

Contracts and Third Parties

12.1 INTRODUCTION

This chapter will examine three distinct issues. The first concerns agreements whereby the creditor or debtor to an existing contract is substituted by a new (third) party. Two types of substitution are envisaged, namely, assignment of rights (assignment) and assignment of debt (novation). The second focus of the chapter is on the effects of contracts on *bona fide* third parties and how the law mitigates any adverse impact. The third is an innovation of the Qatari CC, examining agreements the sole object of which is to attract third parties. This chapter will not deal with the rights of successors (heirs) to a contract following the death of the contracting party.¹

The cardinal rule of privity of contracts demands that persons who have not offered or accepted an offer – and an intention to be bound – cannot be made parties thereto. Hence, third parties may be bound to a contract in respect of which they are not original parties only through their unequivocal consent, as well as the consent of all existing parties.² Sometimes, such consent may be implicit whether by law or contract. The insurance carrier is entitled under its contract with the insured to pursue the latter's claim against a third-party causing loss to the insured. Here, the third party has not provided its consent, but the substitution of rights in the insurance contract between the insurance provider and the insured does not require the consent of third parties.³ In

¹ See Arts 175 and 176 CC. See Court of Appeal Judgment 53/2019.

² See Court of Cassation Judgment 72/2011, which iterated this fundamental rule. In the case at hand, the claimant had contracted with the respondent through the latter's employee, who lacked capacity under the circumstances of the contract. The claimant was in bad faith about the employee's capacity. The Court held that the respondent was not liable for the acts of its employee (a third party).

³ See Court of Appeal Judgments 255/2017 and 277/2017, where the Court reversed a first instance judgment rejecting the effects of a subsidiary warranty agreement. It explained that

other cases, a creditor may wish to assign its rights against a debtor to a third party, so that the third party substitutes the original creditor against the debtor. The Qatari CC regulates such matters extensively under the general principle that the consent of all parties is required.

12.2 ASSIGNMENT OF RIGHTS AND ASSIGNMENT OF DEBTS

An assignment of rights consists of a bilateral agreement between the assignor and the assignee, with sufficient notification given to the debtor. Assignment of obligations (also known as novation) clearly requires the approval of the creditor and hence the assignment of a debt necessarily encompasses an agreement between all three parties. The Qatari CC envisages both types of assignment; assignment of rights is regulated under articles 324–336 CC, while assignment of obligations is regulated by articles 337–353 CC. The pertinent structure in the CC is somewhat confusing. Despite the existence of assignment of rights and assignment of debts, as already described, which corresponds well to assignment (of rights) and novation (of obligations) under civil and common law principles,⁴ the CC sets out two further sets of provisions on novation (articles 381ff CC) and assignment (articles 387–389 CC).

Where the nature of the contract or the conduct/silence of the parties permit an unequivocal inference that either party may substitute itself with another party (and hence transfer its contractual rights and obligations), the third party (assignee) becomes a party to that existing contract in substitution of the rights and obligations of the transferor/assignor.⁵ The extensive sub-contracting inherent in the construction and energy sectors is generally predicated on express authority in the original contract, or is otherwise presumed as standard industry practice. Article 250 CC iterates the general position

a subsidiary warranty lawsuit is one in which the warranty applicant entrusts its guarantor to enter into an existing dispute between itself and a third party in order to hear the judgment ordering compensation of the damage that the warranty claimant suffers from the ruling in the original lawsuit.

