كلية الحقوق

Problems of writing in concluding the arbitration agreement And how to prove it according to The New York Convention of 1958

الدكتورة

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Abstract

In this research, we have addressed the condition of writing in concluding the international arbitration agreement, and whether writing in the arbitration agreement is necessary for proof or for conclusion. Then we moved on to recognize the nature of the arbitration agreement in Egyptian arbitration law and some comparative legal systems, with a statement of the forms of writing necessary to conclude the arbitration agreement. Then we moved on to present some of the problems that revolve around writing to conclude the arbitration agreement, including what revolves around signing the arbitration agreement. We discussed whether it is required that both parties sign the arbitration agreement or it is permissible to sign the arbitration agreement, whether a condition or a stipulation, by someone other than its parties, such as an agent or mediator, and if it is permissible, or necessary to obtain a written power of attorney to carry out the work.

In addition, we presented some of problems raised by modern technology means regarding the existence of readable and audible messages on many electronic platforms and applications, and whether those means are sufficient to conclude an arbitration agreement or not, in addition to the widespread use of expressive symbols in the current period to express rejection or acceptance and so on. Moreover, we asked whether it is permissible to rely on those symbols in concluding an arbitration agreement that would transfer the dispute from the judiciary to arbitration for settlement.

We have addressed all these in this research, in addition to stating the methods of proving an arbitration agreement according to what some comparative judicial precedents have followed based on the New York Convention on the Enforcement of Foreign Judgments 1958**.**

نبذة:

لقد تناولنا في هذا البحث شرط الكتابة في إبرام اتفاق التحكيم. وهل الكتابة في إتفاق التحكيم لازمة للإثبات أم للإنعقاد، ثم انتقلنا بعد ذلك إلى الوقوف على ماهية إتفاق التحكيم في قانون التحكيم المصري وبعض النظم القانونية المقارنة، مع بيان صور الكتابة اللازمة لإبرام إتفاق التحكيم، ثم انتقلنا إلى عرض بعض الإشكاليات التي تدور حول الكتابة لإبرام إتفاق التحكيم، ومنها ما يدور حول توقيع إتفاق التحكيم، هل يشترط التوقيع من كلا الطرفين على إتفاق التحكيم؟ هل يجوز التوقيع على إتفاق التحكيم شرطاً كان أو مشارطة من غير طرفيه، مثل الوكيل، والوسيط؟ وإذا كان يجوز، فهل يلزم أن يحصل على توكيل مكتوب للقيام بالعمل؟ بالإضافة إلى عرض بعض الإشكاليات التي تثيرها وسائل التكنولوجيا الحديثة حول وجود رسائل مقروءة ومسموعة على العديد من المنصات والتطبيقات الإلكترونية، وهل تكفي تلك الوسائل لإبرام إتفاق التحكيم أم لا، فضلاً عن انتشار إستخدام الرموز التعبيرية في الآونة الحالية للتعبير عن الرفض أوالقبول وما إلى ذلك، فهل يجوز التعويل على تلك الرموز في إبرام إتفاق التحكيم الذي من شأنه نقل النزاع من القضاء إلى التحكيم لتسويته، كل ذلك تناولناه في هذا البحث، فضلاً عن بيان طرق إثبات إتفاق التحكيم وفقاً لما اتبعته بعض السوابق القضائية المقارنة استناداً إلى إتفاقية نيويورك لتنفيذ الأحكام الأجنبية ١٩٥٨.

Introduction

Arbitration goes through several stages. At the beginning, it is an agreement, in the middle, it is a procedure, and at the end, it is a ruling, with a difference in the law applicable to each stage [1] .Through research, we found that the arbitration agreement is the cornerstone of the arbitration system, as it is the starting point in the arbitration process. The arbitration agreement is of great importance, as the basis for referring any dispute to arbitration must first be a valid and enforceable arbitration agreement.

Therefore, we will address through this research the writing component in concluding the arbitration agreement, with a presentation of some of the problems that revolve around writing in concluding the arbitration agreement, starting with clarifying whether writing in concluding the arbitration agreement is a condition for proof or a condition for the conclusion, supporting this with some Arab and foreign legislations, arriving at a statement of what modern technology has resulted in from audible and readable messages and the extent to which these messages may be used in concluding the arbitration agreement, in addition to what is called emoticons, and the extent of their validity in expressing the will and then the permissibility of using them in concluding the arbitration agreement, arriving after that to present some judicial precedents in proving the arbitration agreement based on the New York Convention of 1958, through five chapters:

Chapter One: The nature of the arbitration agreement in Egyptian law and some comparative legal systems,

Chapter Two: The extent to which the condition of writing is required in concluding the arbitration agreement,

Chapter Three: Forms of the Writing Condition in the Arbitration Agreement in Some Arab and Foreign Legal Systems,

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[1] **Ibrahim Ahmed Ibrahim, Private International Arbitration, "The Nature and Characteristics of Arbitration, Applicable Law, Arbitration Rules of Arbitration Bodies, Implementation of Foreign Arbitration Awards," Dar Al-Nahda Al-Arabi, 1991, p. 35.**

Chapter four: Problems of writing in the Arbitration agreement, and

Chapter five: Judicial Applications in the Field of Proving the Arbitration Agreement Based on the New York Convention of 1958

Chapter one

The nature of the arbitration agreement in Egyptian law and some comparative legal systems

First: The concept of the arbitration agreement in **the Egyptian Arbitration Law No. 27 of 1994** (1) According to the text of Article 10 of the Egyptian Arbitration Law, the arbitration agreement is defined as:

1- The agreement of the two parties to resort to arbitration; to settle all or some of the disputes that have arisen or may arise between them, on the occasion of a specific legal relationship, whether contractual or non-contractual.

2- The arbitration agreement may be prior to the dispute, whether it arose independently or was included in a specific contract regarding all or some of the disputes that may arise between the two parties, and in this case the subject of the dispute must be specified in the statement of claim referred to in the first paragraph of Article 30 of this law, and the arbitration agreement may also be concluded after the dispute has arisen, even if a lawsuit has been filed in its regard before a judicial authority, and in this case the agreement must specify the issues covered by the arbitration, otherwise the agreement is void.

3- Any reference in the contract to a document containing an arbitration clause shall be considered an arbitration agreement if the reference is clear in considering this clause as part of the contract.

Second: The concept of the arbitration agreement in **the English Arbitration Act of 1996** Article 6/1 stipulates that the term arbitration agreement is an agreement to submit to arbitration current or future disputes, whether contractual or non-contractual. Article 6/2 also stipulates that a reference in the agreement "the contract" to a written condition of an arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement, if the reference makes that condition part of the agreement (2).

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(1) **Egyptian Arbitration Law No. 27 of 1994.**

(2) **BRUCW HARRIS, ROWAN PLANTE ROSE & JONATHAN TECKS, English Arbitration Act 1996, A commentary,**

Section 6 – Definition of Arbitration Agreement :

6) 1: in this part an" arbitration agreement means an agreement to submit to arbitration present or future disputes whether they are contractual or not) .

