the parties from resorting to arbitration upon occurrence of the dispute in such arbitration.

Nevertheless, the Model Law did not make reference to the matters that may not be subject to arbitration and left the matter to the state, according to its legal system, to define the framework whereby arbitration can be conducted in its jurisdiction and such framework must be limited to its public order.

As the subject of this study is the Arbitration Agreement in banking transactions, it is necessary to review such banking transactions in some detail, as it is the subject matter of the Agreement.

Second: the Nature and Characteristics of Banking Transactions that are subject to Arbitration

Banking transactions were introduced to conclude commercial deals since the existence of money. The legislative evidence was found in the old ages indicating the existence of primitive transactions that are based on fixed term-interest loans.

Soon, the idea of banks in the middle ages, given the development and prosperity of commerce and the emergence of new markets in the cities, (such as Venice and Genoa) necessitating the introduction of commercial papers as a means of transferring money among these cities, leading to the appearance of the first technical methods adopted by banks later to create credit.

On the Egyptian level, the Egyptian Banking Law No. 88 of 2003¹ on the Banking Sector and Money defined banking transactions in Article 31 states that “In applying the provisions of this Article, bank transactions shall mean any activity comprising, basically and habitually, the acceptance of deposits, the obtainment of finance, and the investment of these funds in providing finance and credit facilities and contributing to the capital of companies, and all that is considered by banking tradition as bank business.”

In fact, trying to establish a generic definition of bank transactions based on their subject-matter or content is very difficult, given the diversity, rapid development and difference of bank business, depending on the bank’s specialization and the market’s need².

That is, despite the fact that a facility is recognized as a bank based on such definition. A bank is an establishment that undertakes banking business professionally. ³

However, the Egyptian legislator, as indicated in the Law No. 88 of 2003 Promulgating the Law of the Central Bank, the Banking Sector and Money, established the definition of banking transactions. But, we believe the legislator has failed in such attempt. In fact, the definition was not generic and this is

¹ Dr. Reda Al Sayed Abdul Hameed, *The Banking System and Bank Transactions*, op cit, P. 5

² A great example is that the most reputable countries in the banking field, such as France and England, have simply enumerated these transactions, without establishing a specific definition.

³ Dr. Reda Al Sayed Abdul Hameed, *Ibid*, P. 17

evidenced by the fact that the legislator left room for the addition of further transactions.¹

In all cases, the activity of commercial banks can be simply summed up in receiving funds and savings from the public in the form of deposits, to be granted by the bank, after several calculations and expectations, to those who wish to obtain credits.

In so doing, the bank creates tools and means of payment, i.e. deposit money. The bank therefore can be compared to a “warehouse” of deposits that acts as a mediator between the depositor and borrower.²

Noteworthy is that, while the commercial banks assume a prominent role in the economic and commercial field and undertake funding and credit activities inside the countries, but their role is of no less importance in international commerce. In either case, banks undertake their activity through banking transactions embodied by commercial contracts tying banks to customers.

These contracts are characterized by the following:

Contracts binding on both parties: the parties (bank-customer) to such contracts are bound by obligations.

Consensual contracts: the legislator did not limit such contract to a specific type. These contracts are deemed to be concluded by the mere acceptance and agreement of the parties, which can be proven through all means of evidence.

¹The Egyptian legislator should have simply enumerated these transactions without trying to establish a generic definition thereof, just like the French legislations in this respect.

² Dr. Rida Al Sayed Abdul Hameed, Banking System and Bank Transactions, op cit, Clause (1), P. 118

Commercial contracts for the bank: they are banking transactions recognized by the legislator as trading activities that are exercised on a contracting basis, according to Article (5) of the Law No. 1999 on Commerce. For the customer, however, the status of the contract differs depending on whether or not the customer is a tradesman.¹ This means that if the customer is a merchant, the contract will be recognized as a commercial contract for both parties (bank and customer), however, if the customer was not a merchant, the contract will be commercial with regard to one of its parties (the bank) and civil with regard to the other party (the non-merchant customer).

Fixed-term contracts: the parties to such contract must fix its term in advance, i.e. upon execution of the contract. In addition, neither party may terminate such contract prior to its expiration, unless by mutual consent, otherwise such party shall indemnify the other party, unless such termination was justified.

In this respect, the development of banking activity and its size and the diversity of its phenomena, has urged banks to observe the considerations of speed required by such banking transactions and to facilitate these transactions and their procedures, in order to avoid high costs. To that end, banks have sought to establish printed samples of the different bank contracts. The use of the latest equipment and machineries in the field of banking activity has allowed for the standardization of banking transactions and contracts to allow for their automated processing at the bank.

¹ This means that a commercial contract does not differ from the civil contract in terms of its components or technical elements. In other words, the structure of the contract itself remains the same, irrespective of whether such contract was commercial or civil. In addition, commercial contracts, just like civil contracts, are subject to the general rules in the contractual commitment, as regulated under the civil code.

See Dr. Hussam Mohamed Issa, Commercial Contracts, Part 1, No Publisher, No Date, PP.3 Ff.

These patterns have rather imposed themselves on banks, given their resemblance across the banking activity as a whole.

Noteworthy is that banking transactions have, and for the first time, been subject to an integrated legislative regulation under the Trade Law No. 17 of 1999 providing for the application of the provisions of Chapter 3 of the Trade Law to banking transactions. This chapter includes 77 articles (from Article 301 through 377).¹

It may appropriate to mention here that the Egyptian legislator has codified what the banking established customs have settled upon long time ago regarding banking transactions. The texts related to these transactions did not include any new provisions.

However, in our view, those who established the trade law and who call for the establishment of written rules pertaining to banking transactions have sought to achieve the stability of transactions and to encourage bank customers. These written rules identify the obligations of banks and customers clearly, in such a way that each party will be aware of its rights and obligations under clear and thorough rules. The established banking customs, while they are aimed at ensuring the compatibility of banking activity with new circumstances, encompass several difficulties, whether in terms of awareness, conditions of application and difference from one place to another.

The explanatory memorandum of the trade law stated that the legislator's excuse for not regulating banking transactions underwritten texts since 1883, is that banks at the time of putting

¹ Banking transactions regulated by the legislator are represented by the following: Money Deposit (article 301 through article 309), Deposit of Debentures (articles 310-315), Letting of Safes (articles 316-323), Pawning of Securities (articles 324-328), Bank Transfer (articles 329-337), Ordinary Bank Credit (articles 338-340), Documentary Credit (articles 341-350), Discount (articles 351-354), Letter of Guarantee (articles 355-360), Current Account (articles 361-377).

those texts did not enjoy the status they enjoy currently enjoy. Their function was reduced to exchange and money trade activities and banks were not expected to become a key driver of the country's national economy. 1

Despite the diversity of banking transactions, they have some common characteristics that distinguish between them owing to the professional nature of those responsible for their execution, which has a bearing on everything pertaining to banking contracts, whether in terms of their execution, amendment or modification.²

Among these characteristics:

First: they enjoy an international status

The global geographic spread of banking activity and transactions has become a characteristic of the modern age, given the growth and development of foreign trade among countries and the existence of banking transactions that are capable of accommodating full economic operation of the external bank units, as well as the emergence of large facilities like multinational companies that need many capitals in funding their projects, it is often impossible for one bank to assume this role alone.

