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The American University in Cairo
School of Global Affairs and Public Policy

**PRIVATIZATION AND REVOLUTION:
A CRITICAL READING OF THE OMAR EFFENDI CASE**

A Thesis Submitted to the
Department of Law
in partial fulfillment of the requirements for
the LL.M. Degree in International and Comparative Law

By

Ahmed El Sayed Mohamed Saad El Hadidi

December 2012

The American University in Cairo
School of Global Affairs and Public Policy

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PRIVATIZATION AND REVOLUTION:
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Ahmed El Sayed Mohamed Saad El Hadidi

Supervised by Professor Amr Shalakany

ABSTRACT

Privatization is a program first applied in Britain to reform the public sector, mainly to decrease its burden on government spending. Although many countries have successfully followed suit, such as Brazil, such was not the case in Egypt. This failure has become even more apparent after the 25 January Revolution in 2011, in the wake of which many Egyptian citizens and workers filed cases against entities responsible for various public sector projects. One such entity was the Omar Effendi Company, which was purchased by the Saudi Anwal Company in 2008. In 2010, a case was filed against the buyer before the Administrative Court, claiming that the contract for the sale of Omar Effendi was null and void. While the Court concurred with this claim, its decision was criticized on several grounds: competence; arbitrability, specially that previous arbitral award regarding the same issue had been handed; and, that the contract imposed illegal obligations on the buyer. Through a critical reading of the Omar Effendi case materials, including party memoranda and supporting documents, this thesis argues that the Administrative Court judgment was in violation of the law.

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I. Introduction

Privatization is an economic reform program first employed in the late 1970s and early 1980s.¹ It was adopted by conservative governments in the United Kingdom, the United States, and France almost in tandem.² The aim was to improve economic efficiency, decrease the public sector's costs, expand the private sector's role, and increase companies' competition by selling unsuccessful government projects to the private sector.³ Though these countries shared the same objective, each country adopted its own mechanisms for implementing privatization programs. Some countries for example would sell the enterprise or rent it to a foreign investor or workers' unions, while others would liquidate the company and sell its units separately.⁴

In the early 1990s, Egypt adopted an economic reform plan in cooperation with the International Monetary Fund. It aimed to dispose of aspects of governmental bureaucracy and expand investment opportunities domestically and internationally.⁵ Privatization was the principal mechanism for achieving this economic reform as it aims to enhance efficiency and improve enterprise productivity.⁶ Egypt's privatization program was assigned to the Ministerial Committee for Privatization, formed by virtue of a Prime Minister's Decree issued in 20/8/2000.⁷

¹ More technically, in the language of the Administrative Court, privatization means transfer the state ownership of public institutions to the private sector via purchasing and leasing projects for public utilities, and better re-distribution of state revenues. See *Hamdy El Desouky and others v. Anwal Trading Union Co. and others*, 11492 Egyptian State Council 1,3(2011).[Hereinafter "*ElDesouky v. Anwal*"]

² Paul Starr, *The Meaning of Privatization*, 6 YALE L.J. 6, 8 (1988).

³ *ElDesouky v. Anwal*, *supra* note 1, at 22.

⁴ *ElDesouky v. Anwal*, *supra* note 1, at 23.

⁵ Mohamed Fadel, *Public Corruption and the Egyptian Revolution of January 25*, 52 HARVARD L.J.292, (2011), at 293

⁶ *Id.* at 293.

⁷ The Original Arabic reads as follows:اللجنة الوزارية للخصخصة. This committee was entrusted with studying the related topics of various fields of privatization: identifying projects and companies that can be privatized and others that should remain under state control; developing a comprehensive plan for privatization supported by a programme and a timetable for the implementation based on the relevant data; proposing the standards that are to be considered the basis for privatization, as presented by the competent authority; proposing the mechanisms that will be used to monitor the results of the privatization; and adopting the recommendations of ministers concerning the value of companies and assets. See *El Desouky v. Anwal*, *supra* note1, at 15.

In Egypt, privatization has failed to enhance economic efficiency.⁸ This failure is clearly reflected in the deterioration of the Egyptian people's standard of living. According to the IMF's statistics, 20 to 40% of Egyptians are living on less than US\$2 per day, revealing a level of poverty that is harming both the working class and the middle class.⁹ This deterioration has resulted from the predominance of corruption, the absence of monitoring, widespread favoritism, and the ineffectiveness of law. These defects can be seen in the privatization deals which took place before the 2011 January Revolution, such as that involving the privatization of the Omar Effendi Company.¹⁰

During the Mubarak era, the Omar Effendi Company was legally sold in 2008 to Anwal Company in return for 590 million LE and mortgaged in 2010 to Ahli United Bank and Audi Bank in return for 462 million LE. In 2010, a claim was filed by Mr. Hamdy El Desouky before the Egyptian State Council against Anwal Company. This claim ended with the annulment of the sales contract.¹¹ The Omar Effendi case itself included numerous legal violations which harmed several foreign parties, including Anwal Company, the International Financial Corporation, and the Audi and Ahli United banks.

Omar Effendi is an example of and evidence for the corruption in the privatization process under Mubarak . This thesis offers a critical reading of the Omar Effendi decision, in light of party memoranda and other supporting documents presented to the court. It argues that the arbitration clause in the Omar Effendi sale contract is valid. It further argues that the sales contract and the real estate mortgage contracts are governed by civil and commercial law. This means that these contracts are not administrative contracts and accordingly are not governed by administrative law. For this reason, the State Council is not competent for settling the disputes which arise from it.

Part I of this thesis details the determinative facts of the Omar Effendi case and the decision of the court. Part II offers a critique of the decision on procedural grounds. Part III provides a

⁸ Mohamed Fadel, *Public Corruption and the Egyptian Revolution of January 25*, 52 HARVARD L.J.293, (2011), at 295.

⁹ *Id.* at 294.

¹⁰ *ElDesouky v. Anwal*, *supra* note 1, at 22.

¹¹ *Id.* at 53.

critique of the decision on substantive grounds. Part IV evaluates the judgment of the Omar Effendi case and argues that the court misapplied the law.

II. The Omar Effendi Case Decision

This chapter explores the history of the Omar Effendi Company and its development until it was privatized. This particular privatization process occurred in contradiction with the law because the buyer, Anwal Company, violated its obligations as articulated in contracts and governmental decisions. Anwal Company fired many workers, mismanaged the company and received unregistered assets until the filing of a case against him. The court approved the demands of the plaintiffs, annulling the decision to sell Omar Effendi. These facts will highlight the parties' viewpoints, which I will criticize in the following chapters. Below I cover the facts of the case, the plaintiff's demands, the plaintiff's justifications, the final judgment, and the court's justification.

A. Facts on the Case

Omar Effendi is an Egyptian company whose successes and failures over its long life have made it an iconic business name in the Egyptian market. It was founded in 1856 to meet the rising demand in the Egyptian market for inexpensive home wares and quality textiles.¹² Its performance, since it was Egyptianized in 1957, fluctuated due to poor management by the government, which in turn eventually declared that it was a burden on the economy and should therefore be privatized.¹³

On January 1st, 2001, the Ministerial Committee for Privatization approved the privatization of the Omar Effendi Company, which by then comprised 82 branches situated on land valued at 4 billion Egyptian Pounds.¹⁴ The government placed certain conditions on the privatization. For instance, it excluded some of the company's assets, such as sections of land and buildings, from

¹² *ElDesouky v. Anwal*, *supra* note 1, at 3.

¹³ For more data, see, Nadia Daar, "Omar Effendi: Who's to blame?" , at 5 of the article, copy on file with the author.

¹⁴ *ElDesouky v. Anwal*, *supra* note 1, at 25.

being privatized, and it evaluated the company's value according to its then market value. The Egyptian cabinet subsequently approved this deal on January 6th, 2004.¹⁵

On March 5th, 2006, Yehia Hussein Abd El Hady filed a claim in the public prosecution's office claiming that there was corruption in the privatization of the Omar Effendi sale transaction.¹⁶ On March 5th, 2006, the public prosecution investigated this charge and decided on March 21st, 2006 that the deal was legal provided that the commercial name – Omar Effendi – was not changed, the assets not privatized, and the workers not fired.¹⁷

On June 6th, 2006, the privatization process was resumed. Omar Effendi's board of directors decided to sell 90% of the company's stocks in return for 589,410,000 LE.¹⁸ To supervise the implementation of the contract and to protect the worker's rights, they also decided that the Holding Company for Construction and Establishment should remain in possession of the remaining 10%.¹⁹ The ministerial group for economic policies subsequently approved these conditions on September 6th, 2006, and an extraordinary general assembly approved them on September 25th, 2006.²⁰ Following the auction of Omar Effendi, where only one offer was submitted, the sale of the company was awarded to the Anwal Trading Union Company.²¹

On November 2nd, 2006, the Holding Company for Construction and Establishment concluded the Omar Effendi sales contract with Anwal Trading Union Co.²² In 2010, the Holding Company for Construction and Establishment filed a case against the Anwal Company

¹⁵ *Id.* at 25

¹⁶ Yehia Hussein Abdel-Hadi is an activist and a coordinator of the "No to selling Egypt" movement,

¹⁷ *El Desouky v. Anwal*, *supra* note 1, at 26.

¹⁸ Every stock costs 38, 53 EGP.

¹⁹ *El Desouky v. Anwal*, *supra* note 1, at 26.

²⁰ The original Arabic reads as follows: الجمعية العامة الغير عادية للشركة القابضة . *see El Desouky v. Anwal*, *supra* note 1, at 26.

²¹ Anwal United Trading Co. is a professional company that operates over 100 shops all across Saudi Arabia. It was founded in the late eighties as a partnership company. It was converted into a limited company in 2001. Today it has a commanding presence in the arena of ladies and children's apparel. It won the franchise of renowned brands such as Etam, Etam Lingerie, Cache Cache, Origem, Orchestra, Jacadi, Parfois, Trucco, Staccato, Goelia, and Marwa..