Third: The nature of the arbitration agreement in **the French Arbitration Law amended in 2011**, Article 1442 after the amendment states that: "The arbitration agreement may take the form of an arbitration clause **arbitration clause** or an **arbitration agreement**.

The arbitration clause is: an agreement by virtue of which the parties to a contract, or several contracts, undertake to resolve disputes that may arise from this contract or those contracts through arbitration.

The arbitration agreement is: an agreement by virtue of which the parties to a dispute that has already occurred undertake to submit it to arbitration(1).

2- the reference in an agreement to written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement, p 63

(1) Osama Abu Al-Hassan Mujahid, The New French Arbitration Law, Dar Al-Nahda Al-Arabiya, 2012, p. 24,25.

Chapter two
The extent to which the condition of writing is required in concluding the arbitration agreement

By presenting the previous definitions of the arbitration agreement, whether in the Egyptian Arbitration Law No. 27 of 1994, the English Arbitration Law of 1996, and the French Arbitration Law amended in 2011, we find that the arbitration agreement is: an agreement based on transferring the resolution of the dispute from the judiciary to the arbitration body chosen by the parties. The arbitration agreement may come before the dispute in an independent form, or it may come as a condition included in the contract, or it may arise after the dispute in the form of an arbitration agreement to refer the resolution and settlement of the dispute through arbitration(1)

So, What about the writing requirement for the arbitration agreement? Is it a proof requirement or a conclusion requirement in Egyptian arbitration law and some comparative systems?

By research we find the text of Article 12 of the Egyptian Arbitration Law stating in its first paragraph that: "The arbitration agreement must be in writing, otherwise it is void." and The French legislator followed the approach of the Egyptian legislator, making writing a condition for the conclusion of the arbitration agreement which Article 1443/1, after amendment, states: "The arbitration agreement must be in writing, otherwise it is void." (2). So writing in both legislations is a conclusion condition. Moving on to the English Arbitration Law (3), we find the text of Article 5, paragraph 1, stating: 1- The provisions of this part apply only when the arbitration agreement is in writing. So we can conclude that writing is a conclusion condition in the English Arbitration Law, but if the arbitration agreement is oral it will not be null and void,

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(1) The arbitration condition is not considered a matter of public order, and it may be waived explicitly or implicitly, and the court may not rule on it on its own initiative

(2)Article 1443 /1: Apeine de nullite, la convention d' arbitrage est ecrite.

Article 1443 /2: Elle peut resulter d' un e change d' ecrits ou d' un document auquel i lest fait reference dans la convention principale .see Osama Abu Al-Hassan Mujahid, The New French Arbitration Law,ibid,p,26

(3) BRUCW HARRIS & ROWAN PLANTE ROSE ,op. cit, p 59

That is because, The COMMON LAW, including English law, considered the arbitration agreement to be a consensual contract that does not require writing to be concluded, but rather writing was for proof. It was sufficient for the judge to ascertain the parties' intention to refer the subject of their dispute to arbitration, whether orally or implicitly, until the English Arbitration Act of 1996 was issued, and it required writing to be concluded in the text of Article 5, as we mentioned before, but it did not stipulate nullity in the event of the failure to meet the writing requirement.

Upon research, we found that the solution in this situation is that the English Arbitration Act does not apply if the arbitration agreement is oral, and the rules of common law apply (1),and it is not ruled null and void, as its Egyptian counterpart stated in the text of Article 12 mentioned above of the Egyptian Arbitration Law No. 27 of 1994, and the French Arbitration Law in Article 1443/1, meaning that the unwritten arbitration agreement even if it falls outside the scope of application of the English Arbitration Act of 1996 remains valid and subject to The rules of common law, and this is what the English legislator stipulated in the English Arbitration Act 1996, in the text of Article 81, paragraph a (2), where this article stipulated that:

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(5) – 1: the provision of this part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this part only if in writing .

The expressions, agreement, ' agree' and' agreed' shall be construed accordingly

2- there is an agreement in writing;

a- if the agreement is made in writing (whether or not it is signed by the parties

b – if the agreement is made by exchange of communications in writing , or

c- if the agreement is evidenced in writing.

(1) Shams Al-Din Qasim Al-Khaza'leh, The Scope of the Authority of Will in Jordanian Arbitration Law, A Comparative Study with English Law, Dar Al-Kitab Al-Thaqafi, Jordan, 2017, p. 59.

(2) Section 81 – Saving for certain Matters Governed by Common law:

81-1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this part ,in particular ,any rule of law as to

b) the effect of an oral arbitration agreement,

"The law does not deprive a purely oral arbitration agreement of any effect because it is not written, but rather allows it to continue to achieve the effect granted by common law".

And we shall mention that There is an exception to the requirement of writing stipulated in Article 5.1, which is the exception included in the agreement to terminate arbitration, and this exception is permitted due to the impossibility of imposing the requirement of writing practically in some circumstances (1).

Moving to **the Japanese Arbitration Law No. 138 of 2003, amended by No. 147 of 2004**, we find Article 13, paragraphs 2, 3, 4, and 5 stipulates that the arbitration agreement must be written in a document signed by both parties2.so writing is required in concluding the arbitration agreement**.**

As an example of the section's operation, the Act does not deprive a purely oral arbitration agreement of any effect because it is not in writing , but allows it to continue to have such effect as the common law will give to it .s 1) b)... look up" The Arbitration Act 1996 .

(1) 5.1 " exception "

- The only exception to the requirement for writing concerns an agreement to terminate an arbitration as to which see s.23 4) .

The exception is permitted because of the impracticality of imposing a requirement for writing in certain of the circumstances in which an arbitration may be mutually allowed to determine, for example .. where both parties simply abandon proceedings, or allow them to lapse

(2) See https://www-japaneselaw, for the Japanese Arbitration Act in English, No. 138 of 2003, as amended by No. 147 of 2004.

As we know, formal issues differ in terms of their essence, how they are achieved, their function, and the intended goal of their achievement. Therefore, the applicable law differs, and thus the ruling differs as a result of the application of each law. As is known, writing is the most important aspect of the form required by the arbitration agreement. However, the difference in legislation regarding the function performed by writing in the arbitration agreement, whether it is necessary to prove the agreement or to prove its conclusion, has raised many problems regarding the law applicable to the form required for proof, and the law applicable to the form required for conclusion. Form means: the framework or template in which the will is emptied or refuted to show it to the outside world. This template can be represented in writing, whether it is official, customary, or the intervention of a certain authority in concluding the contract. The purpose of the form may be to fulfill the condition of its conclusion, and then the contract is formal and is not completed by the mere consent of the contracting parties, but rather this specific form must be followed for its conclusion (1).