Second: they are based on the personal character of the contractual parties:

The character of the customer dealing with bank is always taken into account. Prior to dealing with anyone, especially when it comes to transactions that involve financial risks like credit facilities, the bank gathers all information pertaining to the

¹ Explanatory memorandum of the trade law of 1999, Advocacy, Part 1, June 1999, .467

² Dr. Reda Al Sayed Abdul Hameed, Banking System and Bank Transactions, op cit, Clause (1), P. 67

customer's conduct and behavior and current capacities, as well as its commercial reputation , so that the bank's funds will not be wasted. If any of the said elements are not satisfied, leading to the disturbance of the customer's financial situation, the bank-customer relationship will then be subject to deterioration. 1

On the other hand, the bank itself is taken into account by the customer, who may resort to one specific bank, depending on such bank's reputation and quality of banking activities that the customer wishes to undertake. Some banks are more specialized in a specific area of transactions than the others.

Third: these transactions are characterized by standardized:

The use of the latest equipment and machineries in the field of banking activity has led to the standardization of banking transactions and contracts.

Second Subject

Formal Condition for the Validity of

Arbitration Agreement in Banking Disputes

As we have previously mentioned, the conditions of validity for the arbitration agreement in banking disputes are similar to the conditions of validity of contracts generally, namely the satisfaction of the agreement, subject-matter and rationale requirements. But the question which arises: is there any special condition for the execution of arbitration agreement, like the writing condition, or oral agreement is enough? And, is the writing condition required for evidence or for conclusion?

¹ Dr. Ali Jamal El Ddin Awad, Banking System and Bank Transactions, op cit, Clause (2), P. 68

Different opinions were expressed as to the writing condition in arbitration agreement. Some legislations, advocated by some scholars and judiciary rules, see that the writing condition in arbitration agreement is for evidence. On the other hand, some other legislations consider that the writing condition in arbitration agreement is for conclusion purposes. ¹

Article 12 of the Egyptian arbitration law has become enforceable in this respect. It states: “The arbitration agreement must be in writing, on penalty of nullity. An agreement is in writing if it is contained in a document signed by both parties or contained in an exchange of letters, telegrams or other means of written communication”.

The arbitration law provided for the writing condition in arbitration agreement, meaning that Banking Arbitration Agreement must be in writing, otherwise it shall be deemed to be invalid”.

The majority of scholars agreed that the writing condition of the Banking Arbitration Agreement is a prerequisite for its conclusion and not for evidence purposes. If the Banking Arbitration Agreement is not concluded in writing, it shall be deemed to be invalid. Such invalidity relates to public policy. This was confirmed by the Egyptian Arbitration Law of 1994 which established the writing as a condition of validity in the arbitration agreement. It expressly established that the writing is a condition that must be satisfied in the arbitration agreement for conclusion purposes and not for evidence only. According to the said law, if an arbitration agreement is not concluded in writing, it shall be deemed to be invalid. Article 12 of the law states that: “The arbitration agreement must be in writing, on penalty of nullity. An

¹ Dr. Naji Abdul Mouammen, Possibility of Agreement to Arbitration by Reference in National Laws and International Trade Relationships, First Regional Introductory Session Held at the Bar Association in Port Said, which was organized by the International Arbitration Center in Cairo, Period from 23-28 /7 /2005.

agreement is in writing if it is contained in a document signed by both parties or contained in an exchange of letters, telegrams or other means of written communication.” Based on this text, the written documents pertaining to the Egyptian law are divided into two types:

First: a document to be signed by the two parties in addition to its writing, like when the parties sign an agreement that includes an arbitration clause;

Second: a document that is not required to be signed but to be written, like the exchanged letters or telegrams that clearly demonstrate the parties’ agreement to arbitrate in writing.

The writing condition is satisfied through a document containing the agreement on arbitration and signed by the two parties, whether the agreement takes the form of a written accord signed by the parties ¹ or the form of an original contract that includes an arbitration clause, if the original contract is signed by the parties.

The signature of the contract by the parties is sufficient, even if the arbitration clause is included within the general conditions of the contract and the parties did not specifically sign the arbitration clause itself. ² This excludes the provisions of Article 750 of the Egyptian Civil Code which provided for the nullity of the arbitration clause included in the general conditions printed on the insurance policy, as it shall take the form of a separate special agreement from the general conditions.

In addition, in order to adhere to the arbitration clause, the original contract shall be signed even if such clause is contained in an annex to such contract, as long as such annex is attached to the

¹ Review article 12 of the Egyptian Arbitration Law.

² Dr. Fathi Wali, Arbitration Law between Theory and Practice, op cit, P.136

original contract upon its signature and the contract refers to such annex. 1

Some scholars 2 believe that letters written by the hand of their dispatchers and that do not bear their signature, provide the form required for an arbitration agreement to exist, if this agreement has been evidenced by the general rules of evidence. Telegrams, however, are not taken as evidence unless the original form is signed by the dispatcher. Letters exchanged by fax and computer provide a sufficient form for an arbitration agreement to be concluded, if their genuineness is not disputed. If disputed, the general rules of evidence shall apply.

These rules are in line with the provisions of New York Convention of 1958. Article 2 of the said Convention stated:

“1- Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them “

2- 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”

This means that the writing is a condition of validity (execution) for the recognition of an arbitration agreement,

In light of the aforementioned texts, it can be established that the writing has now become a total condition, not only for the evidence of contract but rather for its execution and validity. Thus, if such agreement has not been concluded in writing, it shall be

¹Dr. Samia Rashid, Arbitration in International and Private Relations, First Book, Arbitration

Agreement, Dar Al Nahda Al Arabeya, Cairo, 2006, P.244

² Dr. Mustafa Al Jamal and Okasha Abd El A'al, Arbitration in International and Internal

Special Relationships, op cit, PP.382-283

deemed to be null and void and if arbitration is included in a text of the original contract or in an arbitration accord. As arbitration agreement can only be concluded in writing, the appearance of the parties before courts is not sufficient, and the conclusion of contract may not be proved through acknowledgment and oath. 1

The writing condition required under the New York Convention of 1958, binds the countries that signed the agreement by the arbitration agreement in two phases:

Phase 1: the recognition of arbitration agreement, as paragraph 3 of Article 2 of the said convention stated: “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”.

Phase 2: the recognition of arbitral award; Paragraph 1 (b) of Article 4 of the Convention stated: any party requesting recognition and enforcement shall supply, at the time of application, the original agreement referred to in Article 2...”

The scholars have come to a consensus around the idea that the New York Convention of 1958 has established- through the writing condition of arbitration agreement- a unified rule that dominates and supersedes the rules included in the laws of the signing countries, where the writing is required as a condition, as provided for in the Convention strictly in the arbitration clause or arbitration agreement signed by the parties or the exchange of letters by the parties or telegrams, and not by any other means. This exchange can be made through a third party representing them, with each party sending the letter thereof to such third party

¹ Dr. Fathi Wali, The Mediator in the Civil Law, Cairo University Printing house, Cairo, 2001, P.938

and agreement to arbitrate is made without a direct exchange between them ¹.

The New York Convention of 1958 established a rule requiring the writing form condition to be met to ensure the validity of the arbitration agreement and not only to prove it. This means that an arbitration agreement that is not concluded in writing shall be deemed to be invalid and may not be proved by any other means. That is because the text is very clear and defines thoroughly the written arbitration agreement.