²² *El Desouky v. Anwal*, *supra* note 1, at 12

before an arbitral tribunal; it demanded the annulment of the sales contract because Anwal had failed to meet its obligations. On November 10th, 2010, the arbitral tribunal at the Cairo Regional Center for International Commercial Arbitration (CRCICA), issued its arbitral award no. 583/2008, refusing to annul the sales contract.²³

On December 21st, 2010, Hamdy El Desouky, Aly Anwar Atia, Mohamed Ahmed Labib, and Aly El Bassiouny filed lawsuit no.11492, for the judicial year no.65, before the Egyptian State Council, against the Prime Minister, the Minister of Investment, the Chairman of the Holding Company for Construction and Establishment, and the Chairman of Anwal Company Gameel Abd El Rahman El Kenbeit.²⁴

The claimants asked for the complete annulment of the Omar Effendi sale decision, including the sales contract itself, any mortgage contracts issued under it, and any further legal actions taken on the issue. The claimants justified their claims on several grounds. They alleged that Anwal, as buyer, violated both its contractual obligations and workers' rights when it fired more than 600 workers. They also alleged mismanagement on the part of Anwal, that it took possession of a number of unregistered branches, and received title and ownership of properties that were undervalued.²⁵

The first allegation concerned the mismanagement of the company. The buyer asked the government to pay 10% of the company's losses, which is equivalent to its portion of the

²³ -The Original Arabic reads as follows:

وقد قضى فى حكم التحكيم الصادر فى 2010/11/10 على الآتى "رفض طلب الشركة المحتكم ضدها (المطعون ضدها الخامسة) فسخ عقد بيع 90% من أسهم شركة عمر أفندى المؤرخ 2006/11/2 إلى آخر ما جاء بحكم التحكيم رقم 583 لسنة 2008".

²⁴ Hamdy El Desouky is an Egyptian citizen who tried to protect public funds by filing this case against the parties accused of corruption.

Aly Anwar Atia is an Egyptian citizen and a worker in Omar Effendi Company who tried to protect public funds by filing this case against the parties accused of corruption.

Mohamed Ahmed Labib is an Egyptian citizen and a worker in Omar Effendi Company who tried to protect public funds by filing this case against the parties accused of corruption.

Aly El Bassiouny is an Egyptian citizen who tried to protect public funds by filing this case against the parties accused of corruption.

Gameel Abd El Rahman El Kenbeit is the owner of Anwal Company which bought Omar Effendi company. *See El Desouky v. Anwal, supra* note 1, at 1

²⁵ *El Desouky v. Anwal, supra* note 1, at 2

company's stocks. This portion, valued at 130 million LE, comprised the taxes owing and the workers' salaries. This means that the very reason for privatizing this company – that it save the government money – was in reality reversed: the Company remained a burden on the government. There were no taxes for the government, there were no salaries for the workers, and there were no profits for the stockholders, proving that the buyer mismanaged the company.

The second basis on which the claimants brought a case against the Omar Effendi sale contract concerned the holding company taking possession of a number of unregistered branches. The buyer received a number of branches that were not registered in the auction documents and thus had not been valued. One example is the workers' resort in Balteem.²⁶

Thirdly, there are the grounds of the Holding Company's receiving the title and the ownership of the properties. The titles and the ownership of some branches were transferred to the buyer even though these branches were valued at less than their market value. This occurred because they were evaluated as if the Omar Effendi Company leased the branches when in fact they owned them.²⁷

To sum up, the Omar Effendi Company was a successful company which was turned into a failure. Its privatization process was riddled with violations, as the case filed before the Administrative Court soon revealed. The plaintiffs' challenge of the sale process of Omar Effendi transpired on grounds including legal violations, mismanagement, and receiving unregistered branches.

B. Court Decision:

The court issued its judgment in favor of the claimants. It annulled the decision by which Omar Effendi was sold and all its consequences, such as the sales and the mortgage contracts. It ignored the rights of third parties, including the banks that loaned money to Omar Effendi in return for mortgaging its branches.

²⁶ *El Desouky v. Anwal*, *supra* note 1, at 33

²⁷ *Id.* at 2

After the four claimants filed the case on December 21st, 2010, more defendants were added to protect public funds and to protect the workers' rights. These included the Minister of State for Antiquities and the Head of the Central Auditing Agency. The court held sessions in February and March 2011, finally issuing its judgment on May 7th, 2011.²⁸ The court declared the sale agreement null and void, along with the embedded arbitration clause. It then obligated the Anwal Company to hand back to the Government of Egypt all the assets and properties of Omar Effendi. This property included the branches, clear of all mortgages that the buyer had already transacted in favor of some banks in return for loans. The Court obligated the company to both reappoint the fired workers and reimburse them for any loss.

Finally, the Court obligated Anwal to settle any dues and obligations incurred by Omar Effendi from the date of signing the sales contract; these included the workers' salaries, bank loans, and the company's taxes.²⁹ The court also annulled the contract through which Anwal had sold 5% of its stake in Omar Effendi to the International Financial Corporation (IFC). This judgment was issued in favor of the claimants disregarding the rights of bona fide third parties, of which IFC was one.

C. Court justification:

The court justified its judgment on several grounds, some of them easily perceivable, others less so. It focused on several contentious points that had arisen between the claimants and the defendants, and I will now discuss the most relevant of these. Essentially they entail, firstly, the court's justification for accepting the case by the claimant, Mr Hamdy El Desouky, although he was not a party in the legal challenge of the sale decision or contract; secondly, the court's declaration of its competence for settling the disputes that arose from the sale decision; and finally, the court's discussion of the parties' violations of the governmental decision, in turn leading to the annulment of the decision.

The court's acceptance of the case from Mr. Hamdy El Desouky

²⁸ The original Arabic reads as follows: وزير الدولة لشئون الآثار, *see El Desouky v. Anwal*, *supra* note 1, at 3

²⁹ These agreements were concluded between Omar Effendi and the several banks.

The court accepted Omar Effendi's challenge of the sale decision from Mr. Hamdy El Desouky, even though he was not a party to the contract. This is because the government, and hence the citizens of Egypt, own Omar Effendi Company. All citizens have the right to defend their interests against public money being misspent through violations of law. Thus the claimants in Omar Effendi was granted standing in his claim.³⁰

The Competence of the Administrative Court

The court asserted its competence to settle the Omar Effendi dispute by stating that, because it classified the Omar Effendi sale decision as an administrative decision, the Administrative Court was the correct place to resolve this case.

The court firstly defined the administrative decision in order to apply it on Omar Effendi sale decision. It stated that "it is an expression of the government's will, asserting the decision is separate from any subsequent contract resulting from it".³¹ This means that if the government issued an administrative decision to conclude a civil or commercial contract, the challenge of that administrative decision will differ from the challenge of the contract. The administrative decision is challenged before the Administrative Court while the commercial contract is challenged before the Ordinary Court. For example, the government might establish an auction that awarded a decision to a company, and it might then conclude a commercial contract with this company; if any involved party wished to challenge the auction's decision it would do so before the Administrative Court because this is an administrative decision. But if any of the parties involved wished to specifically challenge the commercial contract, the challenge would be heard before the Ordinary Court, which deals with disputes over commercial contracts.³²

It follows from this that the Omar Effendi sale decision is an administrative decision due to its issuance by the Egyptian government – with the involvement of The Higher Committee for

³⁰ *El Desouky v. Anwal*, *supra* note 1, at 14

³¹ *Id.* at 11

³² *Id.* at 12

Privatization, the Ministerial Group for Economic Policy, the Privatization Ministerial Committee, the Egyptian Cabinet, and the Ministry of Investment.³³ Together, these government entities delegated the Holding Company for Construction and Establishment to implement the sale of Omar Effendi Company. This was achieved through the civil/commercial contract, which is the sale contract, with Anwal Company.³⁴

The Holding Company obtained a permission and delegation from the Higher Committee of Privatization before it can sell, ending its public ownership.³⁵ Because the government holds the sale transaction, it is considered an administrative decision – a decision that can be challenged before the Administrative Court.³⁶ This was further confirmed by decision no.343 for the year 2005, as issued by the Ministry of Investment, which states that the holding companies sell the public sector's share of their companies for the benefit of the government.³⁷ In addition, holding companies are obligated to deposit all returns from the sale of public assets in the Central Bank of Egypt, in the government's account. This reaffirms that holding companies are delegated by the government to hold these transactions, meaning once again that the sale decision is challenged before the Administrative Court, while the sale contract is challenged before the Ordinary Court.³⁸

The legislator assigned the competence of settling administrative disputes to the Administrative Court so that the Judicial institution could supervise the privatization program in cooperation with the Privatization Ministerial Committee and the Ministerial Group for

³³ “The ministry of investment should be provided with all the documents which relate to the privatization process This was confirmed in the public sector companies law no.203 for year 1991 as it assigned to the Ministry of Investment the competence of protecting the country's rights in the public sector's companies, supervising the privatization program, investing the return of this program, and getting benefit of the foreign aids that are submitted to Egypt to be used in the privatization program”, The Original Arabic reads as follows: وزير الإستثمار, *See Id.* at 16

³⁴ *El Desouky v. Anwal*, *supra* note1, at 18

³⁵ *Id.* at 16

³⁶ *Id.* at 18

³⁷ *El Desouky v. Anwal*, *supra* note1, at 18

³⁸ *Id.* at 17

Economic Policies which supervises the projects and the companies which will be privatized.³⁹ To sum up, the decisions which relate to the sale transaction of Omar Effendi are administrative decisions because the government delegated the Holding Company for Construction and Establishment to manage the sale after this Holding Company obtained the approval of the Ministerial Group for Economic Policies, the Privatization Ministerial Committee, and the Cabinet.⁴⁰

Violations of government decisions

After the court highlighted the Administrative Court's competence and its acceptance of the case, the court highlighted violations committed during the privatization of Omar Effendi.