The fact that the form is a requirement for proving the international contract or a requirement for its conclusion has its effect in terms of the law applicable to it, as the question arises as to whether the form was required for proof and the form required for conclusion was subject to the law governing the form of the contract, or to the law governing the subject of the contract.

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(1) **The difference between consensual contracts and formal contracts: Consensual contract: is what is sufficient to be agreed upon by the combination of offer and acceptance, unless the law stipulates a specific form such as writing to prove the contract. Formal contract is what is not sufficient to be agreed upon, but rather a specific form must be followed such as an official mortgage. See the details of an article with a detailed explanation and examples of consensual, real and formal contracts, at the following link: https://www.mohamah.net, last accessed on 4/5/2023.**

As for the form required for proving the contract, there was no difference of opinion in jurisprudence regarding it, as it is established that it is subject to the law governing the form of the contract, as the law of form is the reference in knowing the necessity or non-necessity of a certain form to prove the contract. If the law governing the subject of the contract requires writing for proof, while the law of the place of conclusion does not require it as the law of form, then writing is not required to prove the contract, and vice versa, if the law of the subject does not require writing for proof, while the law of the place of conclusion requires it as the law of form, then writing is not required to prove the contract.

As for the form required for the conclusion of the contract as a pillar thereof, a dispute has arisen regarding it, as some jurisprudence (1)holds that stipulating a specific form for the conclusion of the contract, such as its failure results in its invalidity, is one of the matters related to the subject of the contract, and therefore it must be subject to the law governing the subject and not to the formal law, because the formality, if it is required for the conclusion of the contract, is not considered a mere external appearance of the contract, but rather an essential condition that enters into it and is one of its pillars. Referring to the explanatory memorandum of the Egyptian Civil Law, we find that it stated that: "The jurisdiction of the law that applies to the form only covers the external elements of the form, while the essential conditions in the form that are considered a pillar for the conclusion of the transaction such as the formality in the security mortgage are only applicable to the law to which the ruling on the transaction in terms of the subject is referred." By searching, we find that most national laws have stipulated that the arbitration agreement is in writing, but they differed among themselves regarding the required form of writing, whether it is official or customary,

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(1) Hussein Balhawan, the law applicable to the form of the arbitration agreement, Journal of Humanities, Volume 31, Issue 3, year of publication 2020, pp. 167, 168, Dar Al-Manzomah, Egyptian Knowledge Bank

There are some national laws that require writing the arbitration agreement in an official manner, i.e. in an official, notarized document, considering that the arbitration agreement represents the cornerstone for resolving the case by arbitration. Examples of these countries are: Portugal, Mexico, Venezuela, and Peru (1).

However, most national laws do not require writing to be official, and are satisfied with arbitration being in a written contract, such as the English Arbitration Act (2), the Egyptian Arbitration Act, India law, and some Latin American laws such as in Argentina and Brazil. And There are laws that do not require writing in the arbitration agreement, such as in Germany, as it permits oral arbitration in commercial transactions, but there are countries which made writing a condition for the conclusion, and others which considered writing a condition for proof (3).

Finally, but not least, it can be said that writing in the arbitration agreement was not limited to writing in the traditional sense, but, rather, writing took other forms such as exchanging letters or telegrams or any written means of communication provided that it is entered in a permanent record. We will single out what has been summarized by presenting forms that fulfill the requirement of writing in the arbitration agreement in the next chapter.

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(1) Hussein Balhawan, ibid, p. 163, quoting Mahmoud Muhammad Hashim, The General Theory of Arbitration in Civil Matters, Part One, Arbitration Agreement, Dar Al Fikr Al Arabi, 1990, p. 102

(2) BRUCW HARRIS & ROWAN PLANTE ROSE, op.cit, p 59

(3) Hussein Balhawan, ibid, p. 163.

Chapter Three
Forms of the Writing Condition in the Arbitration Agreement in Some Arab and Foreign Legal Systems

In the previous chapter, we addressed the following question: Is writing a condition in the arbitration agreement? That is, is writing considered a condition for proof or a condition for the conclusion? Some legal systems have proposed that writing is required to conclude the arbitration agreement, that is, to make it a condition for the conclusion and there are those which require writing in the arbitration agreement for proof.

Therefore, we found that this requires us to clarify the images of that writing, and what is considered writing in the Egyptian Arbitration Law and other comparative laws, and this is what we will address through the following discussions.

Section One
Writing forms in the arbitration agreement in some Arab legal systems

With regard to **the Egyptian Arbitration Law No. 27 of 1994**, we find the text of Article 12 of this law stating in its first paragraph that: "The arbitration agreement must be in writing, otherwise it is void. The arbitration agreement is in writing if it is signed by a writer or by both parties, or if it is included in what the parties exchange of letters, telegrams, or other means of written communication." With the clarity of the text, we conclude that writing is a condition for the conclusion of the arbitration agreement, and not a means of proof (1), i.e. a condition for the validity of the arbitration agreement, and this may lie in the reason based on considering the conclusion of the arbitration agreement an act in which the parties waive their right to resort to the state courts, i.e. it is an act at a high level of risk and danger, so the arbitration agreement has negative effect, which is removing the dispute from the jurisdiction of the state judiciary, even if it is not completely negative (1), and this is contrary to what was stipulated in the Egyptian Code of Civil Procedure in Article 501 the chapter on repealed arbitration before the issuance of the Egyptian Arbitration Law of 1994, which stipulated that:

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(1) **Egyptian Arbitration Law No. 27 of 1994, Article 12, and despite the clarity of the text, we find those who disagree with it. There is a trend that disagrees with this text and adopts a different point of view, as this trend sees that writing is not a condition for the conclusion, but rather a means of proof that is replaced by an**

“Arbitration shall not be proven except in writing”, so writing was a condition for proof and not a condition for the conclusion, and since that, Article 12 of the Egyptian Arbitration Law of 1994 came to cancel the text of Article 501 of the Egyptian Code of Civil Procedure.

As for **the Jordanian Arbitration Law No. 31 of 2001, amended in 2018**, the tenth article states:

A - The arbitration agreement must be in writing, otherwise it is void. The arbitration agreement is written if it is included in a document signed by the two parties, or if it is included in what the two parties included in letters or telegrams, or by fax, telex or other written means of communication, which are considered a record of the agreement. The same article also states in paragraph.

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admission or an oath. However, we criticize this opinion because there is no interpretation with the clarity of the text. Referred to by. Osama Abu Al-Hassan Mujahid, ibid, footnote 1, p. 26, quoted from Sayed Ahmed Mahmoud, The Arbitration System: A Comparative Study between Islamic Sharia and Kuwaiti and Egyptian Positive Law, Dar Al-Nahda 2005.

(1) Ahmed Abdel Karim Salama, The Theory of the Free International Contract, Dar Al Nahda Al Arabiya, Second Edition, 2018 AD. p. 258 .