Also, paragraph 2 of Article 7 of the Model Law of 1985 stated that “the arbitration agreement shall be in writing...”. Then, it established that an arbitration agreement is in writing “if it is contained in an exchange of letters, telex, telegrams or other means of wired and wireless communication or in an exchange of statement of claims and defense in which the existence of an agreement is alleged by one party and not denied by the other “

Therefore, the Model Law of 1985 did not provide for the nullity of agreements that do not take the required form. Thus, an oral arbitration agreement shall be deemed to be valid under the provisions of the Model Law.

Furthermore, UNCITRAL 1976 established the writing as a condition of validity for the arbitration agreement for evidence and not for conclusion purposes. Paragraph 1 of Article 1 states that “Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, and then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.” Therefore, the arbitration agreement will not be subject to nullity in the absence of the required form of agreement. The writing as a condition of

¹ Dr. Fathi Wali, Arbitration Law between Theory and Practice, op cit, PP.137-138

validity for arbitration agreement under the UNCITRAL 1976 is required for proof and not conclusion of agreement.

With respect to oral arbitration agreements under the UNCITRAL rules, some Jurisdiction scholars relied on the provisions of Article 21/3 which stated: “a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defense or, with respect to a counter-claim, in the reply to the counter-claim.” The acceptance of plea with regarding to the subject excludes disputes in arbitration agreements if it was originally concluded orally.

Others have relied on the provisions of Article 18/1 stating: “unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.” This implies that any failure to annex a copy of the arbitration agreements with the application for arbitration will result in the claim not being examined at all until the arbitration agreement’s form is remedied to be implicitly accepted by the arbitral panel even if it was not concluded in writing. They believe this situation is practical, as oral arbitration agreements are rare.

On the other hand, paragraph 1 of Article 1 of the European Convention on International Commercial Arbitration of 1991 stipulated that “the term “arbitration agreement” shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter” and this has been recognized under the New York Convention of 1958.

According to the same paragraph: “...in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form

authorized by these laws”. Thus, this text establishes the validity of the forms authorized by the countries’ laws that do not require that an arbitration agreement be made in writing in order to be valid.

The writing condition for the execution of an arbitration agreement must be satisfied, not only to establish the validity of an arbitration clause or arbitration accord but also for the validity of any subsequent amendment to any clause in the arbitration agreement.

It should also be noted that the absence of any of the aforementioned validity conditions of arbitration agreements will result in the nullity and invalidity of such agreements. Consequently such arbitration agreement can be appealed. If the arbitrator finds that the arbitration agreement was invalid, the subject-matter of the dispute should not be addressed altogether.

While the conditions referred to above must be satisfied for an arbitration agreement to be valid, in addition to the provisions of the Civil Code generally, it enjoys some sort of independence, which we will be addressing in Chapter 3.

Second Chapter

The Effects of Banking Arbitration Agreement

In this Chapter, we will address the significance of the independence of banking arbitration agreements in Section 1, while dedicating Section 2 to reflect such effects in detail.

First Section

Independence of Banking Arbitration Agreement

The concept of independence is based on the idea that an arbitration clause, while it constitutes part of the contract conditions from a “physical” perspective, is totally independent from the contract from the legal perspective. This independence is mainly attributed to the difference of subject regulated by the

arbitration clause from that regulated by the contract containing such clause. 1

Therefore, it can be said that the independence of banking arbitration agreement implies that: the arbitration concluded in the form of an arbitration clause included in the original contract is independent from that contract and from the factors affecting its invalidity. To put it differently, the arbitration clause, in terms of its existence, validity and nullity, does not relate to the subject-matter of the original contract. The nullity, termination or invalidity of such clause does not result in the nullity of the original contract, and of course vice versa.

The independence is mainly related to the formation of two contracts: the original contract between the parties and the contract related to the arbitration agreement, even if it takes the form of an arbitration clause that forms part of the original contract between the parties. Here, the independence lies in the fact that these two contracts have different conditions.

However, the question of independence of the banking arbitration agreement with respect to arbitration accords is not addressed, for an arbitration accord is necessarily a separate contract concluded independently from the original contract for the settlement of disputes that have arisen out of such contract and its performance. Also, it was evident that an arbitration clause could be separated from the original contract that contained it, where such arbitration clause shall be found to be null and void and the while the original contract is valid. Thus, in this case, the courts shall have jurisdiction over the dispute, for it is just a

¹ Dr. Naji Abdul Moammen, Possibility of Arbitration Agreement by Reference in National Laws and International Trade Relationships, op.cit. P.36

matter of implementation of general rules in respect of the partial nullity or invalidity of the contract. 1

Based on the foregoing, it can be established that resort to banking arbitration can take place by means of a clause contained in the contract tying up the parties to the legal relationship out of which the dispute will arise- such clause is referred to as “arbitration clause”- or otherwise by means of an independent agreement from the original contract representing the legal relationship in respect of which the dispute to be settled has arisen. This means that the Banking Arbitration Agreement is always associated with a contract between the two parties to the legal relationship out of which the dispute to be settled through arbitration has arisen or will arise.

Hence, there is a connection between the banking arbitration agreement, which takes the form of an arbitration clause, and the original contract between the two parties to the legal relationship. Hence the question arises about the effect of the original contract on the banking arbitration agreement, especially if the dispute is linked to the validity of the original contract in case of its nullity or termination.. Will such nullity or termination affect the arbitration agreement? In other words: does the validity or invalidity of the original contract implies the validity or invalidity of the arbitration agreement? Or is the arbitration agreement considered independent from the original contract and remains unaffected by the fate of the original contract and thus remains valid and enforceable, even if the original contract is deemed to be null and void or terminated. ?

Oftentimes, one party may insist on the non-jurisdiction of the arbitration panel, on the grounds that the nullity of the original contract would result in the nullity of the arbitration agreement itself. Such party may also insist on the nullity of the arbitration agreement following the cancellation or termination of the original

¹ Dr. Mustafa Al Jamal, *Shedding Light on Arbitration Contract*, op.cit., P.214

contract. Of course, by saying that the validity or invalidity of the original contract affects the validity or invalidity of the arbitration agreement, arbitral procedures may not be initiated until the courts decide on the disputes relating to the jurisdiction of the arbitration panel, on the one hand. On the other hand, by accepting the principle of independence of arbitration agreement from the original contract that contains it, the arbitration agreement will not be affected by the fate of the original contract. Rather, the arbitration agreement remains binding and enforceable. ¹

The answer to this question can be divided into two options: First: if the banking arbitration agreement is connected to the original contract, the nullity or termination of the original contract will result in the nullity of the arbitration agreement. Thus, the arbitrator will no longer have legal grounds for settling the dispute. This, in turns, prevents the initiation of arbitral procedures until the courts decide upon the disputes relating to the jurisdiction of the arbitration panel.

Second: if the banking arbitration agreement is independent from the original contract, the nullity or termination of the contract would not affect the arbitration agreement, which remains valid and enforceable. The arbitration panel will, in this case, decide on its jurisdiction.

At all events, by accepting the independence of the banking arbitration agreement from the original contract, the original contract can be subjected to a legal system that is different from that governing the original contract. However, by insisting that the arbitration agreement is not independent from the original contract, both the original contract and arbitration agreement will be subject to the same legal system.²

¹ Dr. Mustafa Al Jamal, *Shedding Light on Arbitration Contract*, Ibid, P.214

² See: Dr. Samia Rashid, *Arbitration in Private International Relationships*, op.cit., P.78

For some time now, scholars and courts alike have settled on the idea that arbitration agreements are independent from original contracts.