The Omar Effendi Company was sold in a way that contravened the Auction and Bidding Law no. 89/1998 and the State Council Law no. 47/1972, both of which require the approval of the competent advisory department, as stated on the contract, before concluding the sale. Because the parties did not abide by these conditions, the auction should be annulled, and all subsequent results, including the sales contract to Anwal, the mortgage contracts to the banks, and the sale contract to IFC, should be considered null and void.⁴¹

However, the government refused to annul the auction even though the price presented was less than the true value of the assets. This failure to annul the auction is itself was in contradiction to article 35 of the Auction and the Bidding Law, which requires the government to act in such a way if the sale price does not match the true value of the assets.⁴²

In a further violation, the investor failed to administer Omar Effendi Company because the company did not succeed though it took many loans from Ahli United Bank, Audi Bank, and

³⁹ *Id.* at 15

⁴⁰ The Original Arabic reads as follows:

المجموعة الوزارية للسياسات الإقتصادية، اللجنة الوزارية للخصخصة، مجلس الوزراء

⁴¹ *El Desouky v. Anwal*, *supra* note 1, at 2

⁴² *Id.* at 27

the International Financial Corporation. These loans were guaranteed by real estate mortgages on Omar Effendi assets which negatively affect the financial status of the company as per the financial report dated April 10th, 2011.⁴³

On June 30th, 2009, the Omar Effendi fired 2433 workers in contravention of the company's early retirement program, which limited staff dismissal to 1200 workers only.⁴⁴

That the company assets were wrongly valued did not help. Its assets, including the 82 branches, were valued at 563,105 million Egyptian Pounds before the sale of the company, but the actual sale price for the company was nearly one billion Egyptian Pounds.⁴⁵ Further, 16 of these branches were valued at 462 million Egyptian pounds after the sale of the company, though none of the circumstances and conditions had changed. These 16 branches were mortgaged in favor of Ahli United bank and Audi bank in return for a loan valued at 462 million Egyptian Pounds, which represents more than 66% of the sale price of the company. This unrealistic value resulted from a completely flawed evaluation process; the buildings were evaluated without being investigated, and the machines were evaluated according to the net book value without considering the validity of their technical status.⁴⁶

The auction brochure included the company's lands and real estate assets, contradicting the approval of the Privatization Ministerial Committee, dated in January 1, 2011.⁴⁷ This approval confirmed the exclusion of the company's lands and real estate assets, such as the Abdel Aziz Branch and the Saad Zaghoul Branch, from being privatized. Moreover, the buyer was allowed to sell 30% of Omar Effendi Company assets on the provision that the Holding Company gained priority to buy the Abd El Aziz and Saad Zaghoul Branches.⁴⁸ This means that the buyer was not prohibited from selling them, as was stipulated by law, but was allowed to

⁴³ *Id.* at 41

⁴⁴ *Id.* at 43

⁴⁵ *El Desouky v. Anwal*, *supra* note 1, at 30

⁴⁶ *Id.* at 28

⁴⁷ The translation of the entity name in Arabic is: اللجنة الوزارية للخصخصة

⁴⁸ *El Desouky v. Anwal*, *supra* note1, at 31

sell them to any third party if the Holding Company for Construction and Establishment refused to buy them.⁴⁹

To close then, the sale of the once-great Omar Effendi Company took place amid various irregularities, some of which were outright breaches of law – both administrative law and civil law. Certainly it can be difficult to untangle the role played by those in the court process from those in the government and its various supervisory bodies. However, it seems clear that, from an objective legal standpoint, the privatization of Omar Effendi Company occurred through a process that raises more questions than it answers. In the next chapter I will explore the discrepancies between the law and the privatization process as it unfolded in the case of this well-known Egyptian company.

⁴⁹ *Id.* at 27

III. Critique of the Decision on Procedural Grounds

This chapter provides a close analysis of the Omar Effendi decision from a procedural standpoint. It will highlight the issuance of a previous arbitral award relating to Omar Effendi, which then prohibits reinvestigating the case another time by the Administrative Court, as the Omar Effendi sales contract would be regarded then as an administrative contract. This means that judgment issued on May 7th, 2011, by the Administrative Court, should be deeply criticized. To this end, this chapter will cover the issuance of a previous arbitral award, the competence of arbitrators, the competence of Ordinary Courts, and the validity of the arbitration clause altogether.

a- Issuance of a previous arbitral award on the same issue

Egyptian law prohibits resettling a dispute that was previously settled by any means of recognized dispute settlement mechanisms.⁵⁰ This means that the issuance of an arbitral award in a dispute restricts the probability of settling it another time by litigation, as this will contradict with article 55 of the Egyptian Arbitration law no. 27, dated 1999, and article 101 of the Egyptian Evidence Law no.25/1968.

In June 10th, 2008, Anwal Company and the Holding Company agreed on settling disputes that arise from the sales contract via arbitration. In November 10th, 2010, the arbitral tribunal in CRCICA refused the demand of the Holding Company for Construction and Development to annul Omar Effendi sales contract.

In 2008, another lawsuit no.11492/judicial year no.65 was filled in order to annul the same sales contract. The Claimant in this case had no right to file this lawsuit before the State Council due to the issuance of a previous arbitral award on the same issue by virtue of article 55 of the Egyptian Arbitration Law, and article 101 of Egyptian Evidence Law.

⁵⁰ A Memorandum of defense submitted by Mr. Kenbeit's lawyer to the State Council in 4/7/2011, p.8

Article 55 states that “arbitral awards which are rendered in accordance with the provisions of this law have the authority of res judicata and shall be forcibly executed without prejudice to the provisions of the present Law.”⁵¹

This means that arbitral awards, which are issued in compliance with Egyptian law, shall be recognized, and executed immediately. This was confirmed by the Court of Cassation judgement no.521/ judicial year no.42 hearing dated February 15th, 1978. This judgement states that “It is illegal to debate about the effect and recognition of an arbitral award even if it was not enforced.”⁵² This means that the arbitral award is effective and recognized from the date of its issuance.

Article 101 of Egyptian Evidence Law confirms what was stated by article 55 of the Arbitration law as it states that

“The Court should not accept any evidence which relates to any judgement after its issuance and becoming effective. This is provided that this judgement is effective and enforceable before the same parties and in the same issue of the lawsuit.”⁵³

This means that no lawsuits can be filed by the same parties and about the same issue that was previously settled by a final judgment.⁵⁴

The Court of Cassation confirmed what was stated in articles 55 and 101. For instance, the Court of Cassation judgement no.7115 for the judicial year no. 45 hearing dated March 17th, 1978. This judgement states that the conditions for applying article 101 are as follows: The first

51

The original Arabic reads as follows:

تنص م 55 من قانون التحكيم "تحوز أحكام المحكمين الصادرة طبقا لهذا القانون حجية الأمر المقضى وتكون واجبة النفاذ بمراعاة الأحكام المنصوص عليها في هذا القانون"

52

The original Arabic reads as follows:

ذهبت محكمة النقض فى حكمها رقم 521 لسنة 42 ق بتاريخ 15/2/1987 الى "يجوز حكم التحكيم قوة الأمر المقضى حتى ولو لم يتم تنفيذه"

53

The original Arabic reads as follows:

تنص م 101 إثبات الأحكام التي حازت قوة الأمر المقضى تكون حجة فيما فصلت فيه من الحقوق، ولا يجوز قبول دليل ينقض هذه الحجية، ولكن لا تكون لتلك الأحكام هذه الحجية إلا فى نزاع قام بين الخصوم أنفسهم دون أن تتغير صفاتهم وتعلق بذات الحق محلا وسببا.

⁵⁴ *supra* note 51, at 9

judgement should be final, effective and may not be challenged; the second lawsuit is filed for the same reasons, about the same subject and between the same parties of the first judgement⁵⁵.

Also, the Court of Cassation confirmed that in its judgement no.44 / judicial year no.46 dated February 14th, 1984, in which it stated that “The parties may not file any new claim relating to any issue or any subject which was previously settled by a final judgement between the same parties.”

To sum up, it is illegal to file a suit relating to an issue that was previously settled between the same parties by a final judgement or an arbitral award because this contradicts with Egyptian laws and Court of Cassation judgements.⁵⁶ Consequently, the State Council cannot annul the Omar Effendi sales contract as this demand was previously rejected by an arbitral award no.583/208 in a dispute between the same parties and about the same issue.

b. Competence of arbitrators⁵⁷

The Omar Effendi Judgement was issued in contradiction with article 22 and 23 of the Egyptian Arbitration Law. The arbitrators are competent to settle all the disputes that arise from a contract which includes an arbitration clause even if this dispute relates to the validity of the arbitration clause itself. This is confirmed by article 22 and 23 of the Egyptian Arbitration Law. Specifically, article 22 states that:

The arbitral tribunal is empowered to rule on motions which are related to its non-competence, including motions based on the absence of an arbitral clause, its expiry or nullity, or its failure to include the subject or the dispute⁵⁸

55

The original Arabic reads as follows:

نص الحكم على ان ثمة شروط يلزم توافرها لجواز قبول الدفع بحجية الأمر المقضيه المنصوص عليها فى المادة 101 من قانون الإثبات فى المواد المدنية والتجارية رقم 25 لسنة 1968 وهذه الشروط تنقسم إلى قسمين، قسم يتعلق بالحكم بأن كونه حكماً قضائياً وأن يكون قطعياً وأن يكون التمسك بالحجية فى منطوق الحكم وفى أسبابه التى ارتبطت بالمنطوق ارتباطاً وثيقاً بحيث لا يقوم المنطوق بدون هذه الأسباب، وقسم يتعلق بالحق المدعى به فيشترط أن يكون هناك إتحاد فى الخصوم وإتحاد فى المحل وإتحاد فى السبب .

⁵⁶ *supra* note 51, at9

⁵⁷ *Id.* at 9

⁵⁸

The original Arabic reads as follows:

Thus, neither the Ordinary Court nor the Administrative Court is competent to decide on the validity or the nullity of the arbitral clause because the arbitral tribunal is competent on that.

Article 23 of the Egyptian Arbitration Law confirmed what was stated by article 22 as it states that:

The arbitral clause is deemed to be an agreement that is independent of the other conditions of the contract. The nullity, repudiation or termination of the contract shall not affect the arbitral clause therein, provided that such clause is valid per se⁵⁹

This means that the invalidity and the nullity of the contract do not affect the arbitration clause due to the principle of separability.⁶⁰ In other words, the arbitral clause is separate from the rest of the contract in order to validate the arbitration even if the contract is void.⁶¹ Consequently, neither the Ordinary nor the Administrative Courts may allege that the arbitration clause is null and void as a result of considering the sales contract null and void.⁶²

However, the Administrative Court alleged in Omar Effendi that the arbitration clause in article 20 of the Omar Effendi sales contract is null and void. Article 20 of the Omar Effendi sales contract states that

All the disputes that may arise from the contract will be settled by arbitration; the Egyptian Arbitration law will be the governing law; Arabic will be the language of arbitration. The arbitration will be held in Cairo; the arbitral tribunal will be formed of 3 arbitrators who will be appointed according to the Egyptian Arbitration law. The seller will comply with issuing

تنص المادة 22 من قانون التحكيم على ان تفصل هيئة التحكيم في الدفوع المتعلقة بعدم اختصاصها بما في ذلك الدفوع المبنيّة على عدم وجود إتفاق تحكيم أو سقوطه أو بطلانه أو عدم شموله لموضوع النزاع.