The evidence that resorting to arbitration deprives the parties of their right to resort to the judiciary is the inadmissibility of demanding that the parties to the arbitration apply the text of Article 6 of the European Convention on Human Rights ECHR), which guarantees the procedural right to a fair trial, i.e. the right of the parties to submit their dispute to the judiciary to reach the claimed right, and the parties are deprived of this right if they resort to arbitration voluntarily. See, Kyriaki Nossia, Confidentiality In international Commercial Arbitration law.., op. cit, p33

C: "If an agreement is reached on arbitration during the consideration of the dispute by the court, the court must decide to refer the dispute to arbitration, and this decision is considered a written arbitration agreement." We conclude from here that the Jordanian Arbitration Law agrees with the Egyptian Arbitration Law in considering writing a condition for the conclusion of the arbitration agreement and not just for proof (1).

As for **the UAE Arbitration Law No. 6 of 2018**, Article 7 thereof states the following:

The arbitration agreement must be in writing, otherwise it is void.

The arbitration agreement shall be deemed to have met the writing requirement in the following cases:

A- If it is included in a document signed by the parties, or is included in the letters or other written means of communication they exchanged, or is made by electronic message in accordance with the rules in force in the country regarding electronic transactions.

B- If it is referred in a fixed contract in writing to the provisions of a model contract, an international agreement or any other document that includes an arbitration clause, and the referral is clear in considering this clause as part of the contract.

C- If the arbitration agreement is reached during the consideration of the dispute by the competent court, and the court issues its ruling confirming the arbitration agreement, and the parties are left to directly conduct the arbitration procedures at the place and time specified and under the conditions governing it, and the ruling is to consider the case as if it did not exist.

D- If it is included in the written memoranda exchanged between the parties during the arbitration proceedings, or acknowledged before the judiciary, in which one of the parties requests referring the dispute to arbitration and the other party does not object to that in the course of his/her defense(2) .

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(1) Hamza Ahmed Haddad, Working Paper Submitted to the Dubai Commercial Arbitration Centre, Writing and Interpreting the Arbitration Agreement in Arab Laws

(2) You can find the act of UAE Arbitration Law No. 6 of 2018 through this link: https://lexmena.com, last accessed on June 20, 2023.

Section Two
Forms of Writing in Some Foreign Legal Systems

The French Arbitration Law followed the approach of the Egyptian legislator, as it made writing a condition for the conclusion of the arbitration agreement. Article 1443/1, after amendment, states: "The arbitration agreement must be in writing, otherwise it is void" (1). The French Arbitration Law expanded the form of writing as did the Egyptian legislator, as it stipulated that: It may arise from mutual correspondence, or from a document or document referred to by the basic agreement. Moving on to the English Arbitration Law (2), we find the text of Article 5, paragraph 1, which states:

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(1) Ali Abdel Hamid Turki, New Developments of the Arbitration System in French Law: An Analytical Study in Light of Decree No. 48 of 2011, Journal of Law and Economics, Issue 90, Faculty of Law, Helwan University, p. 449.

(2) BRUCW HARRIS & ROWAN PLANTE ROSE ,op. cit, p 59

5) – 1: the provision of this part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this part only if in writing .

The expressions, agreement, ' agree' and' agreed' shall be construed accordingly

2- there is an agreement in writing ;

a- if the agreement is made in writing whether or not it is signed by the parties

b – if the agreement is made by exchange of communications in writing , or

c- if the agreement is evidenced in writing

We find that this article is derived from the text of Article 7, paragraph 2, of the UNCITRAL Model Law on International Commercial Arbitration, which states that: "The arbitration agreement must be in writing. An agreement is considered to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telegrams, telegrams or other means of wire or wireless communication that serves as a record of the agreement, or in an exchange of statements of claim and defence, in which one party asserts the existence of an agreement and the other party does not deny it. A reference in a contract to a document containing an arbitration clause is considered to be an arbitration agreement,

1- The provisions of this part apply only when the arbitration agreement is in writing, and any other agreement between the parties on any matter is valid for the purposes of this part only if it is in writing. The agreement is in writing if:
The agreement is made in writing, whether or not the parties sign it. B- The agreement is made by exchanging letters in writing.
And Article 2 sub-article 5D(1) of the same law stipulates that: "The arbitration agreement may be concluded in a signed or unsigned document, and it may be an exchange of messages such as letters or faxes." Article 5H of the English Arbitration Act also defined writing as: any means by which the agreement can be recorded.
However, we clarify an important matter, which is: not to confuse writing in the broad sense with the assumption of consent to arbitration, meaning that the concept of writing and its form should not be expanded excessively until we reach the assumption of consent to arbitration. Consent to arbitration is not assumed, but there must be evidence of it; this is because the agreement to arbitration constitutes a departure from the general principle, which is resorting to the judiciary (2).

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provided that the contract is in writing and that the reference is made in such a way as to make that clause part of the contract."

(1) Agreement in writing – subs 2) (5D)

- An agreement may be made – that is to say itself embodied in writing , in which cases its form may be a document that is signed or unsigned, or it may be an exchange of communications,

(2) UNCITRAL Commentary on the New York Convention, p. 59 and footnote 211.
We would like to mention an important issue that reinforces this part, which is:
Case: Dallah Real Estate and tourism Holding Company V. Ministry of Religious Affairs, Government of
Pakistan, supreme court, England and wales, 3 November 2010, Uksc 2009 / 0165 Gouvernment du Pakistan – ministere ...
The gist of that claim is that the UK Supreme Court, based on the New York Convention, refused permission in the Dallah Group of Companies case to a party seeking to enforce an arbitration award issued against the Islamic Republic of Pakistan, on the basis of the lack of evidence of the parties' intention to add the

As for the Japanese Arbitration Law No. 138 of 2003, amended by No. 147 of 2004, Article 13, paragraphs 2, 3, 4, and 5 stipulates that the arbitration agreement must be written in a document signed by both parties. Writing is for the conclusion and not for proof, and takes the traditional form whether written in the contract between them or by fax, telex, or other, and also takes the electronic form. Also, in the event of referring to an agreement that includes an arbitration agreement, this agreement is considered concluded provided that the referred agreement is written (1). Moving on to the New

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Government of Pakistan as a party to the main contract, despite its participation in negotiating that contract and in performing some of the obligations, based on the principle of "no presumption of consent to arbitration". The court did not accept that the Republic had consented to arbitration based on the presumption of its consent to arbitration through the performance of some of the obligations in the contract, because it was not a party to the arbitration agreement. This was contrary to what was decided in the Giza Plateau case, the famous arbitration case in which the Egyptian government was a party, and its consent to arbitration was assumed, while a counter-judgment was issued on the same subject on February 17, 2011 by the Paris Court of Appeal in France. To view the judgment in detail, see:

case: des affaires religieuses v. societe Dallah Real Estate and Tourism Holding Company, court of Appeal of paris, france, 17 February 2011, 9/28533 9/28535 and 09/28541,2011 REV. ARB. 286,

(1) An Arbitration Agreement shall be in writing, such as in the form of a document signed by all the parties, letters or telegrams exchanged between the parties including those sent by facsimile device or other communication measures for parties at a distance which provides the recipient with a written record of the communicated content), or other documents.