In Egypt, the difference has arisen prior to the issuance of the existing Egyptian Arbitration Law No. 27 of 1994, as to the independence of arbitration clause.

Some 1 have insisted on the idea of non-independence of the arbitration clauses, on the grounds that the arbitrator draws the powers and authorities thereof from the contract that includes the arbitration agreement. And, if such contract is the subject of dispute between the litigants and its nullity or termination has been insisted upon, the arbitrator may not examine the matter.

Others² have insisted on the independence of arbitration clause from the original contract, being “an independent legal act, although contained in the contract. Therefore, arbitration clause survives the nullity of the original contract that contains it”.

This opinion as to the independence of arbitration clause was supported by a legal basis establishing that “the clause and contract have different subject-matters; the subject-matter of the clause is the settlement of disputes that may arise in respect of the contract, while the subject-matter of the contract depends on the type of contract”.

On the other hand, others have advocated the principle of independence of arbitration agreement on the ground that: (Egyptian courts adopt the principle of independence of arbitration clause and, if it was not expressly stated.

The court of cassation rules that: “the mere drafting and signature of arbitration accord would each drop the period of

¹ Dr. Ahmed Abu El Wafa, *Optional Arbitration and Mandatory Arbitration*, Monshat el Maref, Alexandria, 5th ed. No Date of Publication., P.33

² Dr. Fathi Wali, *the Mediator in the Civil Law*, op.cit., P. 927

limitation, because the accord is only an agreement as to the submission of a specific dispute to arbitrators and the adherence to their decision. It does not include a claim of right. If the accord contained an acknowledgment by the debtor of the right of the creditor or the existence of the debt itself, the period of limitation is dropped in this case due to this acknowledgement, whether it was express or implicit and not because of the clause itself’.

This ruling is decisive in defining the view of the Egyptian courts towards the enforcement of the principle of independence of the arbitration clause. The court of cassation distinguishes between the arbitration agreement and the subject-matter of the dispute submitted to arbitrators, whether such agreement takes the form of an accord or clause, on the one hand, and the subject-matter of the disputed right. It believes that both have separate rules and effects.

While the Supreme Court supports this principle in its entirety, i.e. irrespective of whether the transaction was internal or pertaining to foreign trade, it has however failed to recognize it as true. In the differentiation between the arbitration agreement and the original relationship, the court did not use the expression “independence of arbitration agreement from the original relationship, whether in the scope, content or conditions. The court contented could simply indicate that “In order to enforce the principle of independence of the arbitration agreement from the original relationship, the debtor’s acknowledgement of the debt is what drops the period of limitation and not the arbitration accord because this acknowledgement is related to the original relationship¹

The Egyptian Arbitration Law No. 27 of 1994 provided for the independence of arbitration agreement from the original contract containing it. The said law expressly recognized this

¹ Dr. Reda Obaid, Arbitration clause in Maritime Transfer Contracts, Legal Studies Review, Law School, Asyout University, Vol.6, June 1984, P.233-234

principle in Article 23 thereof, stating that: “the arbitration clause shall be treated as an independent agreement separate from the other terms of the contract. The nullity, rescission or termination of the contract shall not affect the arbitration clause, provided that such clause is valid per se.”

Therefore, the Egyptian legislator has taken a clear position by advocating the principle of independence of the arbitration clause, which shall not be affected by the nullity of the original contract containing it. Also, the Egyptian legislator acknowledged that the termination or cancellation of the contract does not affect the arbitration clause contained in such contract. In so doing, the Egyptian legislator arrived at a final decision regarding the difference of opinion as to the independence of the arbitration agreement from the original contract tying the parties up.

While the Egyptian legislator addressed the independence of the arbitration clause, without making any mention of the arbitration accord, the legislator examined the case where some believe that the arbitration clause is considered a provision of the original contract and, the invalidity or termination of the original contract will result in the invalidity of all its provisions including the arbitration clause. The legislator was thus keen on the independence of the arbitration clause, so that it survives the invalidity or termination of the original contract. And, if the arbitration clause that is considered a provision of the original contract is regarded as independent, this would evidently entail the independence of the arbitration accord. 1

In fact, an arbitration clause has its own subject-matter, and its own condition which the arbitrated dispute takes it away from the jurisdiction of the court and give it to a specific body appointed by the parties to the dispute, or which the parties agreed

¹ Dr. Fathi Wali, Arbitration Law between Theory and Practice, op.cit, P.95;
Dr. Fayez Naim Radwan, Arbitration Agreement According to the
UNCITRAL Rules on
International Commercial Arbitration op.cit, P.91.

upon the way of their appointment or otherwise entrusted the courts with their appointment, where applicable according to the legal system. In other words, the subject-matter of the arbitration clause is a pure procedural act, and is recognized as a separate, independent subject-matter from the subject-matter of the original contract containing it, such as credit contracts or loan contracts or others. Therefore, the difference of the two contracts' subject-matters results in the independence of these contracts, even if they were contained in one document. 1

The procedural nature of the arbitration clause is the reason behind its independence from the original contract. For example, the subject-matter of the original contract could be a loan for instance, and it is regulated according to the civil code or contracts law. But the arbitration clause is subject to the procedural law, which defines everything pertaining to the clause or arbitration agreement. Also, the subject-matter of the original contract is totally different from the subject-matter of the arbitration clause.

The UNCITRAL Rules on International Commercial Arbitration of 1976 have codified in Article 21/2 the principle of independence of the arbitration agreement. The said Article stated that “the arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause”.

In addition, the UNCITRAL Model Law on International Commercial Arbitration (1985) also provides for the independence of the arbitration agreement in Article 16, which stipulated that “The arbitral tribunal may rule on its own

¹ Dr. Mustafa Al Jamal, *Shedding Light on the Arbitration Contract*, op.cit., P.218

jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

Based on the foregoing, it can be established that the principle of independence of the arbitration agreement from the original contract was advocated under the national laws, international conventions, and bank arbitration regulations and terms.

The scholars justify the principle of independence of the arbitration clause from the original contract in many justifications:

If we have failed to authorize the principle of independence of the arbitration clause from the original contract, we would differentiate between the execution of the arbitration agreement in the form of an arbitration clause and its execution in the form of an arbitration accord. In this way, the arbitrator would be able, in the event of execution of the arbitration agreement in the form of an arbitration accord, to issue a final decision as to the nullity or validity of the original contract. This is unlike the execution of the agreement in the form of an arbitration clause, where the arbitrator’s decision as to the nullity or validity of the original contract will be subject to subsequent judicial control that might result in the annulment of the arbitrator’s decision. This differentiation between the two forms of arbitration agreements is not justified.

Also, it respects the will of the parties, who usually include the arbitration clause in the original contract in a broad manner, for they intend to submit all disputes that arise between them to arbitration, including the disputes regarding the validity or invalidity of the original contract that contains the arbitration clause. If the principle of independence of the arbitration clause

from the original contract was disregarded, that would narrow the scope of arbitration, contrary to the will of the parties. In fact, if they sought such narrowing, they would have expressed their wishes in the arbitration agreement.

Lastly, if we did not allow for the independence of the arbitration clause from the original contract, the arbitrator's decision as to the nullity of the original contract would also affect the competence and jurisdiction thereof. In fact, the nullity of the original contract that contains the arbitration clause would entail the invalidity of the arbitration clause, thus, the arbitrator's decision as to the validity or invalidity of the original contract will be subject to subsequent judicial control, which would require the judge to examine the subject-matter of the dispute to determine whether the arbitrator has ruled on the validity or invalidity of the original contract in a sound manner.