- ⁴ In the common law, an assignment consists only in the transfer of the assignor's rights, whereas novation encompasses both rights and burdens. See *Burdana v Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980. An agreement of novation must include all three parties, namely, debtor, creditor and new third party, all of which must provide their unequivocal consent. Moreover, the novator (original debtor) must be released from its obligation and there is a vesting of remedies.
- ⁵ There is a notable presumption against such inference. Art 33(2) CC clearly states that 'where the original debtor or the transferee notifies the creditor of such transfer and a reasonable time is fixed for acceptance thereof by the creditor, and such time expires without any declaration of acceptance by the creditor, such non-declaration shall be considered as a rejection of the transfer'.

by stating that ‘where the terms of the agreement or the nature of the debt requires performance of the obligation by the obligor himself, the obligee may reject payment by any third party’. The agreement/consent of existing parties is therefore a *sine qua non* (fundamental) condition for the substitution of the debtor or creditor, wholly or partially, with another party.⁶

12.2.1 Assignment of Rights

Assignment consists in the transfer of existing contractual rights by one party (assignor) to another (assignee). This is achieved through a bilateral agreement between assignor and assignee under article 387 CC. In order to prevent harm to *bona fide* parties, the assignment is invalid if the assignee is insolvent at the time of the assignment.⁷ Some commercial transactions can only be completed by assignment. Article 470 of Law No 27 of 2006 (Commercial Law) stipulates that when the drawer has inserted in a bill of exchange the words ‘not to order’ or an equivalent expression, the instrument can only be transferred according to the form, and with the effects, of an ordinary assignment.⁸ Certain assets cannot be made the object of assignment, namely, real estate, movables subject to a mortgage or pledge and business enterprises.⁹ It is suggested that while the CC does not permit the use of assignment as security, assignment of rights is often used as security, particularly where banks have no right to enforce the assigned rights, save in the event of default by the creditor.¹⁰

The Qatari CC generally allows such substitution, or subrogation (of rights) subject to several limitations.¹¹ In accordance with article 324 CC (assignment of rights) an obligee may transfer to a third party its rights against the obligor,

⁶ Art 338(1) CC; equally Art 340 CC.

⁷ Art 388 CC.

⁸ See equally Art 471 of the Commercial Law (CL) regarding endorsements on bills of exchange; in the event of bankruptcy, the group of creditors mentioned in Art 742 of the Commercial Law must assign their debts to a third party (assignee). The assignee may not participate in the company’s deliberations on composition, nor vote thereon. Under Art 743 CL, such assignment may encompass a part of the securities provided that it is equivalent to no less than half of the debt.

⁹ S El-Serafy, ‘Qatar: Assignment of Rights and Obligations under the Qatar Civil Code’, available at www.tamimi.com/law-update-articles/qatar-assignment-of-rights-and-obligations-under-the-qatari-civil-code/

¹⁰ Ibid.

¹¹ Limitations against transferring rights to third parties is not confined to contracts. Art 203 CC, for example, forbids the transfer of indemnity rights for moral damages to third parties, ‘unless their value is fixed by law or by agreement, or if the obligee claims such indemnity before the court’.

unless the law, the agreement or the nature of the obligation otherwise requires. Where there is no applicable limitation on the transfer the consent of the obligor is not required, provided that the creditor's right/claim has been fully discharged by the third party, in accordance with article 358(1) CC. The assignment of the right whereby a third party is entitled to collect damages or a debt is recognised in article 356(1) CC. Paragraph 2 of this provision goes on to say that where a payment is made against the debtor's will, the latter may prevent recourse by the payer in connection with the debt, in full or in part, 'if the debtor proves that it has an interest in objecting to such payment'. As already stated, assignment of rights does not require consent of the debtor, save where the assignment agreement is made after the date of the payment of the debt.¹² The Qatari Court of Cassation has clarified that assignment of a right does not impose or create a new obligation on the assignee.¹³

Article 326 CC envisages assignment in respect of attached assets, whereby the liquidation of the assets would pass in the ownership of the third party. Article 326 CC stipulates that such transfer is effective against the obligor and the third party only where the obligor is notified of the subrogation and duly accepts and that moreover the transfer is fixed by a precise date.