3)If a document containing a clause of an Arbitration Agreement is quoted in a contract concluded in writing as constituting part of said contract, such Arbitration Agreement shall be in writing.

4)If an Arbitration Agreement is made in an electromagnetic record meaning a record used computerized information processing which is created in electronic

York Convention of 1958 (1) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, we find that Article Two of this Convention stipulates:

Each Contracting State recognizes any written agreement in which the parties undertake to refer to arbitration all disputes, or any disputes that have arisen or may arise between them in relation to a specific legal relationship, contractual or non-contractual, related to a subject that can be settled by arbitration.

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form, magnetic form, or any other form that cannot be perceived by the human senses) recording the contents thereof, such Arbitration Agreement shall be in writing.

5)In an arbitration procedure, if a Written Allegation submitted by either party contains the contents of an Arbitration Agreement, and a Written Allegation submitted in response by the other party does not contain anything to dispute it, such Arbitration Agreement shall be deemed to be made in writing.

See https://www-japaneselaw, for the full Japanese Arbitration Act in English, No. 138 of 2003, as amended by No. 147 of 2004.

(1)See UNCITRAL's explanation of the New York Convention, Article 2 of the Convention, p. 58. It must be mentioned that initially, the Geneva Protocol and Convention of 1923 and 1927 left the matter to the freedom of national legislation in organizing arbitration and were satisfied with referring to the system of each country according to its arrangement, which led to a disturbance in arbitration at the international level, which prompted the New York Convention to address this difference as shown above, by requiring writing in the arbitration agreement. However, the Convention did not clarify whether writing is for proof or for conclusion, and there are those who believe that it is for proof only, and based on this, the text of Article 12 of the National Arbitration Law, which stipulates writing for the conclusion of the arbitration agreement, is cancelled, otherwise it is void, due to the supremacy of the international treaty or agreement over domestic law. See Dr. Ahmed Abdel Karim Salama, Views on the law applicable to international arbitration agreements, Helwan Law Journal for Legal and Economic Studies, p 85.

The term "written agreement" includes any condition contained in a contract, or any arbitration agreement signed by the two parties or contained in exchanged letters or telegrams.
The court in any contracting state, when a dispute is submitted to it in a matter in which the two parties have concluded an agreement within the meaning used in this article, shall refer the two parties to arbitration upon the request of either of them, unless it finds that this agreement is null and void, ineffective or unenforceable.
Finally, we would like to point out that there are some problems that revolve around the form of writing required to conclude an arbitration agreement. Is it limited to the traditional form, or, does it expand to include what are called audio messages? Do expressive symbols rise in their validity to the validity of writing, whether traditional or electronic in concluding an arbitration agreement or not?

Chapter four

Problems of writing in the arbitration agreement

There are some problems regarding writing an arbitration agreement: Is a signature required? Does an electronic signature have the same authority as a traditional signature? To what extent is it permissible to use emojis to express the will and then conclude an arbitration agreement? To what extent is it permissible to rely on oral arbitration? Clarifying the controls for taking it into account, we will explain all of this through the following sections

Section One

Problems of Signature in Concluding the Arbitration Agreement

First: signature, According to the Egyptian Court of Cassation's definition of a written signature, it is: manuscript writing in the hands of the person from whom it issues it, or every sign by which a person expresses that he/she has accepted the content of the paper and is committed to it (1). The signature is an expression of the will to act, approval of its content, and approval of it. If we have mentioned the handwritten signature, we cannot ignore the electronic signature and its evidential value.

The electronic signature is what is placed on an electronic document, and takes the form of letters, numbers, symbols, signs, or others, and has a unique character that allows the identification of the signatory person and distinguishes him from others (2), and this is for a natural person.

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(1) Civil Cassation, Session of January 31, 1978, Appeal No. 527 of 44 Q, Provisions and Principles of Cassation in a Hundred Years, p. 124. See also: Civil Cassation, Session of May 22, 1991, Appeal No. 664 of 47 Q, referred to by Ahmed Sedky Mahmoud, The Concept of Writing in the Arbitration Agreement, Dar Al Nahda Al Arabiya, 2004, p. 41.

(2) See Article 1 of the Egyptian Electronic Signature Law of 2004. See also :

ELECTRONIC EVIDENCE IN CIVIL AND ADMINISTRATION PROCEEDINGS, Guidelines adopted by the committee of Ministers of the Council of Europe on 30 /1/2019 , p 19.

For the purposes of guideline7, "advanced electronic signature" means an electronic signature which meets the requirements of Article 26 of the eIDAS regulation, namely a. it is uniquely linked to the signatory; b. it is capable of identifying the signatory; c. it is created using electronic signature creation data

As for a legal person, if he wants to conclude an arbitration agreement, what about the form of the electronic signature used in the conclusion? This is done through the electronic seal, which is just an electronic signature, which allows the identification of the legal person who created this seal. The difference between the two means: **electronic signature** and **electronic seal**, is that the first relates to natural persons, while the second relates to legal persons. It was introduced by the recent amendments to the executive regulations of the Electronic Signature Law, issued in April 2020, as a means of identifying the legal person, and it performs the same task as the electronic signature (1).

The electronic signature, within the scope of civil, commercial and administrative transactions, has the same evidential value as signatures in the provisions of the Evidence Law in Civil and Commercial Matters, if the conditions stipulated in this law and the technical and technological controls specified by the executive regulations of this law are observed in its creation and completion. This is in accordance with the text of Article 14 of the Egyptian Electronic Signature Law.

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that the signatory can, with a high level of confidence, use under his or her sole control; and d. it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable. The term "qualified electronic signature" means an advanced electronic signature that has been created by a specific device for this purpose a "qualified electronic signature creation device"). Such devices must benefit from a "qualified certificate for electronic signatures", that is a certificate that has been issued by a natural or legal person who provides one or more qualified trust services a "qualified trust service provider") and who is authorised to do so by the appropriate supervisory body, ELECTRONIC EVIDENCE IN CIVIL AND ADMINISTRATION PROCEEDINGS , Guidelines adopted by the committee of Ministers of the Council of Europe on 30 /1/2019 ,p 19.

(1) Text of Article 1, Paragraph 9 of the Executive Regulations of the Egyptian Electronic Signature Law of 2004, amended by No. 361 of 2020.

It is noted in the text of Articles 14, 15 that electronic documents and electronic signatures have evidential value, but with specific conditions, namely (1)

1- The signature is linked to the signator alone and no other.

2- The site alone has control over the electronic medium.

It is possible to detect any modification or change in the data of the electronic editor, or the electronic signature.