⁵⁹

The original Arabic reads as follows:

تنص المادة 23 يعتبر شرط التحكيم إتفاقا مستقلا عن شروط العقد الاخرى ولا يترتب على بطلان العقد أو فسخه أو إنهائه أي أثر على شرط التحكيم الذي يتضمنه، إذا كان هذا الشرط صحيحا في ذاته.

⁶⁰ Amr Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 440 (2000).

⁶¹

The original Arabic reads as follows:

تنص المادة من قانون التحكيم 23 يعتبر شرط التحكيم إتفاقا مستقلا عن شروط العقد الاخرى ولا يترتب على بطلان العقد أو فسخه أو إنهائه أي أثر على شرط التحكيم الذي يتضمنه، إذا كان هذا الشرط صحيحا في ذاته.

⁶² See, e.g., *French Claimant v. Egyptian Respondent*, 17 Y.B. Com. ARB. 153 (Int'l Com. Arb. 1990). The entire agreement involved in the case **was governed by Egyptian law**, yet the arbitral clause-void under said law-was deemed **to be governed by Swiss law** in order **to preserve its validity**.

all the approvals and permits that relates to the enforcement of the Arbitration clause according to the prevailing rules in the Egyptian laws ⁶³

This means that arbitration is competent to settle any dispute that may arise from the contract including the validity of the arbitration clause even if the contract is void.

To sum, the arbitral tribunal is competent to decide on its competence even if the arbitral clause is null and void as described in article 22 of the Egyptian arbitration law.⁶⁴ The Administrative Courts cannot annul the arbitration clause as a result of annulling the sales contract.

c. Competence of Ordinary Courts⁶⁵

Even if the arbitral tribunal was not competent to settling the Omar Effendi contract disputes, Administrative Courts would still not be the competent authority on that front. Rather, Ordinary Courts would be competent there.

This was stated in article 15/1 of the Judicial Authority Law, and articles 15, 38, and 39 of the Notary Public Law no.114/1946. On the other hand the Administrative Court is competent for settling the disputes which arise from administrative contracts as it was stated in article 10 /11 of the State Council law no.47/1972 and article 10 of the State Council law no.165/1955. This principle was confirmed by the Court of Cassation and the Constitutional Court.

Article 15/1 of the Judicial Authority Law states that “Ordinary Courts have the jurisdiction to settle all the disputes except for the administrative disputes which should be settled by the State Council.”⁶⁶ This means that the Ordinary Courts have the jurisdiction of

⁶³

The original Arabic reads as follows:

تنص المادة 20 من عقد بيع عمرا أفندي على ما يلي " تسوى كافة المنازعات الناشئة عن العقد عن طريق التحكيم وتكون اللغة العربية هي لغة التحكيم وتكون مصر هي مكان التحكيم ويكون القانون المصرى هو القانون الحاكم للتحكيم."

⁶⁴

The original Arabic reads as follows:

تنص المادة 22 من قانون التحكيم على ان تفصل هيئة التحكيم فى الدفوع المتعلقة بعدم إختصاصها بما فى ذلك الدفوع المبنية على عدم وجود إتفاق تحكيم أو سقوطه أو بطلانه أو عدم شموله لموضوع النزاع.

⁶⁵ A Memorandum of defense submitted by Audi Bank to the State Council in 4/7/2011, p.4,13

⁶⁶ A Memorandum of defense submitted by Mr.Khaled Farouk Mohamed to the State Council in 16/6/2011, p. 13

The original Arabic reads as follows:

تنص المادة 1/15 من قانون السلطة القضائية "تختص المحاكم العادية بتسوية كافة المنازعات باستثناء المنازعات الادارية التى يتم تسويتها عن طريق مجلس الدولة"

settling all the disputes whether they are civil, commercial, or criminal disputes except for the administrative disputes which are settled by the Administrative Court.

This principle was confirmed by the Court of Cassation in its judgement as it stated that "Ordinary Courts are competent for settling all the disputes except for the disputes that are assigned to other courts by clear and obvious articles in law".⁶⁷ It also stated that " Ordinary Courts are competent for settling the disputes that may arise from the ownership of the movables and immovable assets. The Ordinary Courts have a jurisdiction for settling all the civil and commercial disputes except for the disputes that are assigned by the legislator for another judicial entity."⁶⁸ This authority has been given to it by the constitution in order to be able to achieve justice and protect the citizen's rights".⁶⁹

The Supreme Constitutional Court stated that "the Ordinary Court is competent for settling the disputes that arise from all the financial rights that relate to movable or the immovable assets."⁷⁰ This competence may be challenged for the first time before the Court of Cassation."⁷¹ This means that the law, the Constitutional Court, and the Cassation Court all agree on the competence of Ordinary Courts for settling all the disputes except for the administrative variety.

67

The original Arabic reads as follows:

قضت محكمة النقض في النقض رقم 15 لسنة 9 قضائية بأن "المحاكم العادية هي السلطة الوحيدة التي تملك الفصل في كافة المنازعات باستثناء ما يتم إسناده لمحاكم آخر في قوانين خاصة"

68

The original Arabic reads as follows:

وقضت محكمة النقض في النقض رقم 1625 ورقم 3183 بأن (المحاكم العادية هي السلطة الوحيدة التي تملك الفصل في المنازعات التي تثور بين الأفراد والحكومة بشأن تبعية الأموال المتنازع عليها للدولة أو بشأن ما يدعيه الأفراد من حقوق عينية لهم عليها باعتبار أن القضاء العادي- وعلى ما جرى به قضاء هذه المحكمة – هو صاحب الولاية العامة في نظر المنازعات المدنية والتجارية وأي قيد يضعه المشرع للحد من هذه الولاية- ولا يخالف به أحكام الدستور يعتبر استثناء وارداً على أصل عام، ومن ثم يجب عدم التوسع في تفسيره))

⁶⁹ A Memorandum of defense submitted by Audi Bank to the State Council in 16/6/2011, p. 15

The Judgement of the Court of Cassation no.3556 for judicial year no.61 hearing dated 7/2/1993

70

The original Arabic reads as follows:

قضت محكمة النقض في النقض رقم 16 لسنة 9 قضائية بأن "المحاكم العادية هي السلطة الوحيدة التي تملك الفصل في كافة المنازعات المتعلقة بالعقارات والاصول الثابتة والمنقولة."

71

The original Arabic reads as follows:

قضت محكمة النقض في الحكم رقم 1858 يونيو 1972 – مجموعة النقض 23-1087-12-17، 17 مايو 1975 مجموعة النقض (26-963-185) "يجوز الدفع بعدم اختصاص المحكمة أول مرة أمام محكمة النقض"

On the other hand, the State Council is competent to settle disputes that arise from administrative contracts as described in the following:

Article 10 /11 of the State Council law no.47/1972 which states that “the State Council is competent for settling disputes which result from 1)...2)...3)...11) contracts that relate to administering public utilities and providing the government with commodities and any other administrative contract.”⁷²

In addition, article 10 of State Council Law no.165/1955 assigned the competence of settling public works and supply contracts disputes to the Administrative Courts. It states that “the State Council is competent of settling the disputes that arise from the public works and supply contracts and any administrative contract.”⁷³

The same principle was confirmed yet again by the Court of Cassation. It stated that “Ordinary Courts are competent of settling all the disputes except for the disputes that are settled by another courts according to obvious and clear articles in law.”⁷⁴

The Supreme Administrative Court also confirmed this principle. It stated that “the Administrative Court will not be competent for settling contract disputes unless the contract is an administrative contract.”⁷⁵ It also stated that “the State Council is not competent for settling

⁷² A Memorandum of defense submitted by Dr.Zaki Hashem Law Firm to the State Council in 4/7/2011, p.7

The original Arabic reads as follows:

تنص المادة 11/10 من قانون مجلس الدولة رقم 1972/47 " يختص مجلس الدولة بتسوية كافة النزاعات الناشئة عن (1)...2)...3)...11) يختص مجلس الدولة بتسوية كافة النزاعات المتعلقة بعقود المرافق العامة وعقود توريد السلع للحكومة وأي عقد إداري آخر"

⁷³

The original Arabic reads as follows:

تنص المادة 10 من قانون مجلس الدولة رقم 1955/165 "يختص مجلس الدولة بتسوية كافة المنازعات المتعلقة بعقود التوريد و عقود الأشغال العامة والعقود الإدارية".

⁷⁴

The original Arabic reads as follows:

وقضى كذلك على أن: ((المحاكم العادية هي صاحبة الولاية العامة للقضاء فتختص بالفصل في كافة المنازعات أيا كان نوعها وأيا كان أطرافها ما لم تكن إدارية أو يكون الاختصاص بالفصل فيها مقررار بنص الدستور أو القانون لجهة أخرى استثناء لعلة أو لأخرى فليست العبرة بثبوت العلة وإنما بوجود النص" (1983/2/27 طعن 538 سنة 46 قضائية – م نقص م – 35 – 758) وأي قيد يضعه المشرع للحد من اختصاص القضاء العادى ولا يخالف الدستور، يعتبر استثناء و اراد على أصل عام ومن ثم يجب عدم التوسع في تفسيره" (1989/4/9 طعن 1426 سنة 56 قضائية – 1982/12/28 طعن 867 سنة 49 قضائية – 1967/12/28 – م نقص م – 18 - 1925) (((24 – 63)

⁷⁵

The original Arabic reads as follows:

أستقرت المحكمة الإدارية العليا في (الطعن رقم 1059 لسنة 7 ق جلسة 1963/5/25 –على أنه متي انتفى قيام العقد الإداري انحسرت تبعاً لذلك ولاية القضاء الإداري واختصاصه بنظر المنازعات الرهانة لخروجها من نطاق العقود الإدارية بولايته المقررة وإذ قضت محكمة القضاء الإداري بحكمها المطعون فيه بعدم اختصاصها بنظر الدعوى فإنها تكون قد أصابت الحق في النتيجة التي انتهى إليها قضاؤها.

disputes that arise from property law as property is governed by private law which is applied by Ordinary Courts".⁷⁶ This means that the Administrative Courts are competent for settling all the disputes which arise from the administrative contracts and the Ordinary Courts are competent for settling all disputes which arise from commercial and civil contracts.