Interestingly, article 396(1) CC explains that where assignment has taken place with reservation from the debtor, the latter may not hold the transferee/third party to any right of set-off available prior to the exercise of the transfer. In such cases, the debtor shall have a right of recourse against the transferor only. It is hence important to voice any reservations from the outset.¹⁴

12.2.2 *Novation or Assignment of Obligations*

A particular species of assignment is *novation*, which is regulated in articles 381ff CC and which is also known as assignment of debt. In practice, novation arises where the debtor (who now becomes the assignor) borrows from a third party (assignee) in order to pay its debt to the creditor. In such case, the original creditor is substituted by the new lender with the original creditor's consent. Such consent may not be required, 'provided that the loan agreement shall state that such money is designated to pay such debt and that, upon settlement, such money borrowed from the new creditor is applied to pay such debt'.¹⁵ In all cases,

¹² Art 358(1) CC.

¹³ Court of Cassation Judgment 49/2016. In the case at hand the question was whether the assignment encompassed also the arbitration clause in the original contract. The Court was adamant that under the particular circumstances it was not so encompassed.

¹⁴ On set-off in the Qatari CC, see Chapter 12.

¹⁵ Art 358(2) CC.

subrogation becomes effective only when the date in the relevant agreement is fixed, in accordance with article 358(3) CC. Novation overlaps with assignment to the degree that the parties to an existing contract agree to substitute either one with a new third party. The key difference with assignment is that one of the objectives of novation is to replace an existing obligation with a new one or add a new obligation to the underlying contract (whereas assignment concerns the transfer of rights). This may, or may not, include the introduction of a new party. Another difference is that assignment affects the parties' rights and duties from a particular point in time (the so-called point of assignment). Some commentators suggest that when securing a debt, such security is not automatically transferred under a novation agreement; in the event of assignment, however, the security is automatically transferred to the assignee.¹⁶ A valid contract of assignment (between assignor, assignee and creditor) is deemed a renewal of the original debt obligation, albeit with a new debtor.¹⁷

Novation, in the sense of party substitution, is a tripartite agreement requiring the consent of debtor (novator), new creditor (novate) and original creditor.¹⁸ Despite the use of the words 'replace' and 'substitute', both assignment and novation culminate in a new contract on the same terms as the original contract, albeit with a new set of parties. This is an important observation because it is not improbable that a novation agreement be supplemented by subsequent such agreements, particularly where the sub-contractor requests variation of its obligations. In such case, unless the subsequent novation agreements provide otherwise, all prior agreements remain in force.¹⁹ In the context of Qatar, novation is prevalent in construction whereby the contractor enters into a sub-contracting agreement with a third party by which to conclude part of the work, requesting in the process that the third party acquires a demand guarantee (bonds) from a bank in favour of the contractor in the event it is in breach of its sub-contracting obligations.²⁰ The QFC Court, relying chiefly on English which it deemed as reflecting principles recognised internationally, including Qatar, has gone on to state that demand guarantees are not payable to the contract where fraud is involved (fraud exception).²¹

¹⁶ El Serafi (n 9).

¹⁷ Court of Cassation Judgment 195/2010.

¹⁸ Art 381 CC.

¹⁹ *Obayashi Qatar LLC and HBK Contracting Co WLL v Qatar First Bank LLC* [2020] QIC (F) 5, para 112.

²⁰ There are several cases of this nature before the QFC Court, which has clarified that the QFC Contract Regulations and the Qatari CC are very much identical in their treatment of demand guarantee bonds. See *Obayashi Qatar LLC and HBK Contracting Co WLL v Qatar First Bank LLC*, *ibid*, paras 52–56.

²¹ *Ibid*, paras 9–100.