It is noted that it is not required that the arbitration agreement be signed specifically, nor is it required that each page of the contract be signed, so it is sufficient to empty the arbitration agreement into a document signed by both parties, provided that there is no doubt or suspicion about the direction of the parties' will to strip the jurisdiction of the state judiciary and authorize it to arbitrate (2), but a question may be raised about the extent to which the two parties must sign the document containing the arbitration agreement between them?

To answer this question, we, for our part, take the opinion that differentiated between the two forms of the arbitration agreement, as for the arbitration agreement if it takes the form of a clause, or an arbitration condition included in the original contract between the two parties, then there is no such problem here, namely, the necessity of the two parties signing next to the arbitration condition; this is because the condition of the agreement to arbitrate here is included in the core of the contract concluded between the two parties, and actually signed by them. As for the arbitration agreement being included in a document, or a document independent of the original contract, here the matter is different, as it must be stamped with their signatures, otherwise it becomes subject to denial at any time and does not acquire validity (3).

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(1) See the Egyptian Electronic Signature Act of 2004, also see the Bangladesh Evidence Bill introduced to Parliament on 31 August 2022, centered on electronic evidence, introducing the term digital record and digital signature, and establishing the authenticity of electronic evidence. Also:

The Evidence Amendment) Bill 2022 An appraisal, article on The Daily Star, see the article on https://www.thedailystar.net, last accessed on1-12-2022.

(2) Ahmed Sedky Mahmoud, ibid, p. 42,p 43.

(3) Ahmed Sedky Mahmoud, ibid, p. 46, p 47.

As for the arbitration agreement in the form of a stipulation, i.e. after the dispute has actually occurred, this assumes that it has been negotiated and agreed upon, and it is impossible for it to be issued by the two parties without their signatures, i.e. logically it must be signed. If we reach this answer to the previous question, we may realize two other questions related to the problem of the extent to which the two parties must sign the document containing the arbitration agreement between them. Namely, is it permissible to sign the arbitration agreement, whether it is a condition or a stipulation, by someone other than its two parties, such as the agent and the mediator? And if it is permissible, is it necessary to obtain a written power of attorney to carry out the work? Referring to the decision of the German arbitration court in a case, the facts of which are that a sales contract had been concluded in the name of the Italian seller by a broker, and the contract signed by the broker with the German buyer included an arbitration agreement stipulating that the settlement of disputes arising from the contract would be within the jurisdiction of a specialized German arbitration court, the "Arbitral Tribunal Of Hamburg War Exchange". When the dispute arose between the two parties and the German buyer brought it before the arbitration court, the Italian seller insisted before the court that the arbitration agreement was void and not binding on him, because it was issued by an agent who did not obtain written authorization from the principal, in accordance with what is stipulated by Italian law, which requires that the authorization granted to the agent be written, while the German buyer insisted on applying the German law that the two parties had explicitly chosen to govern their contractual relationship, in addition to the fact that Article 2/2 of the New York Convention did not include a condition of this kind, but the arbitration court concluded to apply German law in this regard, as the applicable law. Since the parties agreed in their contract to be subject to its provisions, and since the German rules do not require the availability of writing as a requirement, but rather allow the agent's authority to be proven by testimony, the arbitration panel's ruling was based on the statements of witnesses who were heard before it to determine that the broker had the authority in the case at hand to agree to arbitration (1). But what about the position of Egyptian law on this problem? Referring to the text of Article 699 of the Egyptian Civil Code, we find that it defines the agency as: a contract whereby the agent undertakes to perform a legal act on

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(1) **Ahmed Sedky Mahmoud, ibid, p 48,p 49..**

behalf of the client. And Article 76 of the Code of Civil Procedure stipulates that:

"It is not valid without a special authorization to acknowledge the claimed right, or to waive it, or to settle or arbitrate it. Article 702 of the Civil Code also states:

"A special agency is required for any act that is not an act of administration, and in particular in selling, mortgaging, donations, reconciliation, acknowledgment, arbitration, directing oaths, and pleading before the judiciary.

Therefore, there must be a special authorization to conclude the arbitration agreement in accordance with Egyptian legislation. Since the arbitration agreement must be written in accordance with Egyptian arbitration law, the agency to conclude the arbitration agreement must also be in writing, and an oral agency is not sufficient, according to Article 700 of the Egyptian Civil Code, which stipulates that: "The agency must have the form required for the legal act that is the subject of the agency unless there is a text that stipulates otherwise." Since the law applicable to the form of the contract is subject to the law of the place of conclusion, the agency, as a contract, is subject to the law of the place of conclusion.

Therefore, if the agency by virtue of which the arbitration agreement was concluded was made outside Egypt, and the law of the country in which the agency was made does not require a special agency to agree to arbitration, and is satisfied with a general agency, or not, a written power of attorney is required and an oral power of attorney is sufficient. The arbitration agreement signed by the agent under this general or oral power of attorney is a valid agreement to be implemented in Egypt (1).

• If we ask a question about the purpose of the signature, is it to identify the signatory or to prove approval of what is stated in the document and commitment to it (2)?

If the answer is that the purpose is to prove the identity of the signatory, then what is the position of the signature in the form or the initials signature?

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(1) Duaa Fawzy Mahrous, Objective Conditions for the Validity of the Arbitration Agreement, Faculty of Law, Sadat University, p. 6- p8.

(2) For details on this part, see the lecture of Dr. Mahmoud Lotfy Mahmoud, the thirteenth forum sponsored by Ain Shams University, Faculty of Law, and the Arab International Organization, available on YouTube, the Arab International Organization for Dispute Resolution.

Signature in the form or the initials signature, is a signature that takes a specific form specific to the signatory and we cannot determine the identity of the signatory through it. So this takes us to the previous question again, about the purpose of the signature, to find that the main purpose of the signature is to prove the signatory's approval of what is stated in the document and commitment to it, and not to determine the identity of the person in the first place.

The initials signature and the form signature have evidential value, and have the validity of the full signature, based on what the Egyptian judiciary has decided that (1): The signature is the writting by the hand of the one who writes it. The name includes the full or abbreviated name, as well as any written reference or term chosen by the person for himself, of his own free will, to express that he issued the document and agreed to what is stated in this document and to abide by its contents.

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(1) Civil Cassation, January 31, 1978, Collection S 29, p. 357. For details of the ruling, see, Tharwat Abdel Hamid, Electronic Signature, no publisher, year of publication 2021, p. 20.

See also: Appeal No. 810 of 54 Q, Session 2/12/1991, Vol. 42, Part 2, p. 1751.. The private document is evidence of what is written therein against the person who signed it, unless he explicitly denies signing it. It is not required that the signature be legible and reveal the name of its owner, or that the signature on the private document be authenticated by the seal of its signer or its editor on printed materials bearing his name.