The contracts which were concluded by Omar Effendi Company, whether they are sales or mortgage contracts, are commercial contracts so the disputes which arise from these contracts should be settled by Ordinary Courts.

For instance, the real-estate mortgage agreements that were concluded by Omar Effendi Company in favor of the banks are commercial contracts.⁷⁷ This is because they are considered to be commercial transactions as described in article 7 of the Central Bank of Egypt law, the Egyptian Commercial law article. Article 7 of the Central Bank of Egypt law states that "Commercial Law governs all the transactions that are held between the banks and its clients whether they are merchants or not and whatever the nature of the transactions is."⁷⁸ Article 5 of Egyptian Commercial Law states that "the bank's transactions are considered to be a commercial transaction and are governed by the Commercial law no.17 dated 1999."⁷⁹

Banking transactions are therefore governed by Commercial Law. This was confirmed by the Court of Cassation judgment which states that "All the banking transactions including the issuance of the letter of guarantees are considered to be commercial transactions according to sub

The original Arabic reads as follows:

قضت المحكمة الادارية العليا في حكمها رقم 1059 لسنة 7 ق بتاريخ 1965/5/25 على " يختص القضاء الإدارى بتسوية النزاعات الناشئة عن العقود الإدارية"

76

The original Arabic reads as follows:

أستقرت المحكمة الإدارية العليا في (الطعن رقم 4546 لسنة 47ق، 4570 لسنة 47ق- جلسة 2002/2/22) إن الملكية من المسائل المتعلقة بالقانون الخاص، ومن ثم فإن الاختصاص بنظر النزاعات الناشئة عنها إنما ينعقد للمحكمة المدنية المختصة وهي محكمة جنوب القاهرة الابتدائية التي يقع في دائرتها مقر الهيئة الطاعنة (64 – 26)

⁷⁷ *supra* note 66, at5, *see also supra* note 70, at 14

78

The original Arabic reads as follows:

تنص المادة 7 من قانون البنك المركزي على مايلي " يحكم القانون التجارى العمليات التي تبرمها البنوك ايا كانت طبيعة العملية او الطرف الأخر.

79

The original Arabic reads as follows:

تنص م5 من قانون التجارة على أنه " تعد الأعمال الأتية أعمال تجارية إذا كانت مزاولتها على وجه الإحتراف: عمليات البنوك والصرافة "

article 4, 5 of article 2 of the Commercial law.⁸⁰ This means that the contracts which were concluded by the Omar Effendi Company are commercial contracts, so the disputes that arose from them should be settled by Ordinary Courts

D-Validity of the arbitration clause

The Omar Effendi judgement was issued by an Administrative Court after invalidating the arbitration clause. The Administrative Court should not invalidate the arbitration clause because the sales contract is not an administrative contract, so there is no need for the approval of the competent minister on the arbitration clause.⁸¹

To elaborate, Egyptian law expands the scope of arbitration as it allows arbitration to settle all disputes described in Article (11) of Egyptian Arbitration Law, namely, "Arbitral agreements may only be concluded by natural or juridical persons having capacity to dispose of their rights, arbitration is not permitted in matters where compromise is not allowed",⁸² and as described in article (551) of the Egyptian Civil law "Compromise is not allowed in matters that relate to public policy or Family law but it is allowed in financial matters."⁸³

Egyptian Arbitration Law no.27/1994 allows the parties to settle their disputes via arbitration except for the disputes that relate to Public Policy, Family Law and Administrative Law. In administrative matters, the legislator refuses to allow the government to settle the administrative disputes via arbitration because civil, procedural, and State Council laws do not include any article that gives the government this authority. In addition, this is considered to be

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The original Arabic reads as follows:

استقرت احكام محكمة النقض على أن : ((جميع أعمال البنوك من بينها إصدار خطابات الضمان تعتبر عملاً تجارياً طبقاً لنص الفقرتين 4، 5 من المادة 2 من قانون التجارة ولو تمت بصفة منفردة أو لصالح شخص غير تاجر)) (الطعن رقم 411 سنة 49 ق جلسة 1981/4/13)

⁸¹ *supra* note 74, at 8

⁸²

The original Arabic reads as follows:

تنص م 11 تحكيم على " لا يجوز الاتفاق على التحكيم الا للشخص الطبيعي أو الاعتباري الذي يملك التصرف في حقوقه، ولا يجوز التحكيم في المسائل التي لا يجوز فيها الصلح"

⁸³

The original Arabic reads as follows:

تنص م 551 مدني على أنه "لا يجوز الصلح في المسائل المتعلقة بالحالة الشخصية أو بالنظام العام، ولكن يجوز الصلح على المصالح المالية التي تترتب على الحالة الشخصية أو التي تنشأ عن ارتكاب إحدى الجرائم".

a violation of state sovereignty as it deprives the government from its right to revert to litigation which is considered to be the ordinary and default mechanism for settling disputes.

In 1994, the Egyptian legislature allowed the State, and its public institutions to conclude arbitration agreements with public and private entities in order to settle their disputes via arbitration. This was described in article 1 of the Egyptian Arbitration law, no.27/1994, stating:

Without prejudice to the provisions of international conventions in force in the Arab Republic of Egypt, the provisions of the present Law shall apply to all arbitration between Public law or Private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such arbitrations are conducted in Egypt or when the parties to an international commercial arbitration conducted abroad agree to subject it to the provisions of this Law

Although article 1 is clear in allowing public bodies to settle administrative disputes by arbitration, it did not finalize the debate about the arbitrability of administrative disputes. The General Assembly for Legislations and Legal Opinions in the State Council narrowed the interpretation of article 1 via prohibiting usage of arbitration in settling disputes that arise from administrative contracts.

This prohibition was cancelled as a result of the issuance of law no.9/1997. This law allows settlement of disputes that arise from administrative contracts by arbitration following an approval by the competent minister. As described in article 1” with regard to administrative contract disputes, the arbitration agreement shall be approved by the concerned minister or the official person who assumes his powers with respect to public juridical persons. No delegation of powers shall authorize the same.”⁸⁴

It is clear that the law prohibits the competent minister from delegating anyone to sign the arbitration agreement on behalf of his/her office, due to the importance of this authority. Consequently, the competent minister alone bears the political and the legal responsibility if this authority is misused as this will negatively affect the interests of the state.⁸⁵

84

The original Arabic reads as follows:

تنص م 1 على " وبالنسبة الى منازعات العقود الإدارية يكون الاتفاق على التحكيم بموافقة الوزير المختص أو من يتولى إختصاصه بالنسبة للأشخاص الاعتبارية العامة ولا يجوز التفويض في ذلك"

⁸⁵SOLIMAN MAHMOUD EL TAMAWY, EL WAGIZ IN THE ADMINISTRATIVE LAW158 (Dar El Nahada El Arabia2007)(2007).

This restriction was used by the State Council to invalidate the arbitration clause. In May 7th, 2011, the State Council issued a judgement in which it annulled the arbitration clause due to its violation of law no.9/1997. The State Council alleged that the sales contract is an administrative contract, so the competent minister, who is the minister of investment, should have signed the arbitration clause instead of the Holding Company for Construction and Development.⁸⁶

The Administrative Court stated that the Holding Company for Construction and Development is administered and supervised by the Minister of Investment who should legally represent it in signing the arbitration agreement. Consequently, all the disputes that may arise from the sales contract of Omar Effendi cannot be settled by arbitration, but should be settled by the State Council as described in article 1 of Arbitration law no.9/1997.

The judge here clearly misapplied law no.9/1997 because this law is applied to administrative contracts while Omar Effendi sales contract were not an administrative contract. This is because it does not include the principal elements of the administrative contract.⁸⁷

The Administrative Court determines the principal elements of the administrative contract as follows: "The administrative contract is the contract which is concluded between the government and any other party in order to administer a public utility. It must be governed by the public law and will include exceptional conditions that are not recognized by Private law."⁸⁸ It also states that "The administrative contract is the contract which is concluded in between the government and any other party"⁸⁹ The Administrative Court stated that " the administrative

⁸⁶

The original Arabic reads as follows:

تنص م 1 على " وبالنسبة الى منازعات العقود الإدارية يكون الاتفاق على التحكيم بموافقة الوزير المختص أو من يتولى إختصاصه بالنسبة للأشخاص الاعتبارية العامة ولا يجوز التفويض فى ذلك"

⁸⁷ *supra* note 74, at9

⁸⁸

The original Arabic reads as follows:

حكم المحكمة الإدارية العليا رقم 3480 بتاريخ 1957/6/2 وحكم رقم 1184 بتاريخ 1961 "العقد الإدارى هو عقد يتم إبرامه فيما بين الحكومة واي طرف آخر"
استقر الفقه والقضاء على أن المرفق العام على هو " كل مشروع تنشئة الدولة أو تشرف على إدارته ويعمل بانتظام واستمرار وتستعين فى إنشائه وتسييره بسلطات الإدارة لتزويد الجمهور بالحاجات العامة التى يتطلبها، لا بقصد الربح، بل بقصد المساهمة فى صيانة النظام العام وخدمة المصالح العامة فى الدولة، والصفات المميزة للمرفق العام هى أن يكون المشروع من المشروعات ذات النفع العام، أى أن يكون غرضه سد حاجات عامة مشتركة أو تقديم خدمات عامة" (محكمة القضاء الإدارى – الدعوى رقم 3480 لسنة 9 ق جلسة 1957/6/2)

⁸⁹ *supra* note 74, at10

contract is a contract that is concluded by a public entity in order to administer a public utility.”⁹⁰ It also stated that “ Though the government is a party in the contract, this contract cannot be considered an administrative contract as Public Law does not govern it.”⁹¹.. The Supreme Administrative Court also confirmed the mentioned definition as it stated that” the contracts that are concluded with the public entities to administer the public utility should be included a privilege in favour of the government.”⁹²

This judgement means that the contract will be considered an administrative contract, if the government is a party to it; the management of a public utility is subject to it; and the exceptional conditions, that are known in the Common law and unknown in Private Law, are a part of it. In other words, the administrative contract assumes an unequal relationship between the state and the other parties in favor of the state as it may take unilateral action in amending its obligations.⁹³

In Omar Effendi, the Administrative Court considered the sales contract to be administrative contract though it does not include the elements of an administrative contract especially the presence of the government as a party in the contract and the presence of the public utility as a subject of the contract. Consequently, it considered the arbitration clause null and void because the competent minister did not sign it though it is an administrative contract.