12.3 EFFECTS OF CONTRACTS ON THIRD PARTIES

The Qatari CC, just like its other civil law counterparts, imposes several limitations concerning the effects of contracts on *bona fide* third parties.²² A sales contract disposing of property owned by a third party (without its consent) is invalid.²³ In addition to article 250 CC, explained above, article 63 CC sets out a fundamental rule, whereby the exercise of a right is deemed unlawful where, among others, its intended use is solely to cause damage to others, or if the exercise of the right ‘may cause unusually gross damage to third parties’. This is an important observation, since anything below gross damage is permitted and is not considered an abuse of right. Where a contract is invalid or revoked due to a mistake of any of the parties to that contract, *bona fide* third parties suffering damage thereof may validly claim damages in tort and request the invalidity of the contract.²⁴

Another fundamental rule is that assets that have come in the possession of a *bona fide* third party cannot be taken from such party by the operation of a contract to which it is not a party.²⁵ No doubt, if the object of the contract is lawfully in the hands of a third party, the underlying contract may be terminated or rescinded.²⁶

²² Although in this chapter we are concerned with effects arising from contracts, the CC is replete with provisions limiting any effect on third parties. See, for example, Art 1081(1) CC, which stipulates that a ‘mortgage shall not be effective against third parties unless it is registered before the third party acquires any real right over the mortgaged real property without prejudice to the provisions of bankruptcy’. Confirmed by Court of Cassation Judgment 167/2016; see also Art 19 CL, concerning effects on *bona fide* third parties from the mismanagement of a minor’s personal affairs; see also Art 65 CL concerning the assumption of commitments of the previous store owner by its successor.

²³ Court of Cassation Judgment 184/2016; see also Art 93 CL, stipulating that ‘Where a trader sells movable property belonging to a third party, which comes within the remit of its business and delivers it to a buyer, then the buyer shall own the sale item if it has acted in good faith, but if the said item is a missing or stolen item then the real owner may recover it within five years from the time of loss or theft and the buyer may request the return of its payment’.

²⁴ Art 168(1) CC. See Court of Cassation Judgment 11/2015, where the parties had violated Art 2 of Law No. (13) of 2000 amended by Law No. 2 of 2005 Regulating the Investment of Non-Qatari Capital in Economic Activity, which requires that a Qatari partner hold 51% of shares. The contract was invalid between them but not against third parties; see equally, Court of Cassation Judgment 74/2010 to the same effect. There seems to be one notable exception to the principle enunciated in Judgment 11/2015. The Court of Cassation in Judgment 221/2014 held that a violation of Art 10 of Law No. 2 of 2007 establishing a system for popular housing did not create any legal effects ‘between the contracting parties or third parties, on the heirs of the beneficiary’.

²⁵ Art 487 CC; see also Art 451(1) CC, concerning partial dispossession of goods encumbered with a lien in favour of a third party; see also Art 466(2) CC.

²⁶ Art 189(2) CC.

The Qatari CC imposes a general duty to provide information/notification to third parties, lest any action affecting third-party rights is deemed invalid. By way of illustration, article 82(2) CC sets out to protect the interests of *bona fide* third parties when dealing with the agent of the principal. Where the principal commits a mistake that leads a *bona fide* third party to believe that the agency upon which the agent contracted with this third party is still valid, the agent's agreement with the third party is enforceable against the principal.²⁷ Where an agency is predicated on an agreement and exceeds the authority of the agent under a discreet power of attorney deed, the authority under the agreement is valid against third parties if they have been so notified by the principal.²⁸ Another poignant illustration is offered by articles 514 and 515 CC. These maintain that until such time as a company has satisfied the pertinent publication procedures it (as a transacting legal persons) shall not be effective against third parties.²⁹ Even so, third parties may still derive, if they so wish, rights from a transaction with such unregistered company. In equal measure, although the absence of a written company contract renders the company invalid, such invalidity may not be invoked by the shareholders against *bona fide* third parties.³⁰ The Court of Cassation has consistently held that in order for the director of a limited liability company (LLC) to avoid liability through his or her own assets, the LLC designation must be clear to all those transacting with it. If such clarity/notification is missing, the director is liable against third parties.³¹ Such formality/notification is apparent elsewhere, notably official registration of rights *in rem* over real property. Without appropriate registration such rights are not effective against third parties.³²

We referred to subrogation of debt in the previous section. Article 347 CC stipulates that where the debtor transfers its debt under a transfer limited to the property in the custody of the transfer debtor and such property is lost prior to delivery thereof to the creditor, but not due to the fault of the transfer debtor, the transfer shall be terminated. However, 'where such property in custody is payable to a third party, the transfer shall be void'. In this manner,

²⁷ Court of Cassation Judgment 209/2015.