The Rule:

Since the private document - and according to the rulings of this court - is evidence of what is written therein against the person who signed it, unless he explicitly denies signing it, and there is nothing in the law that requires the signature to be legible and reveal the name of its owner, since the signature alone, regardless of the way it is written, is sufficient to identify it and achieve the purpose of the legislator, as long as the person to whom the signature is attributed does not deny his signature, and there is also nothing in the law that requires authenticating the private document with the seal of its signer and that it be on printed materials bearing his name.

Section Two
The validity of using written and spoken messages in concluding the arbitration agreement

According to the text of Article 12 of the Egyptian Arbitration Law, No. 27 of 1994, arbitration agreement shall be concluded through written means of communication. This phrase is broad enough to include what the text does not mention of modern means of communication that are carried out remotely.

We are currently witnessing a revolution in technological development, through which written and spoken messages can be sent and received. These means are suitable for concluding the arbitration agreement, provided that they provide a permanent, unchangeable record, in order to be able to refer to it in the event of denial of proof (1).

In this form, the legislator does not require signing the arbitration agreement, as it is in the form of letters or massage (2), but it must be saved through a permanent record to know all the details about it, and a written copy is extracted that can be referred to when one of the parties denies the existence of such an agreement (1)، Therefore, if there is no evidence that a written offer issued by one party was met with a written acceptance by the other party, then the exchange required by the New York Convention is not available, and the arbitration agreement must be ruled to be non-existent within the meaning of the Convention, and thus within Egyptian arbitration law (1).

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(1) Mahmoud Lotfy Mahmoud Abdel Aziz, The Court Competent to Consider Disputes Arising from Consumer Contracts Concluded via the Internet, Journal of Legal and Economic Sciences, Volume 61, Page 84, Issue 2, Faculty of Law, Ain Shams University, 2019, where he relied on the text of Article 23/2 of the Brussels Regulations, which states that the term writing includes communications made by electronic means provided that they provide a permanent and unchangeable record.

(2) Joanna Kisielińska-Garncarek, Łukasz Ostas GESSEL), Kluwer Arbitration Blog, Concluding an Arbitration Agreement via Means of Remote Communication under Polish Law: A Short Guide for Practitioners, , November 13, 2022

The notion of "means of remote communication" applies to simple electronic forms without the parties' signatures), such as telefax, telegram, e-mail or short

text messages – this in light of both CCP as well as the 1958 New York Arbitration Convention, which Poland is a party thereto. The Polish Supreme Court also took the position that an electronic signature is not required for exchange of electronic correspondence. It is permissible to conclude an arbitration clause also in "simple" electronic form, i.e., not requiring that the clause be accompanied by a secure electronic signature verified with a valid qualified certificate – subject, of course, to the condition that the technical means enable the content of the declarations of intent to be recorded see the decision of 28 November 2018, case no. III CSK 406/16

But this is not acceptable in consumer contracts, as both parties must sign the arbitration agreement, taking into consideration an important matter, which is: the agreement on the arbitration clause for disputes arising from consumer contracts is done as an arbitration agreement and not as an arbitration condition, that is, in clearer terms: it is agreed upon and concluded after the dispute actually occurs and not before it; in order to protect the weak party, which is the consumer. For details, see:

Article 11622) of the CCP does not apply when the arbitration agreement is concluded with consumers. An arbitration clause covering disputes arising from contracts to which a consumer is a party may be executed only after the dispute has arisen and must be made in writing within the meaning of Article 11611) CCP, i.e. with a wet-ink or qualified electronic signature).

(1) There was a disagreement among the jurisprudence regarding the validity of extracts of modern means, or technology in proof before the courts. For details, see Ahmed Sedky ,ibid , p. 54, footnote 115. The solution to this problem can be found by referring to the ruling of the Egyptian Court of Cassation mentioned in our thesis entitled "Evidence in Private International Disputes before National Judiciary and International Arbitration," Dar Al Nahda Al Arabiya, first edition, p. 245 and following. See also:

Section Three
Validity of symbols emoticons in expressing will and concluding the arbitration agreement

The extent to which symbols emoticons are permissible to use in expressing will, and thus concluding an arbitration agreement.

Emojis are defined as: common imaginary digital images, used in emails, and social media platforms on the Internet, providing many functions and purposes, and having a social and cultural history that differs from one culture to another (2). But do these symbols rise to the level of legal authority as a means of expressing will, and thus concluding legal actions? To answer this question, we will cite a legal precedent that may be the latest in recognizing emojis in expressing will, and thus concluding legal transactions, which is a lawsuit filed before the Canadian court in July 2023.

Joanna Kisielińska-Garncarek, Łukasz Ostas GESSEL),Kluwer Arbitration Blog, Concluding an Arbitration Agreement via Means of Remote Communication under Polish Law: A Short Guide for Practitioners, November 13, 2022

the Polish Supreme Court has stated that the requirements for presentation of an arbitration agreement in Article IV1) must be considered taking into account the form in which the agreement may have been concluded. The Supreme Court emphasised that, in the event the arbitration agreement is concluded via e-mail, there is no "original" thereof within the meaning of Article IV1)b) of 1958 New York Arbitration Convention; in such a case, supplying the court with written confirmation of the agreement e.g., print-out of e-mails) is sufficient see the decision of 13 September 2012, case no. V CSK 323/11).

(1) Ahmed Sedky, ibid , p. 61.

(2) Elizabeth Curley, Marilyn McMahon, Article: The Emoji Factor, Humanizing the Emerging Law of Digital Speech, Dubai Judicial Institute Journal, Issue 13, Year 9, April 2021.

The facts of that case were summarized in a negotiation that arose between a grain farmer and a buyer, where the buyer sent a picture of a contract to buy grain in a text message to the farmer, while the farmer responded with an Emoji thumbs up, so the buyer considered that sign as evidence of approval, while the farmer claimed that this Emoji was only to acknowledge receipt, i.e. receiving a picture of the contract, i.e. confirming the arrival of the offer while not representing acceptance. The court had another opinion, as the court saw in this incident that this Emoji sign was nothing but an acknowledgment of approval of the offer, i.e. it constituted acceptance and resulted in a valid contract (1).

From here, we conclude that Emojis may be used to express will, and thus conclude an arbitration agreement, because they are considered a valid language for communication and expression, so they are a valid language for concluding legal transactions, and thus arranging their legal effects and acquiring legal authority.

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(1) Can Emojis Creat a Legally Binding Contract? Stefan Rubin, https://www.jdsupra.com, July 20, 2023, Sputh West Terminal SWT) V. Achter Land & Cattle

Chapter five
Judicial applications in the field of proving the arbitration agreement based on the New York Convention 1958

We will use some judicial precedents reported in various countries that apply the New York Convention of 1958 "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1)" There is something called evidence of the parties' knowledge of the arbitration condition, so we will mention several cases as examples and not limited to, through which we will explain the methods of proving the arbitration agreement, if the court is unable to access direct written evidence proving the agreement to arbitrate. They are as follows:

First: If the parties participated in negotiating the contract.

Second: If the parties participated in implementing the contract.