By contract, we do not think the Omar Effendi sales contract is an administrative contract, because the government is not a party to it. Though the Holding Company for

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The original Arabic reads as follows:

نص(الطعن رقم 5811 لسنة 42ق – جلسة 1998/11/24) على أنه " من المستقر عليه في قضاء هذا المحكمة أن العقد الإدارى هو العقد الذى يبرمه أحد أشخاص القانون العام بقصد إدارة مرفق عام أو بمناسبة تسييره وأن تظهر نيته فى الأخذ بأسلوب القانون العام، ومن ثم فإنه بمراعاة أن العقد مثار المنازعة لا يتعلق بإدارة مرفق عام أو بقصد تسييره لتعلقه ببيع احدي الوحدات السكنية التى تقيمها الإدارة للأفراد وبالتالي فإن هذا العقد يخضع لأحكام القانون الخاص وإن يتضمن هذا العقد الشروط الاستثنائية، ذلك لأن هذا العقد يقيناً لا يتصل بنشاط مرفق عام بقصد تسييره أو تنظيمه "

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The original Arabic reads as follows:

نص(الطعن رقم 4874 لسنة 45 ق جلسة 2002/3/13). " أن العقد المشار إليه وإن كان أحد طرفيه شخص فى أشخاص القانون العام إلا أنه يبين من بنوده أنه لا يتسم بسمات العقود الإدارية، فهو لا يعدو أن يكون مجرد عقد بيع مال مملوك للدولة ملكاً خاصاً وقد أبرم بشروط ليس فيها أدنى خروج على أسلوب القانون الخاص ولا توحى باتجاه نية الإدارة فى الأخذ بوسائل القانون العام .

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The original Arabic reads as follows:

حكم المحكمة الإدارية العليا رقم 4874 لسنة 47 قضائية ينص على "يجب ان يتضمن عقد إدارة المنفعة شرط تمييزى وتفضيلى لصالح الحكومة"

⁹³See *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic*, 53 I.L.R. 478 (L.C.J. Arb. 1975, 1977) (hereinafter *Texaco Award*).

Construction and Development.⁹⁴ is a governmental entity, it owns Omar Effendi Company , as if it is a natural person . This is because the government does not own the entire Omar Effendi Company but it owns some of its stocks as any private person would in society. This means that any contract by the government concerning these stocks is not considered to be an administrative contract but rather a civil contract because the government, in this case, is considered a private entity.⁹⁵

Moreover, the subject of the sales contract is not a public utility, so it cannot be considered an administrative contract, since the State Council in judgement no.353 dated 21/3/1965 stated that “the public utility is a project that is established by the government in order to present public services, to provide the people with their needs.”⁹⁶ The Administrative Court also stated that “the Public utility should aim to achieve public interests without gaining any profits.”⁹⁷ And “the Public utility should be supervised by the administrative authorities.”⁹⁸

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The Holding Company for Construction and Building, which is the seller of Omar Effendi Company, is an Egyptian joint stock company .The seller is established by virtue of lawno.203/1991which states that the joint stock company is considered to be a private entity as described in article 1 of this law

” the holding company is a joint stock company which is considered to be a private entity ”.In addition, if the government is a stock holder in the joint stock company , the funds of the joint stock company is owned by the government a private ownership as described in article 12 of law no.203/1991” See *ElDesouky v. Anwal*, *supra* note 1, at 25.

The original Arabic reads as follows:

تنص م 1 على الأتى" وتأخذ الشركة القابضة شكل شركة المساهمة، وتعتبر من أشخاص القانون الخاص، فضلا عن أن أموال الشركة بموجب المادة (12) من القانون المذكور أموالا مملوكة للدولة ملكية خاصة، إذ قررت المادة المشار إليها" وتد أموال الشركة من الأموال المملوكة للدولة ملكية خاصة

The funds of the company is owned by the government a private ownership”⁹⁴ 94

⁹⁵ *supra* note 74, at11

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The original Arabic reads as follows:

وقررت الجمعية العمومية لقسمى الفتوى والتشريع بمجلس الدولةفى الفتوى رقم 353 فى 1965/3/21" أن المرفق العام كل مشروع تنشئة الدولة أو تشرف على إدارته ويعمل بانتظام واستمرار وتستعين بسلطات الإدارة لتزويد الجمهور بالحاجات العامة التى يتطلبها، لا بقصد الربح، بل بقصد المساهمة فى صيانة النظام العام وخدمة المصالح العامة فى الدولة ."

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The original Arabic reads as follows:

استقر الفقة والقضاء على أن المرفق العام على هو " كل مشروع تنشئة الدولة أو تشرف على إدارته ويعمل بانتظام واستمرار وتستعين فى إنشائه وتسييره بسلطات الإدارة لتزويد الجمهور بالحاجات العامة التى يتطلبها، لا بقصد الربح، بل بقصد المساهمة فى صيانة النظام العام وخدمة المصالح العامة فى الدولة، والصفات المميزة للمرفق العام هى أن يكون المشروع من المشروعات ذات النفع العام، أى أن يكون غرضه سد حاجات عامة مشتركة أو تقديم خدمات عامة" (محكمة القضاء الإدارى – الدعوى رقم 3480 لسنة 9ق جلسة 1957/6/2)

The Omar Effendi Company is a project that aims to gain money, and achieve profits via holding commercial transactions. In addition, it is not supervised by an administrative entity, but it is supervised by a board of directors. Consequently, it is not a public utility, but a commercial one according to article 10 the Egyptian Commercial Law which states that” The merchant is every party who practices a trade professionally; every company that is governed by any law relating to the companies regardless of the purpose of its establishment”.⁹⁹ This means that all the transactions that are held by Omar Effendi Company are governed by Civil and Commercial Laws. Consequently they are not governed by Administrative law.

The State Council stated that Omar Effendi stocks are considered to be a public utility which is governed by prime minister decision no.1765/2000 which formed the Ministerial Committee for Privatization ¹⁰⁰ The government owns the stocks in the Holding Company for Construction and Development which in its turn owns stocks in the Omar Effendi Company which is considered to be a public utility.

However, the Omar Effendi Company is not a public utility. The Omar Effendi sales contract is not an administrative contract as it does not include the second condition of the administrative contract which is administering and managing any public utility. The Omar Effendi sales contract is a civil contract according to article 418 of the Egyptian Civil code, which states that “a sales contract is a contract whereby a vendor binds himself to transfer ownership or another monetary right in return for a monetary price”,¹⁰¹ so Omar Effendi sales contract is considered to be a sales contract because its subject is the transfer of 90% of Omar Effendi stake in return for L.E. 589, 410, 000.

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The original Arabic reads as follows:

وقررت الجمعية العمومية في الفتوى رقم 178 في 1954/5/16 على أنه " وإن كانت فكرة المرفق العام غير محددة تحديداً واضحاً، وليس لها تعريف جامع مانع، إلا أن العنصر الأساس فيها هو ضرورة وجود خدمة عامة يهدف المشرع إلى أدائها وتقوم بها الحكومة مباشرة أو يقوم بها ملتزم تحت إشراف السلطة الإدارية في نطاق القانون العام".

99

The original Arabic reads as follows:

تنص م10 على " أن يكون تاجراً:
1- كل من يزاول على وجه الإحتراف بأسمه ولحسابه عملاً تجارياً.
2- كل شركة تتخذ أحد الأشكال المنصوص عليها في القوانين المتعلقة بالشركات أيا كان الغرض الذي أنشئت الشركة من أجله.

¹⁰⁰ *supra* note 74, at12

¹⁰¹ *Id.* at 11

The original Arabic reads as follows:

تنص المادة418 على أنه"البيع عقد يلتزم به البائع أن ينقل للمشتري ملكية شئ أو حقا ماليا آخر مقابل ثمن نقدي"

This was confirmed by the administrative judgement no.105/judicial year 11 dated June 4th, 1961, which states that “the administrative contract is a contract which is concluded between a public entity and any other entity in order to administer a public utility.”¹⁰² This means that the public entity should be a party to the contract. Otherwise, it should delegate another public entity within the limits of its work. Consequently, the Holding Company for Construction and Development cannot be considered a deputy to the government because it is a private entity.¹⁰³

Moreover, the Omar Effendi sales contract is not administrative contract because Omar Effendi stocks are considered to be private money, and not public money, that is owned by the government. Consequently, the government cannot deal on this money with any privileges as it is considered to be a natural person in these deals. Both parties in the Omar Effendi Contract are not public entities but they are private.

To sum, the Omar Effendi sales contract is not an administrative contract, it is a private law sales contract because the government is not a party to it and its subject is not managing a public utility. It also does not include a privilege in favor of the government which is considered to be an important element in defining an administrative contract as described in article 10 of the State Council law. Consequently, this contract is governed by civil law. This means that the arbitration clause is also valid as there is no need for its approval by the competent minister and the approval of the Holding Company for Construction and Development is enough for adopting it.

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The original Arabic reads as follows:

قضت محكمة القضاء الإدارى بالدعوى رقم 105 لسنة 11 ق - جلسة 1961/6/4 بأنه من المقرر " أن العقد الإدارى هو اتفاق ببرمه شخص من أشخاص القانون العام مع أحد الأشخاص أو الهيئات بقصد تسيير مرفق عام وتنظيمه فإذا كان العقدان موضوع الدعوى قد أبرما بين المدعى وبين شركة شل. ويقول المدعى فى هذا الصدد أن الشركة المذكورة تعاقدت معه على هذا النحو بوصفها نائبة عن إدارة خطوط أنابيب البترول، إلا انه متى كان شأن إنابة إدارة خطوط أنابيب البترول لشركة شل فى التعاقد مع المدعى فيه إهدار لقواعد الاختصاص فى إبرام هذا العقد، فإن هذه النيابة مع افتراض ثبوتها لا تضى على عقدى النزاع صفة العقود الإدارية، فضلا عن أنها غير جائزة فى نطاق القانون العام لورواها على خلاف الأصل العام فى القانون، ذلك أنه وإن كان من الجائز تفويض الاختصاصات فى نطاق القانون العام، فإن ذلك مشروطا بأن يكون التفويض متفقا مع القانون، وأن يكون صادرا لأحد الموظفين العموميين فى حدود اختصاصاته الوظيفية أما أن يصدر التفويض لشخص من أشخاص القانون الخاص فهو يقع باطلا فى نطاق القانون العام، ومن ثم فقد تخلف فى عقدى النزاع شرط كون جهة الإدارة طرفا فيها، وبالتالي فإنهما لا يعتبرنا من العقود الإدارية المنصوص عليها فى المادة العاشرة من القانون رقم 165 لسنة 1955، ويختص القضاء العادى بنظر المنازعة المتفرعة عنها" .