²⁸ In equal measure, although the agency contract may be terminated unilaterally by either party, this is not the case where the agency is decided in favour of the agent or if a third party has an interest in it. See Court of Cassation Judgment 163/2016.

²⁹ See Court of Cassation Judgment 55/2015. In the case at hand, the company's contract/articles of association were not drafted in Arabic and the partners had not fulfilled the pertinent registration obligations.

³⁰ *Ibid.*

³¹ Court of Cassation Judgment 164/2010; iterated by Court of Appeal Judgment 36/2019.

³² See Court of Cassation Judgment 123/2010, relying on Art 4, of Law No 14 of 1964, concerning Land Registration.

the third party's rights are not affected by the loss of the transferred property of the debtor.³³

Article 385(1)(a) CC sets out yet another protective mechanism to prevent damage to third parties. It goes on to say that where an obligation is secured by securities in kind provided by the debtor and the creditor and debtor agree to transfer such securities, such transfer must cause no damage to third parties. A similar limitation is stipulated in respect of set-off (unilateral actions) that cause harm to a third party.³⁴

12.4 CONTRACTS EXPLICITLY INTENDED TO CONFER RIGHTS ON THIRD PARTIES

Articles 177–182 CC set out the contours of a situation pertinent to third parties that is different from assignment or novation as discussed in previous sections. They envisage the creation of a contract with the aim, sole, or partial, of attracting a third party. Article 177 CC sets forth an important caveat in respect of such contracts. It stipulates that while contracts cannot create obligations binding upon third parties, contracts can in fact grant rights in favour of third parties. This is akin to the regime pertinent to minors whereby they are only bound to complex contracts through which they derive benefit.³⁵ The participation of the third party envisaged in article 177 CC, while ultimately requiring the approval of said third party, is effectively tantamount to an open offer conferring rights but not obligations. The original parties may stipulate particular obligations among themselves in favour of the third party, provided that the instigator of said obligations 'has a material or moral interest in such obligations'.³⁶ Article 179(2) CC makes it clear that the third-party beneficiary may be a prospective person, or a person not particularly identified in such stipulation if such person can be identified at the time of performing the relevant obligation. In any event, the stipulation in favour of the third party is required in order to prove the latter's right.³⁷ Given that the type of contracts envisaged in articles 177ff CC are geared towards favouring a third party, the stipulating party may well demand of its other contracting party to confer the relevant right on the third party. The original contract may, however, just as well indicate that such a demand is limited to the

³³ See to the same effect, Art 348 CC, which concerns subrogation of debt under wrongful possession.

³⁴ Art 395(1) CC; see also Art 397 CC to the same effect, concerning set-off against securities held by the debtor.

³⁵ See, for example, Art 115(1) CC; for further analysis, see Chapter 4 on capacity.

³⁶ Art 179(1) CC.

³⁷ Art 180(1) CC.

beneficiary.³⁸ In the latter case, the right is not yet established until such time as the pertinent offer is made by both parties to the original contract.

Clearly, the third party's participation is onerous to the existing parties, and this is clearly spelt out in article 178 CC. Hence, if a person contracts with another for the purpose of committing a third party, any obligation committed in the original contract must be performed.³⁹ Hence, if the third party, for whose benefit the original contract was made, rejects the benefit offered, 'the person who made the undertaking shall be liable to indemnify the other contracting party against any damage due to the breach of such undertaking, unless the party who made the undertaking fulfils the obligation itself, provided that this party can do so without causing any damage to the other contracting party'.⁴⁰ Although article 177 CC speaks of rights (only) being conferred on third parties, it is evident that once the third party consents to the offer, the relevant contracting party is discharged from its own undertaking to the other contracting party. In this case, the 'third party shall be bound by such undertaking from the time of acceptance thereof, unless it is indicated expressly or by implication that the consent is retroactive from the date of the agreement between the contracting parties'.⁴¹