Third: If the parties participated in negotiating the contract and implementing it equally.

Fourth: If the parties had knowledge of the arbitration agreement.

Fifth: If the parties participated in the arbitration proceedings, without objecting to the jurisdiction of the arbitration panel.

First: If the parties participated in negotiating the contract.

The first case is the existence of written documents indicating the existence of an arbitration agreement. This is sufficient evidence of the arbitration agreement.

Second: If the parties participate in the implementation of the contract.

The consent is inferred from the parties' behavior in implementing the contract. These judicial precedents have observed several cases in which a party does not sign the contract or does not reaffirm in writing, but performs its obligations. Many courts have considered that this behavior means that there is implicit consent to the terms of the contract, including the arbitration agreement.

The Supreme Court of India has implemented an arbitration award even though the arbitration agreement was not signed or included in the exchanged documents.

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(1) UNCITRAL explanation of the New York Convention 1958, see the following link: https://newyorkconvention1958.org

The court considered that the party's behavior, especially its opening of letters of credit based on the contract and its invocation of the force majeure clause included in the contract, is evidence of acceptance of the terms of the written contract, including the arbitration clause (1).

A French court also upheld an arbitration agreement contained in a seizure note on the basis that the parties had executed the note, and held that since the parties were aware of the seizure note, which was the only "subject of agreement" between them, they were bound by the arbitration agreement contained therein (2).

Thirdly: If the parties participated in negotiating the contract and in implementing it equally

This is in cases where a party that did not sign the contract containing the arbitration agreement participates in negotiating that contract and implementing obligations under it.

In support of this, we find that the Paris Court of Appeal ruled that the parent company, which participated in negotiating the main contract and performed obligations under it, is bound by the arbitration agreement despite not being a party to the main contract (3).

Fourth: If the parties have knowledge of the arbitration agreement The conclusion of the arbitration agreement can also be proven by proving the Knowledge of the arbitration parties of the arbitration agreement, and this is proven in the case where the arbitration condition is printed on the back of the contract, or is included in the general terms and conditions printed on the back of the contract.

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(1) Smita conductors ltd .v. Euro Alloys ltd, supreme court, India, 31 August 2001, civil Appeal No. 12930 of 1996, UNCITRAL Commentary on the 1958 New York Convention, pp. 43, 44, see footnote 207.

(2) SA Groupama transports V. Societe Ms Regine Hans und Klaus Heinrich KG, court of Appeal of Basse terre, france, 18 April 2005, UNCITRAL Commentary on the New York Convention of 1958, pp. 43, 44. See footnote 209, p. 44.

(3) Societe kis, france et autres v. societe Generale et autres, court of Appeal of Paris, France 31 October 1989, 1992, UNCITRAL Commentary on the 1958 York Convention, pp. 58, 59. See footnote 210.

If these cases are available, the parties are considered to be aware of the arbitration condition, but in the case where the arbitration condition is included in a paper other than the main contract, then here we must refer to the main contract; to prove any specific reference in the contract that suggests and indicates the parties' knowledge of the condition so, we can say that the parties are aware of the arbitration agreement, and the reference to their knowledge is explicitly stated that they are aware, and this is what the Italian Court of Cassation ruled in a dispute in which the arbitration agreement was included in another document other than the main contract, that in order to prove the parties' approval of the arbitration agreement, they must have knowledge of the agreement through a specific reference to it explicitly in the main contract (1) .

We would like to point out the nature of knowledge of the arbitration agreement mentioned in this fourth clause. Did the Italian Court of Cassation mean in its previous ruling to refer to it?

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(1) Iouis Dreyfus S.P.A.V. cereal Mangimi s.r.l., court of cassation, Italy, 19 May2009, 11529.. See UNCITRAL Commentary on the 1958 New York Convention, p. 45 and footnote 213.

In other words, did it refer to the actual knowledge of the parties of the arbitration agreement, or could it be replaced by "logically assumed knowledge", where the parties are considered to be aware of the arbitration agreement, regardless of their actual knowledge of the arbitration agreement if knowledge of it can be logically assumed? For example, the Italian Court of Cassation mentioned that professional businessmen are supposed to be aware of the content of the general terms and conditions in their field of work, so the implicit reference to those terms and conditions satisfies the agreement to arbitrate (1), as supported by the German courts (2), where the German court indicated the possibility of inferring approval of the arbitration agreement, through relevant practices in international trade, when the contract is specific to the field in question, and the parties are working in this field.

The arbitration agreement can also be proven if it is included in a document referred to in the main contract. The French Court of Appeal in the Bonner case relied on both the New York Convention and French law, that an arbitration agreement contained in a document referred to in the main contract should be enforced if it can be proven that the parties were or should have been aware of it (3).

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(1) Del Medico & C. SAS V. Iberprot ein sl, court of cassation, Italy, `6 June 2011, 13231, See UNCITRAL Commentary on the 1958 New York Convention, p. 45. Also see the Italian Court of Cassation, see footnote 214.

(2) Bundesgerichtshof BGH) Germany, 3 December 1992, See UNCITRAL Commentary on the 1958 New York Convention, pp. 45, 46, see also note 215 p.46.

(3) Societe Bomar oil N. N. V. Entreprise tunisienne d' activites petrolieres ETAP), court of Appeal of Versailles, france, 23 January 1991, upheld by societe Bomar oil N.V.V. Entreprise tunisienne, The following courts followed this approach:

Case: Court of cassation, Italy, 16 June 2011, 13231, copape productos de petrole LTDA .v. Glencore LTD,Didtrict court, southern District of New York, united of America, 8 February 2012 ,See p. 46 of the UNCITRAL Commentary on the New York Convention, see also footnote 220 of the same page.

This is also in accordance with the text of Article 10, Paragraph 3 of the Egyptian Arbitration Law.

We cite Article 76 of the UNCITRAL Model Law on International Commercial Arbitration, which states that: a reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing (1).

Fifth: If the parties participate in the arbitration proceedings without objecting to the jurisdiction of the arbitration panel

The courts have inferred the parties' consent to refer their disputes to arbitration through their conduct in the arbitration proceedings. Participation in the arbitration proceedings without any objection to the jurisdiction of the arbitration panel is evidence of the parties' consent to arbitration.

This is what the Supreme Court of Justice in Brazil (2) went to, where the court concluded that despite the failure to sign the arbitration agreement and the failure to meet the conditions of Article Two of the agreement, it decided to implement an arbitration award issued pursuant to the aforementioned arbitration agreement, considering that the parties had participated in the arbitration proceedings without any objection to the arbitration panel's assumption of the dispute.

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(1) UNCITRAL Model Law on International Commercial Arbitration 1985, 76) Option I.

(2) Case: L ' Aiglon S/A v. Textil Un1ao S/A, Superior Court of Justic, Brazil, 18 May 2005, SEC 856, See explanation of the New York Convention, p. 47.

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C . (Acts)

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