¹⁰³ *Id.* at 12

IV. Critique of the Decision on Substantive Grounds

This chapter will highlight the illegality of filing the case after the deadline and the lack of parties' standings, all substantive questions of law separate from the procedural objections outlined in the preceding chapter.

This chapter will also chronicle the illegality of the Omar Effendi judgement due to the non-submission of the parties' defence; the illegality of annulling the mortgage contracts; the illegality of obligating Anwal Company to return Omar Effendi assets; and, the illegality of reappointing previously retired employees. If we assume that the Administrative Court is competent for settling contract disputes, this claim should not be accepted and the Administrative Court's judgement should be annulled for the following reasons:

A.-Violation of the statute of limitations

The passage of the legal deadline is an important ground for challenging the Omar Effendi judgement. In Omar Effendi, the administrative decision was challenged after the deadline which is determined by the State Council law for challenging it. This should lead, in turn, to the rejection of the challenge to the Omar Effendi sales decision.

An administrative decision must be challenged within sixty days of its announcement in official newspapers. This is confirmed in Article 22 of the State Council law no.55/1959 which states that "the legal time of challenging administrative decisions is sixty days from its announcing in the official newspaper, or informing the parties of it."¹⁰⁴

This means that the court violated the law when it accepted the case because the Omar Effendi sales decision was issued on December 21, 2010, while the contract and its relevant

¹⁰⁴ The original Arabic reads as follows:

تنص المادة 22 من قانون مجلس الدولة رقم 1959/55 " يجب ان يطعن فى القرارات الإدارية خلال 60 يوم من إعلان القرارات فى الجريدة الرسمية."

decisions were challenged four years after its issuance. This period exceeds the sixty days which determined by Article 22 of the State Council law.¹⁰⁵

To sum up, the Omar Effendi administrative decision cannot be challenged due to the surpassing of the legal time allowed for challenging it. However, the Administrative court not only accepted the challenge, it also annulled these decisions in contradiction to the State Council law.

B-Lack of Seriousness or Urgency in Stopping the Execution of the Contract

The contract is an expression of the mutual will of the parties, so it should be executed after its signing. It may not be executed if there is serious intent or urgency in stopping its execution. The Omar Effendi judgement stopped the execution of the contract though there was no urgency involved in doing so. This is considered an important ground for challenging the judgement as this contradicts with the state council law and the high administrative decisions.

Article 49 of the State Council law states that "the non-execution of the administrative decisions should be based on seriousness and urgency." This means that its level of seriousness and urgency should be continuous till the issuance of a final judgement in the administrative decision disputes. This was also confirmed by the High Administrative court which states that "the seriousness and the urgency which are referred to in article 49 should be found and continue till the issuance of the final judgement."¹⁰⁶

In Omar Effendi, the contracts and the relevant decisions were challenged after the passage of four years from the date of their issuance. This proves that there is no urgency or seriousness on the part of the claimants to stop the execution of the administrative decisions.¹⁰⁷

¹⁰⁵ *Id.* at 12

¹⁰⁶

The original Arabic reads as follows:

تنص المادة 49 من قانون مجلس الدولة على أن " يجب ان يتوافر شرطى الجدبة والإستعجال لكى يتم إيقاف القرارات الإدارية"

وقد أكدت المحكمة الإدارية العليا ذلك فى حكمها رقم 1274 لسنة 39 ق
قضت المحكمة الإدارية العليا فى حكمها رقم 673 لسنة 43 " إن المقصود من المصلحة المشار إليها فى المادة 49 من قانون مجلس الدولة هى المصلحة
المستمرة حتى صدور حكم نهائى "

Consequently, if we consider that the Omar Effendi sale contract was concluded through an administrative decision, the execution of this contract could not be prohibited because there was no urgency or seriousness in stopping its execution. It was executed four years previously which proves that there was no urgency in prohibiting it.¹⁰⁸

To sum up, the Omar Effendi judgement should be challenged as it violates article 49 of the State Council law and high administrative judgements.¹⁰⁹

C-Lack of claimant standing in bringing the suit against the Defendants

The claimants should have standing to be able to file a case. This means that they must have a relation to the dispute or to the other parties. The case should not be accepted unless the claimants have an interest or benefit in filing it. This is confirmed in Article 12 of the State Council law no.47/1972” which states that the claimant should have a benefit and interest in the case that will be filed by him/her.”¹¹⁰

In Omar Effendi, the claimants had no standing in filing the case as they are not related to the dispute, the buyer, or the seller. This means that the Omar Effendi judgment should be challenged because the case was accepted from claimants who have no standing in filing it.

D-Lack of Party Notification to Present their Defence

The Omar Effendi judgement was issued without allowing the parties to present their defence. This contradicts with the law and the Court of Cassation judgements which, in turn, allow those parties to challenge the judgement. This was confirmed by the Court of Cassation which stated that "The court should allow the parties to submit their defence, once it is a logical defence."¹¹¹ In Omar Effendi, the Administrative Court violated the rights of the parties as the IFC, Audi

¹⁰⁸ *supra* note 74, at13

¹⁰⁹ *Id.* at 14

¹¹⁰

The original Arabic reads as follows:

تنص المادة 12 من قانون مجلس الدولة " يجب ان يكون للمدعى مصلحة فى رفع الدعوي "

¹¹¹

The original Arabic reads as follows:

قد ذهبت محكمة النقض إلى أنه :

Bank, and Ahli United Bank and other banks were not allowed to present their defence. Moreover, the court refused to resume the hearings to allow them to submit their defence. This judgement deprives the parties of their rights to present their defence which are stated in the Egyptian Constitution and the law.¹¹²

E. Lack of Effect for the Bona Fide Buyer and Mortgagee

The sales contracts are valid as the annulment of the administrative decision does not lead to the annulment of the contracts which resulted from it. This has been confirmed by the High Administrative court in several of judgements which were issued by it. This means that the Omar Effendi judgement can be challenged because it annulled the Omar Effendi sales contract as a result of the annulment of an administrative decision in contradiction with the law and the High Administrative judgements.

The Administrative Court stated that “the subject of the decision is the criteria that discriminates the administrative decision from the other decisions.”¹¹³ This means that unless these decisions relate to administrative matters, they cannot not be considered administrative decisions even if they are issued by administrative entities.

In Omar Effendi, the sales decision could not be considered an administrative decision because it relates to the selling of the Omar Effendi Company which is not considered to be an

تقديم الخصم طلب بإعادة فتح باب المرافعة فيها- اتسام هذا الطلب بالجدية بأنه كان دفاعاً جوهرياً – وجوب إعادة فتح باب المرافعة لتحقيق المواجهة بين الخصوم – مخالفة ذلك أثره- إخلال بحق الدفاع .

(الطعن رقم 4883 لسنة 68 ق جلسة 1999/11/30)

¹¹² *Id.* at 13

¹¹³

The original Arabic reads as follows:

لما كان من المستقر عليه في شأن تعريف القرارات الإدارية في قضاء المحكمة الإدارية العليا ان مجرد صدور القرار عن جهة إدارية لا يخلع عليه في كل الأحوال وبحكم اللازم وصف القرار (ولا يعتبر من القرارات الإدارية) إنما يلزم حتى يتحقق له هذا الوصف ان يكون كذلك بحسب موضوعه وفحواه، فإن إصدار القرار هو مسألة من مسائل القانون الخاص أو تعلق بإدارة شخص معنوي خاص خرج من عداد القرارات الإدارية أيا كان مصدره أو موقعة من مدارج السلم الإداري.

(الإدارية العليا طعن 377 لسنة 26 ق جلسة 1986/5/25)

الطعن 432 لسنة 32 ق جلسة 1979/1/27

الطعن رقم 674 لسنة 12 ق جلسة 1967/9/2

الطعن رقم 675 لسنة 28 ق جلسة 1984/12/9)

administrative matter. In addition, the annulment of the administrative decisions should not extend to the contracts which resulted from it even if the administrative decisions are annulled. This is because the decision is an expression of the government's will, so it can be annulled by the government solely. On the other hand, the contract is an expression of the two parties' will, so it cannot be annulled except by the mutual agreement of the parties.¹¹⁴

The invalidity of annulling an administrative contract as a result of annulling an administrative decision was confirmed by the High Administrative judgement. It stated that "the challenge and the annulment of the administrative decisions do not affect the contracts which resulted from them."¹¹⁵ It also stated that "Any third party has the right to ask for annulling a decision that is issued concerning the assignment of an auction to a party that does not deserve due to its contradiction with the rules which were issued by the ministerial cabinet dated November 4th, 1943,. The annulment of this decision will not affect the contract that is resulted from it, unless one of the contract's parties challenged this contract before the competent Ordinary Court."¹¹⁶ In other words, the Administrative Court is a competent body for annulling administrative decisions, but it is not for annulling contracts. The Ordinary Courts have the competency to do that.

Consequently, any third party in Omar Effendi may challenge the Omar Effendi sales decision dated 25/9/2006 which was issued by the Ministerial Committee for Economic Policies, but they cannot challenge the Omar Effendi sales contract itself. On the contrary, the buyer's money should be returned to him or be remunerated if the sales contract is challenged or annulled. This is confirmed in article 142/1 of the Civil law which states that "when a contract is

¹¹⁴ *Id.* at 14, *see also* HAMDY YASSEEN AUKASHA, THE PRACTICAL APPLICATION OF THE ADMINISTRATIVE CONTRACTS 422 (Dar El Nahda press 1998) (1998).