Therefore, the judge will intervene in the subject-matter of the dispute, which is rejected by the majority of the arbitration laws. Also, the termination of the original agreement does not entail the termination of the agreement to arbitrator, for the arbitration agreement is usually enforceable when the relationships between the two parties begins to deteriorate and either party uses the right thereof to terminate the contract. In this case, the role of the arbitration agreement begins, so as to remedy the situation between the two parties and determine whether such termination is authorized and whether the rights and obligations of each party shall become null and void. Therefore, the arbitration agreement survives the termination of the original contract, for its role begins upon such termination most of the time.

Noteworthy is that the idea of independence of the arbitration agreement from the original contract is not an end in itself, but rather is instrumental to arriving at the associated results, including:

First: the banking arbitration agreement can be null and void itself despite the validity of the original contract. So long as the banking arbitration clause is an independent agreement, its invalidity shall not affect the validity and enforceability of the original contract. Nevertheless, if the parties to the contract have expressly indicated that they consider the arbitration clause as a substantial clause for their acceptance of the remaining contract provisions, i.e. for the conclusion of the contract, the nullity of the clause results in the nullity of the contract itself. The original contract lays out the rights and obligations of the parties thereto, unlike the arbitration clause which aims at regulating the procedures pertaining to the way of settling the disputes that may arise out of the original contract. It is therefore recognized as a second contract included in the first contract.

Second: the fate of the original contract has no effect whatsoever on the banking arbitration clause contained in it. The nullity of the original contract may be insisted upon, while the banking arbitration agreement remains valid and enforceable under the law. In fact, the agreement remains valid and continues to have legal effect, even if the original contract has been annulled or terminated. Arbitration may be resorted to, despite the fact that the original legal relationship no longer exists or is not based on proper grounds, unless the reasons for such nullity or invalidity includes also the arbitration clause, e.g. if the contract was concluded by a person lacking capacity . This outcome was expressly codified under Article 23 of the Egyptian Arbitration Law which stipulate that” the arbitration clause shall be treated as an independent agreement separate from the other terms of the contract. The nullity, rescission or termination of the contract shall not affect the arbitration clause, provided that such clause is valid per se”

Third: the law applicable to the original contract may extend to include the arbitration agreement. The validity or invalidity of the arbitration accord depends exclusively on the rules required by applicable law. It may not necessarily be the

applicable law governing the arbitration agreement. The parties may subject it to a different law. If the arbitration agreement did not provide for the implementation of a specific law, the court may decide on the validity of the agreement independently from the law applicable to the original contract¹.

Fourth: the arbitration panel shall have jurisdiction over the initiation of arbitral proceedings and settlement of disputes pertaining to the validity of the original contract, according to the arbitration clause contained in the contract, for it draws its jurisdiction from the arbitration clause that is separate from the contract, subject-matter of the dispute. As article 22/1 of the Egyptian Arbitration Law provides². Therefore, it is futile to insist upon the non jurisdiction and competence of the arbitral tribunal on the grounds that the original contract that contains the arbitration clause was not executed, or is null and void, or otherwise has expired or has been terminated, This nullity, invalidity or termination does not prevent the enforcement of the arbitration clause contained in the contract, unless the parties have expressly agreed in the contract that the termination or cancellation of the contract includes all the terms of such contract, including the arbitration clause. In this case, the clause will also be subject to termination or cancellation.

Fifth: if the national courts shall establish, through interpretation or by a legislative text, that the restrictions

¹ The International Chamber of Commerce has confirmed this view under the decisions issued in 1986, which stated that “the parties shall be entitled to indicate, in the arbitration agreement, their desire to apply the law of their choice to the arbitration contract and the arbitration agreement. This also applies to the arbitral procedures. If the arbitration agreement did not provide for a specific law, the court may decide on the validity of the agreement independently from the law applicable to the original contract”.

² Article 22/1 of the Egyptian Arbitration Law stated that: “The arbitral tribunal is competent to rule on the objections related to its lack of jurisdiction, including objections claiming the non -existence of an arbitration agreement its extinction, nullity of said agreement, or that it does not cover the subject matter in dispute”.

contained in the internal legislations regarding the conditions of validity for arbitration agreements do not apply to the relationships pertaining to international transactions, the arbitration agreement draws its binding force from the “autonomy of will” principle directly, being an international principle that applies independently without observance of any internal or foreign national law .

Sixth: if the seat of arbitration under the agreement is abroad, or if the arbitration agreement refers to the application of the rules of a permanent arbitral panel existing abroad, the applicable rules in force in the country of arbitration or those contained in the rules of the permanent arbitral panel shall be applicable with respect to the validity or invalidity of the arbitration agreement, without the need for recourse to the provisions of the national law in this respect. ¹

Based on the foregoing, it can be said that the principle of independence of arbitration agreement from the original contract is worthy of recognition. Thus, if the arbitration agreement is considered to be independent from the original contract containing it, and if it was duly and correctly concluded, what would its effects be? This question will be addressed in Section 2.

Second Section

Effects of Arbitration Agreements in Banking Disputes

The direct effect of a banking arbitration agreement would be to withdraw the power of the country’s courts to rule on the

¹ Dr. Samia Rashid, Arbitration in International and Private Relations, First Book, Arbitration Agreement, op.cit., P.109

subject-matter-matter of the dispute that arises between the parties to the agreement and to submit the dispute to the arbitral panel. This effect is associated with the litigation procedures regarding the disputes arising out of the original relationship tying up the parties to the agreement. This effect is referred to as the procedural effect, which we will be addressing in Subject 1.

If the arbitration agreement is a contract, then such contract implies obligations for both parties and has a binding force upon both parties in that the disputes that arise out of their original relationship shall be submitted to arbitration. Neither party may evade the provisions of such contract or otherwise terminate it in its sole discretion. This binding force of the arbitration agreement is referred to as “the substantive effect”, which we will be addressing in Subject 2.

That being said, we will divide this Section into two Subjects, as follows:

First Subject: The Procedural Effect of the Banking Arbitration Agreement

Second Subject: The Substantive Effect of the Banking Arbitration Agreement

First Subject

The Procedural Effect of the Banking Arbitration Agreement

Each contract has binding force upon its parties. The banking arbitration agreement is a contract and thus this rule

applies to it. The two parties to the banking arbitration agreement undertake to submit their disputes to arbitration and to abstain from resorting to the country's courts, for national courts have no jurisdiction over the disputes which it has been decided to submit to arbitration, irrespective of whether such arbitration agreement took the form of an arbitration clause contained in a contract or an arbitration accord agreed upon following the occurrence of the dispute.

The New York Arbitration Convention of 1958 provided for the abstinence from resorting to the country's courts and the principle of exclusion of the original courts' jurisdiction over the disputes, subject-matter of the arbitration agreement, in paragraph 3 of Article 2, which stated that "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".

The said text provided for a unified substantive rule that prevails over the internal legislations, and which is observed by the courts of all the member states of the New York Convention, irrespective of the nationality of the parties to the arbitration agreement or the agreed-upon seat of arbitration.