The benefit stipulated in favour of the beneficiary/third party may be revoked by the stipulating party, following notification to the beneficiary, unless the revocation is contrary to the spirit of the underlying contract.⁴² Revocation does not discharge the obligor towards the stipulating party, unless otherwise agreed or otherwise implied by the terms of the contract, and the stipulator may proceed to substitute the former beneficiary with a new one, or retain for himself the benefit of the stipulation.⁴³

12.5 RESPONSIBILITY FOR ACTS OF THIRD PARTIES

Just like other civil codes, the Qatari CC envisages the liability of the guardian or employer for those acts of minors or employees, respectively, that cause harm to others. This type of liability is regulated under articles 208ff CC. In such cases the guardian and employer are third parties to the unlawful act caused by the minor or employee, respectively; albeit because of their particular relationship the law demands that they exercise heightened due diligence

³⁸ Art 180(2) CC.

³⁹ Art 178(1) CC.

⁴⁰ Art 178(2) CC.

⁴¹ Art 178(3) CC.

⁴² Art 182(1) CC.

⁴³ Arts 182(2) and (3) CC.

to prevent unlawful conduct. Articles 208ff CC are primarily concerned with the law of tort and hence fall beyond the purview of this book.

Even so, there is at least one context in which this body of law is relevant to the construction of contractual obligations. This concerns the so-called collateral damage or consequential loss, which consists of damage/loss caused while performing an existing contractual obligation (e.g. while erecting a building the builders damage the owner's car). It is not clear from the CC whether collateral damage is explicitly recognised as a contractual remedy. If not, the injured party may rely on articles 208ff CC.

12.6 VOIDANCE OF A CONTRACT ON ACCOUNT OF THE CONDUCT OF OR BENEFIT TO A THIRD PARTY

We have already explained in Chapter 8 that voidable contracts are those involving mistake, fraud, coercion or exploitation. The injured party may seek restitution and termination as a result of the unlawful conduct (or the mistake) of the other party. Articles 135ff CC stipulate that a contract may also become voidable by acts of third parties. Article 135(1) CC specifically refers to fraudulent misrepresentation whereby the subterfuge (deceit) is attributable to the other contracting party's representative or subordinate; situations involving the broker empowered to conclude the contract, or the party in whose interest the contract was concluded. In such cases the deceived party may seek voidance only if it is established that the other contracting party 'was, or should necessarily have been, aware of the fraudulent misrepresentation'.⁴⁴ The same is true in respect of a contract or gift in respect of which consent was procured by means of fraud caused by a third party,⁴⁵ equally as regards duress caused by a third party.⁴⁶ A vulnerable person who is exploited to conclude a contract in favour of a third party that contains an excessive imbalance of obligations may request the voidance of such contract or the adjustment of obligations.⁴⁷

12.7 TERMINATION BY REASON OF LAWFUL THIRD-PARTY INTERFERENCE

Where a third-party lawfully interferes with the subject matter of a contract, then the parties cannot be expected to fulfil their underlying obligations,

⁴⁴ Art 135(2) CC.

⁴⁵ Art 136 CC.

⁴⁶ Arts 138 and 139 CC.

⁴⁷ Art 140 CC.

assuming of course that neither party contributed to such interference. Hence, where the government lawfully expropriates property subject to a lease contract, this contract may be terminated.⁴⁸

The sub-tenant is not a party to the contract between the tenant and the landlord. Even so, the sub-tenant's contract with the tenant is dependent on a tenant–landlord lease. As a result, upon termination of the latter, so too the agreement between tenant and sub-tenant must necessarily be terminated.⁴⁹

⁴⁸ Court of Cassation Judgment 34/2011, relying on Art 12 of Law No. 13 of 1988 regarding the temporary expropriation and seizure of real estate for the public benefit.

⁴⁹ Court of Cassation Judgment 138/2010.