In addition, the Model Law of 1985 provided for the principle of exclusion of the national courts' jurisdiction over the dispute, subject-matter of the arbitration agreement. The said law confirmed the provisions contained in New York Convention of 1958. Article 8 of the Model Law stipulated that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. Where the said action has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Also, Article 13 of the Egyptian Arbitration Law of 1994 states that: “1. the court before which an action is brought concerning a disputed matter which is the subject of an arbitration agreement shall hold this action inadmissible provided that the respondent raises this objection before submitting any demand or defense on the substance of the dispute. 2. The fact that the judicial action referred to in the preceding paragraph is brought shall not prevent the arbitral proceedings from being commenced or continued, or the making of the arbitral award”.

Pursuant to the said text, the respondent’s right to raise this objection owing to the existence of an arbitration agreement pertaining to the dispute raised with the court, shall lapse in the event of submitting any demand or defense on the substance of the dispute. The respondent’s submission of any demand or defense shall be recognized as a waiver of the arbitration agreement and acceptance of the national court’s jurisdiction over the dispute, subject-matter of the arbitration agreement.

In fact, the solution that the Egyptian legislator came up with is based on the nature of the arbitration agreement. Arbitration, by its very nature, is based on the will of the parties who chose arbitration as a method of settling the disputes arising between them. The parties, based on their agreement, may opt not to resort to the country’s courts, either expressly or implicitly. It is for that reason that the judge before which the dispute, subject-matter of the agreement, is raised cannot challenge the jurisdiction based on the existence of this condition.¹

When the plaintiff informs the contracting party of the need to appear before the country’s court, the plaintiff waives the benefit of the arbitration agreement. Also, the appearance of the respondent before the court without challenging the jurisdiction of such court is recognized as an acceptance by the respondent of the

¹ Dr. Hafiza Al Sayyed Al Haddad, Modern Trends relating to the Arbitration Agreement,

Dar el Fkr Al Gamie, Alexandria, 2001, P. 75

jurisdiction of such court. This agreement in the will of both the plaintiff and the defendant is imposed on the judge as any other agreement is imposed regardless of its nature.

Thus, the international conventions and national laws agree that the arbitration agreement may exclude the jurisdiction of the national courts over the dispute, subject-matter of the agreement. This is considered to be a *ratione personae* jurisdiction of the national court, which the stakeholder shall insist upon. The *ratione personae* nature for the lack of jurisdiction of the ordinary courts to examine the dispute, subject-matter of the arbitration agreement, leads to two outcomes:

First: the exclusion of national courts from the arbitral process is not a final, definite exclusion. Courts will still play a role in the arbitral process: the scope of this exclusion is limited to substantive disputes, subject matter of the arbitration agreement. National courts will still play a role in the arbitral process, beginning with the assistance in the appointment of arbitrators and the assistance in the execution of the arbitral award subsequently, in addition to the supervision and control over the arbitral proceedings and the possibility of resorting to national courts to take provisional or conservatory measures.

Second: the parties to the banking arbitration agreement may abandon such agreement by accepting the jurisdiction of the national courts and not insisting upon the arbitration agreement. In fact, if by the execution of the arbitration agreement it becomes final and effective to its parties, it therefore may not be abandoned at the sole discretion of either party. It is agreed that the express abandonment of such arbitration agreement must take place with the consent of the two parties thereto, by revealing to the court before which the dispute, subject-matter of the arbitration agreement, has been raised, that they have assigned this agreement, and by expressing their desire to proceed with the examination of the case before national courts.

But what about the provisional orders and conservatory measures issued by the national courts prior to challenging their jurisdiction over the dispute, subject-matter of the arbitration agreement and prior to the discontinuance of the case proceedings? Will they be cancelled or remain in force?

It is difficult, within the framework of arbitration in international banking disputes, to develop a uniform definition of provisional or conservatory measures, in the absence of a generic, common idea among the different national judicial systems, to which the national judicial system or the arbitration system may refer in the context of arbitration in international banking disputes. Thus, the national courts, when asked to take a provisional or conservatory measure, will determine the essence of this measure, in accordance with the national law thereof, being the applicable law, to know whether the required measure is considered to be a provisional or conservatory measure. The bank arbitrator, however, is an international arbitrator and not a local judge with a national law, thus, such arbitrator will be free to determine the essence of the measure required through the texts of the arbitration regulations governing the work thereof, as well as through the law selected by the parties to govern the arbitral proceedings, where necessary, to complete the missing arbitral regulations. But, on the other hand, the bank arbitrator will not be able to abstain from implementing the law, subject-matter of the arbitration, if it included commanding provisions related to provisional or conservatory measures.

With respect to national laws, Article 14 of the Egyptian Arbitration law No. 27 of 1994 stated that “Upon request of either party to the arbitration, the court of appeal in Cairo or any other court of appeal in Egypt that the parties may agree to resort to, may order the taking of an interim or conservatory measure, whether before the commencement of the arbitral proceedings or during said proceedings.

That being said, the existence of a banking arbitration agreement does not imply the prevention of the court from the authority to issue provisional, conservatory measures the court may deem appropriate, in accordance with the applicable law of pleadings in the judge's country. The New York Convention doesn't have anything that would stop this well-established judicial rule or compromise the jurisdiction of the national judicial system in this field which falls outside the issues that are agreed to be decided by arbitration. At the same time, the resort by either party to national courts to request the taking of a specific provisional or conservatory measure does not imply the assignment of the arbitration agreement by such party, and is not recognized as a reason for the extension of the mandate of the national courts to decide on the substantive aspects of the dispute.

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This has been recognized by some arbitral regulations, such as the UNCITRAL Arbitration Rules of 1976. Articles 26/3 of the said Rules stipulated that "a request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement".

If the other arbitral rules have failed to establish relevant provisions, the intent was to grant the arbitrators the power to take such interim or conservatory measures. Arbitrators should not be denied this power, but this does not prevent the fact that the claimant should not be allowed to choose between arbitration and courts when it comes to these matters, because if the required guarantee is available to the requesting party, then there is no issue. But the problem arises when the provisional measure relates to third parties over which the arbitration panel has no control or when the taking of a conservatory measure requires the intervention of national authorities in such a restraining measure which falls outside the capability of the arbitrator. At all events,

¹ Dr. Samia Rashid, Previous Reference, P.459-460

this power should not be granted to the national court to take provisional or conservatory measures as an excuse to intervene in the dispute, subject-matter of the arbitration agreement, which is regarded as an assault on the powers of the arbitrators.

Second Subject

The Substantive Effect of the Arbitration Agreement

The commitment of the parties to the arbitration is recognized as a “result commitment”. Such commitment is represented by their contribution to the taking of arbitration measures and abstinence from submitting the disputes arising between them with respect to the original contract to the courts of the country. Neither party to banking arbitration agreement may withdraw from the contract, terminate it, or otherwise amend it based on the unilateral will of such party. Should any party to the banking arbitration agreement seek not to perform the contract, such party may be compelled to fulfill its obligations by compelling such party to appoint the arbitrator thereof, submit the documents required, and initiating arbitral proceedings. The arbitration panel acts as the negligent litigant¹ and arbitral proceedings only cease by the issuance of one of the following two orders:

First: the issuance of a final award by the arbitration panel with respect to the dispute

¹ Dr. Fayez Naim Radwan, Arbitration Agreement According to the UNCITRAL Rules on International Commercial Arbitration, op.cit., P.95

Second: the consent of the parties to the agreement to withdraw and end the arbitral proceedings prior to the issuance of the award.

Based on the foregoing, it can be said that the substantive effect of the banking arbitration agreement can be divided into two parts: the first being positive, while the negative effect is represented by the parties' commitment to abstain from resorting to courts to settle the dispute, subject-matter of the arbitration. The positive effect, however, is represented by the ability of the parties to resort to an arbitration panel to decide on the dispute.

Therefore, our study of the substantive effect of the arbitration agreement will address two main themes: the negative effect of the arbitration agreement and the substantive effect as follows:

First: The Negative Effect of the Arbitration Agreement in Banking Disputes (Prevention of Resorting to Courts)

The arbitration agreement in banking disputes creates a mutual negative commitment binding the two parties to refrain from resorting to the courts to settle the dispute between them. This commitment is a voluntary commitment of the parties, by their Joint will, therefore, it can be waived by a similar mutual agreement.

In case any of the parties breaches this commitment and resorted to the judge, ignoring the arbitration agreement, the other party may plead this case by the arbitration agreement, and in this case the court will cease considering the dispute if the plea was verified. However, in case the opponent appeared before the court and submitted his substantive defense in the lawsuit, then realized at a later stage the importance of adhering to the arbitration agreement against his opponent, and plead by the arbitration agreement, or in case he did not submit the plead before the

judgment is issued by the Court of First Instance, and submitted it to the Court of Appeal, will the defendant's delay in submitting the plea by the arbitration agreement and his submission of substantive defense be considered an implicit expression of waiving his right to adhere to the obligation of not resorting to courts? On the other hand, may the judge refrain from settling the dispute pursuant to the applicable agreement, despite the defendant's failure to invoke it?

The judiciary agrees that the defendant ignoring the arbitration agreement and his involving in the subject reflects his will to release himself from the mutual commitment not to resort to courts, and to waive his right to adhere to this commitment against his opponent. The commitment not to resort to courts is not a commitment related to public order, and each of the parties may waive their right thereto explicitly or implicitly. In this sense, the Egyptian Court of Cassation ruled that "arbitration is an exceptional way to avoid regular litigation, and may be waived explicitly or implicitly, and falls if used late after it was raised, as ignoring submitting the same before considering the case is considered a implicit waiver f the same ... "

Article 13 of the Egyptian Arbitration Act of 1994, stated the following: "1. The court to which the dispute subject to arbitration is referred, shall not accept the case if the defendant pleaded before any request or defense in the lawsuit. 2. Referring the case mentioned in the above paragraph does not hinder starting the arbitration proceedings, or continuing the same proceedings and issuing the arbitration decision".

In case the court was in a session dedicated to collecting evidence, which is a session that takes place before entering into the basis of the dispute, not provoking the arbitration clause by any of the parties shall not be considered a waiver of the arbitration clause in. Paris Court of Appeal adopted this theory and rule: Not provoking the arbitration clause in the court before the judge of summary proceedings shall not be considered a

waiver the arbitration clause, as long as the appearing before the court was a precautionary procedure, based on the provisions of Article 145 of the new Civil Procedures Code, which is a session preceding entering into the basis of the dispute and is dedicated to the collection of evidence, and does not address the subsequent execution of the arbitration clause”.

Concerning the fact that the judge may refrain from ruling upon the dispute, the jurisprudence agrees that the judge may not refrain from ruling upon the case in the absence of plea submitted by the defendant concerning the arbitration agreement.

Second: The Positive Effect of the Arbitration Agreement in Banking Disputes (Legalization of Resorting to Courts)

The positive effect of the banking arbitration agreement, which is the legalization of resorting to the arbitral tribunal the parties deems appropriate to settle the dispute, or to continue in the arbitration without judiciary. This shall be determined according to the common will of the contractors and not according to the will of one of them only.

Article 13/2 of the Egyptian Arbitration Act stipulates that "Filing the lawsuit referred to in the preceding paragraph does not preclude starting the arbitration proceedings or continuing such proceedings and issuing the arbitration decision". In fact, continuing the arbitration proceedings is an obligation stipulated by the International Commercial Arbitration Law (UNCITRAL) and considered as well by the Egyptian legislator. This obligation requires the arbitration body to settle the dispute referred thereto.

The banking arbitration agreement shall be drafted in a document signed by the two parties including all issues agreed upon, therefore the terms of this document shall be considered as reference for the arbitration agreed upon.

However, the banking arbitration agreement may not be contained in such a document, but learned from the correspondence between the two parties of any kind whatsoever. So, to what extent these documents are regarded as part of the agreement and relied upon in determining the arbitration agreed upon?

The banking agreement may be clear in terms of meaning and may be matching with the common will of the two parties, in which case it shall be binding to both parties. If the agreement was ambiguous, or not conform with the will of the two parties, or in case the agreement between the two parties needed to be interpreter, such interpretation shall be done by the judge if the two parties referred the dispute to him or may be done by the arbitrator.

Conclusion

In the light of the arbitration role in the commercial life nowadays, no one can deny that the arbitration agreements have become of a high importance for those who prefer to settle their disputes through arbitration. An arbitration agreement is the arbitration foundation and the source of arbitrators' powers. An Arbitration agreement prevents courts from having jurisdiction over the dispute, subject-matter of the arbitration. This provides the arbitrator with the power of dispute settlement by a binding decision.

Because of the advantages of Arbitration, banks do prefer to adopt arbitration as a means to settle any dispute may arise between them and their clients.

This study deals with the arbitration agreement in the banking transactions under the Egyptian Arbitration Law No. 27 of 1994. It is divided into introductory chapter and two other chapters.

The Introductory Chapter deals with Definition of Banking Arbitration Agreement and its Importance. The first section demonstrates the definition of Banking Arbitration Agreement, while the second section shows both of the advantages and disadvantages of Agreement to Arbitration in banking operations.

The First Chapter deals with types, drafting and validity conditions for Banking Arbitration Agreements. This chapter is divided into two sections; the first of them concerns with the three different types of Banking Arbitration Agreements, i.e. Banking Arbitration Clause, Banking Arbitration Accord and Banking Arbitration Clause by Reference, then the section shows how to draft a Banking Arbitration Agreement by referring to the subjects

that should be considered at the time of drafting such an agreement.

The second section concerns with the Validity Conditions for Banking Arbitration Agreements, These conditions are divided into two types of conditions, the first type is the Objective ones, including the Consent, Legal Capacity to Enter into an Arbitration Agreement in Banking Disputes and Subject Matter of the Arbitration Agreement in Banking Disputes, while the second type is the Formal Condition which relates to writing the Agreement.

The Second Chapter deals with the effects of banking arbitration agreement, this chapter is divided into two sections, the first section concerns with the significance of the independence of banking arbitration agreements, while the second section concerns with the reflect such effects in detail, i.e. effects of arbitration agreements in banking disputes, this section was divide into two Subjects, the first addressed the procedural effect of the arbitration agreement, while the second addressed the substantive effect of the arbitration agreement, focusing on the negative effect of the arbitration agreement in banking disputes (prevention of resorting to courts) and the positive effect of the arbitration agreement in banking disputes (legalization of resorting to courts).

Generally, we may conclude the following:

- The Banking Arbitration Agreement serves as a starting point in the banking arbitration process. A Banking Arbitration Agreement is necessarily subject to the contract's general rules set by the legislator in the civil code, in addition to its own rules and conditions. Thus, such agreement should be clear and non-ambiguous to validate its consequences.
- Arbitration in banking activities has numerous advantages, such as Speed, Flexibility, The Continuation of the

Relationship between the Parties, Maintaining the Confidentiality of the Parties' Secrets, Expertise and Specialization, Guarantee of Neutrality, Absolute Finality of Arbitral Awards, Enforceability of Foreign Arbitral Awards, Encouragement of Investment and Observance of the Privacy of Islamic Banking Transactions.

- On the other side, Arbitration in banking activities has some disadvantages, including High Expenses, Parties' Procrastination, Consensual Solution in Arbitration, Arbitrators' Lack of Judge Powers, Lack of Expertise, Fear of unfair and incontestable awards.
- In its definition of the arbitration agreement, the Egyptian legislator adopted the three different types of Arbitration Agreement, i.e. Banking Arbitration Clause, Banking Arbitration Accord and Banking Arbitration Clause by Reference, so any of them can be used to settle banking disputes through arbitration.
- There is no unified model for the drafting of arbitration agreement that is adjusted to the particularity of each international contract and that meets the needs of the parties thereof and matches their positions. Therefore, the drafting of the provisions of arbitration agreements is identified based on the specifics of the contractual relationship and the conditions of the parties. However, there are number of subjects to be included in the Banking Arbitration Agreement, such as Settlement of Dispute by means of Arbitration, Identification of the Scope of the Subject-Matter of Dispute, Arbitration Type Selected, Formation of the Arbitration Panel, Arbitral Procedures, Law Applicable to the Subject-Matter of the Dispute, Seat of Arbitration, Language of Arbitration and Arbitration Expenses.

- In its interpretation, a Banking Arbitration Agreement is subject to the interpretation rules decided for the other contracts, being a consensual contract, even if it shall be made in writing in order to be executed and proved. In this respect, the judge shall stick to the principle of restrictive interpretation in identifying the dispute subject-matter of arbitration and to limit himself to the definition of the disputing parties of this subject matter.
- To ensure the validity of an arbitration agreement in banking disputes, the same objective conditions which apply to all contracts apply to arbitration agreements. A Banking Arbitration Agreement is based on the will of the parties, i.e. the mutual agreement between the parties enjoying legal capacity to enter into the agreement, with the presence of a subject-matter which is the dispute being arbitrated.
- Consent to enter into arbitration agreement in banking disputes is a mutual consent by the two parties to such agreement to use arbitration as a means of settling the disputes that have arisen between them, or otherwise that are likely to arise in the future. Often, the expression of the will is explicit. Given that the arbitration agreement is a contract, it must be based on the satisfaction and agreement of the parties to settle the dispute that will arise between them by means of arbitration. Such will must be expressly expressed without any vices of consent.
- When the bank imposes arbitration as a means of settling banking disputes that arise between the bank and its customers. In this case, the agreement and acceptance can be compared to a vice of consent and resort to arbitration is compulsory, meaning that the party may be deprived of a constitutional right. Therefore, the arbitration clause may not be taken into account if the other party rejected

arbitration and wished to refer the dispute to the courts for the settlement of disputes between such party and the bank. (According to the opinion of the Supreme Constitutional Court of Egypt).

- For a Banking Arbitration Agreement to be concluded, the two parties to such agreement (the bank and the customer) shall have the capacity required to dispose of the rights, subject-matter of the arbitration.
- Banks are joint-stock companies enjoying legal personality. This personality is only revealed when such banks satisfy all the criteria for their legal existence and possess an independent financial trust from their members and have met all legal incorporation procedures. Then, and only then, would the arbitration agreement concluded by such banks be deemed to be valid. Failure to satisfy these procedures, this personality remains available among partners only. It can't be used as evidence against third parties. Nevertheless, third parties may insist on the legal personality of the company, even if the legal incorporation procedures referred to have not been satisfied.
- Since banks may assume the form of a joint-stock company, so any action or disposal emanating from the General Assembly or the board of directors or any of its committees, or its representatives in the management,, will be binding upon the company in the ordinary way.
- In case the Banking Arbitration Agreement is signed by an Unauthorized Person, the Egyptian legislator is keen on protecting bona fide third parties dealing with the company's representative, it has expressly provided for the ability of third parties to protest on the actions performed by any representatives of the company in confrontation of

the company, even if such actions exceed the powers granted thereto.

- The subject-matter of an arbitration agreement in banking disputes is the subject-matter of banking disputes arising or that are likely to arise in the future out of the contract and where the parties to the disputes have agreed to settle such dispute by means of arbitration. The subject-matter of the dispute has to be specified.
- The Egyptian Banking Law No. 88 of 2003 on the Banking Sector and Money defined banking transactions in Article 31: In applying the provisions of this Article, bank business shall mean any activity comprising, basically and habitually, the acceptance of deposits, the obtainment of finance, and the investment of these funds in providing finance and credit facilities and contributing to the capital of companies, and all that is considered by banking tradition as bank business.”
- The arbitration law provided for the writing condition in arbitration agreement, meaning that Banking Arbitration Agreement must be in writing, otherwise it shall be deemed to be invalid. The writing condition of the arbitration agreement is a prerequisite for its conclusion and not for evidence purposes. If the arbitration agreement is not executed in writing, it shall be deemed to be invalid. As arbitration agreement can only be concluded in writing, the appearance of the parties before courts is not sufficient, and the conclusion of contract may not be proved through acknowledgment and oath.
- The independence of arbitration agreement implies that: the arbitration concluded in the form of an arbitration clause

included in the original contract is independent from that contract and from the factors affecting its invalidity. In other words, the arbitration clause, in terms of its existence, validity and nullity, does not relate to the subject-matter of the original contract. The nullity, termination or invalidity of such clause does not result in the nullity of the original contract, and of course vice versa.

- The Egyptian legislator has taken a clear position by advocating the principle of independence of the arbitration clause, which shall not be affected by the nullity of the original contract containing it. Also, the Egyptian legislator acknowledged that the termination or cancellation of the contract does not affect the arbitration clause contained in such contract.
- The idea of independence of the banking arbitration agreement from the original contract is instrumental to arriving at the associated results, including that the arbitration agreement can be null and void itself despite the validity of the original contract, the fate of the original contract has no effect whatsoever on the arbitration clause contained in it, the law applicable to the original contract may extend to include the arbitration agreement. The validity or invalidity of the arbitration accord depends exclusively on the rules required by applicable law. It may not necessarily be the applicable law governing the arbitration agreement, and the arbitration panel shall have jurisdiction over the initiation of arbitral proceedings and settlement of disputes pertaining to the validity of the original contract, according to the arbitration clause contained in the contract.
- The direct effect of a banking arbitration agreement would be to withdraw the power of the country's courts to rule on the subject-matter of the dispute that arises between the parties to the agreement and to submit the dispute to the

arbitral panel. This effect is associated with the litigation procedures regarding the disputes arising out of the original relationship tying up the parties to the agreement. This effect is referred to as the procedural effect.

- The banking arbitration agreement is a contract, then such contract implies obligations for both parties and has a binding force upon both parties in that the disputes that arise out of their original relationship shall be submitted to arbitration. Neither party may evade the provisions of such contract or otherwise terminate it in its sole discretion. This binding force of the arbitration agreement is referred to as “the substantive effect”.
- The substantive effect of the banking arbitration agreement can be divided into two parts: the first being positive, while the negative effect is represented by the parties’ commitment to abstain from resorting to courts to settle the dispute, subject-matter of the arbitration. The positive effect, however, is represented by the ability of the parties to resort to an arbitration panel to decide on the dispute.

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