¹¹⁵

The original Arabic reads as follows:

قضت المحكمة الإدارية العليا في حكمها رقم 180 لسنة 10 بأنه "إن إلغاء القرارات الإدارية لا يؤثر على صحة العقود التي أبرمت كأثر لتلك القرارات"

¹¹⁶ *Id.*, at 423

The original Arabic reads as follows:

قضت المحكمة الإدارية العليا في حكمها رقم 143 بأن "إذا كان من حق الطرف الثالث المطالبة بإلغاء القرار الإداري الخاص بإسناد المناقصة إلى أحد الأطراف الذي لا يستحقها مخالفة بذلك القرار الوزاري رقم 4 1943/11/4، فليس من حقه المطالبة بالعقود الناتجة من هذا القرار، لأن المحاكم العادية هي المختصة بنظر تلك الدعاوي بناء على طلب أحد أطراف العقد"

annulled or declared void, the parties return to their legal status before concluding the contract. If such reinstatement is impossible, damages equivalent to the loss may be awarded.”¹¹⁷

The mortgage agreements are valid as they were protected by law and the Court of Cassation judgements from being annulled as a result of annulling the mortgagor ownership. However, the Omar Effendi judgement annulled the mortgage contract because of annulling the sales contract in contradiction with Civil law. This gives the parties the right to challenge the judgement as it contradicts article 1034 of the Civil Code and the Court of Cassation judgements which immune the mortgage contracts from being annulled.

The annulment of a sales contract of an asset does not affect any subsequent real estate mortgage on this asset. This is provided that the buyer (mortgagor) and the mortgagee are bona fide parties, so the mortgage agreements should not be annulled even if the sales contracts were annulled. In Omar Effendi, Ahli United Bank and Audi Bank gave Omar Effendi a loan in return for real estate mortgages on some of the Omar Effendi branches.¹¹⁸ –However the Omar Effendi judgment stated that “the sales and mortgage contracts will be annulled.”¹¹⁹ This means that the court deprived the banks of securities guaranteeing their loans. This contradicts with the Egyptian Central Bank law which confirms the importance of securing the banks’ rights. It also contradicts with article 1034 of the Civil Law which states that “If a mortgage is created by an owner whose title to the property is subsequently annulled, rescinded, abolished, or ceases to exist for any reason, the mortgage will remain valid in favor of the mortgagee if he was of a good faith at the time of creating the mortgagee.”¹²⁰

The annulling of a mortgage contract was confirmed by the Egyptian Court of Cassation In 26/2/1986. It states that

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The original Arabic reads as follows:

تنص م 1/142 "فى حالتى إبطال العقد وبطلانه يعاد المتعقدان الى الحالة التى كانا عليها قبل العقد ،فإذا كان هذا مستحيلا جاز الحكم بتعويض معادل"

¹¹⁸ *supra* note 67, at 7

¹¹⁹ *supra* note 70, at 13

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The original Arabic reads as follows:

تنص م 1034 مدنى على أنه "يبقى قائما لمصلحة الدائن المرتهن الصادر من المالك الذى تقرر إبطال سند ملكيته أو فسخها أو الغاؤه أو زواله لأى سبب آخر،إذا كان هذا الدائن حسن النية فى الوقت الذى أبرم فيه الرهن.

”Although the main civil rule states that the true owner is not bound by any act that is not committed by him, civil jurisprudence supports the application of article 1034 which obligates him to comply with any mortgage on his asset even if it was not mortgaged by him. In this case the true owner and the apparent party becomes liable before the bona fide third party”¹²¹

The Court of Cassation also called up article 1034 of the Civil law and confirmed on the mortgage contract importance in its judgment dated 26/2/1986 (challenge no.826, Judicial year54) as it stated that

The application of this article is not confined to cases that are established by virtue of a text of law, rather it has a general application to all cases where the dealer with an apparent owner or mortgagor is bona fide even if no statutory provision exists.¹²² This rule includes: The mortgages affected by an apparent heir; an apparent legatee; an owner whose title to the property is subsequently annulled; a fictitious owner; a prête nom. The legal protection of article 1034 can be extended to the judgement liens and the pledge

Thus in article1034 of the Civil Code, the legislator protects the mortgage from being annulled or challenged as a result of the annulment of the ownership documents provided that the mortgagee is bona fide at the time of committing the mortgage; the mortgagee is not aware of the defects in the ownership documents; the mortgage agreement is effective, includes all the legal requirements, and is officially registered before the annulment of the ownership documents.

The explanation memorandum for drafting article 1034 also stated that “the mortgage will be effective even if the mortgagor is not the authentic owner as this mortgagor will be considered the rightful owner.”¹²³

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The original Arabic reads as follows:
وأن صاحب الحق لا يلتزم بما صدر من قضت محكمة النقض بيهيئتها العامة للمواد المدنية والتجارية: "الأصل أن العقود لا تنفذ الا في حق عاقدتها، غيره من تصرفات بشأنها، إلا أنه باستقراء نصوص القانون المدني، يتبين أن المشرع قد أعتد في عدة تطبيقات هامة بالوضع الظاهر لإعتبارات توجيهها بما يحول ووصفها بالإستثناء، وتصبح قاعدة العدالة وحماية حركة التعامل في المجتمع وتنضبط جميعا مع وحدة علتها واتساق الحكم المشترك فيها، واجبة الأعمال متى توافرت موجبات أعمالها واستوفت شرائط تطبيقها وموادها أنه إذا كان صاحب الحق قد أسهم بخطئه سلبا أو إيجابا- في ظهور المتصرف على الحق بمظهر صاحبه ، مما يدفع الغير حسن النية الى التعاقد معه ،للشواهد المحبطة بهذا المركز، والتي من شأنها ان تولد الإعتقاد الشائع بسوابقه هذا المظهر للحقيقة ، مقتضاه نفاذ التصرف المبرم بعوض بين صاحب الوضع الظاهر والغير حسن النية في مواجهة صاحب الحق

¹²² ABD EL RAZEK EL SANHOURY, ELWASEET IN THE CIVIL LAW 437 (Dar El Nahda Press 1990) (1990)

¹²³

To sum up, the Omar Effendi judgement should be challenged because it annulled the mortgage contract in violation of the Civil law.

F. Invalidity of Anwal Company obligation to hand back the assets

It is illogic to obligate a stockholder to hand back the company's assets as the stockholder does not buy assets; rather, he/she buys stocks. The assets remain in the company which is, in turn, is managed by the board of directors. The Omar Effendi judgement obligated the stockholder to hand back the assets though he did not receive them. This in turn leads to the challenge of the Omar Effendi judgement.

The Omar Effendi judgement stated that the Anwal Company should hand back all the assets that it received following the purchase of the Omar Effendi Company. This point must be challenged because the Anwal Company is not a buyer; rather, it is a stockholder. This was confirmed in Article 3 of the Omar Effendi sales contract which states that "The subject of this contract is the sale of 90% of Omar Effendi stocks." This means that the buyer did not buy the company's assets but he bought the company's stocks.¹²⁴

The court should abide by this meaning because the sales contract is considered to be law. This was confirmed in Article 147/1, 148/1, and 89. Article 147/1 of the Civil law states that "The contract is considered to be the law of the parties. It cannot be revoked or modified except by agreement of the parties or for the reasons provided by law."¹²⁵ In addition, Article 148/1 of the Civil law states that "A contract must be performed in accordance with its provisions and in compliance with the requirements of good faith".¹²⁶ In addition, article 89 of the Civil Code states that "A contract is formed when the two parties express two identical

ABD EL RAZEK EL SANHOURY, ELWASEET IN THE CIVIL LAW 437 (Dar El Nahda Press 1990) (1990)

¹²⁴ A Memorandum of defense submitted by Mr. Medhat wahba to the State Council in 27/6/2011 p.16

¹²⁵

The original Arabic reads as follows:

تنص المادة 1/147 مدنى على أن "العقد شريعة المتعاقدين، فلا يجوز نقضه أو تعديله إلا باتفاق الطرفين، ولأسباب التي يقررها القانون".¹²⁶

The original Arabic reads as follows:

تنص المادة 1/148 مدنى "يجب تنفيذ العقد طبقا لما أشتمل عليه وبطريقة تتفق مع ما توجبه حسن النية"

intentions to each other, this contract is subject to any additional specific determinants that may be required by law.”¹²⁷

In November 27, 2001, the High Administrative Court confirmed that the contract is considered to be a law unto its parties, stating that “the clauses of the contracts including the administrative contracts should be applied in good faith.”¹²⁸ “the administrative contract like the civil contracts should be applied in good faith.”¹²⁹ “Applying contracts in good faith is the legal basis for civil and the administrative contracts.”¹³⁰.

To sum up, Anwal Company did not purchase Omar Effendi assets: it bought Omar Effendi stocks. Thus, it is illogical to obligate the stockholder to give back assets that were not received by him especially that these assets are still owned by the Omar Effendi Company.

G. Invalidity of Omar Effendi obligation to reappoint past employees

The employer should accept the resignation of any employee requesting to do so. At the same time, the employer is not obligated to reappoint the retired employees in contradiction with the law and the Court of Cassation judgments. This judgment stated that Anwal Company violated its obligations as they obligated the workers to retire early.

In the Omar Effendi sales contract, sub article 4 of Article 12 states that "early retirement is a system in which the seller will pay 50 million Egyptian pounds as a cost for the early

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The original Arabic reads as follows:

تنص م 89 مدنى على أنه " يتم العقد بمجرد أن يتبادل الطرفان التعبير عن إرادتين متطابقتين مع مراعاة ما يقرره القانون فوق ذلك من أوضاع معينة لإنعقاد العقد".

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The original Arabic reads as follows:

وقد استقرت أحكام المحكمة الإدارية العليا على أن العقد إدارى – يتم تنفيذه مع ما يتفق مع حسن النية: من المقرر قضاء أن تنفيذ العقود ومن بينها العقود الإدارية يتعين أن يكون طبقاً لما اشتملت عليه نصوص العقد وبطريقة تتفق مع حسن النية وهي التي تحدد حقوق والتزامات طرفيه وأن يكون التنفيذ طبقاً لما اشتمل عليه العقد وبطريقة تتفق مع حسن النية . (الطعن رقم 1333 لسنة 45 ق عليا جلسة 2001/11/27)

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The original Arabic reads as follows:

من المقرر أن العقود الإدارية شأنها شأن العقود المدنية يحكمها أصل عام هو أن العقد شريعة المتعاقدين حيث تقوم قواعده مقام القانون بالنسبة للطرفين (الطعن رقم 8716 لسنة 44 ق عليا جلسة 2011/11/6) .

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The original Arabic reads as follows:

تنفيذ العقد الإدارى طبقاً لما اشتمل عليه وبطريقة تتفق مع حسن النية أصل عام فى أصول القانون يفضى بأن يكون تنفيذ العقد طبقاً لما اشتملت عليه نصوصه وما تضمنته أحكامه، وهذا الأصل مطبق فى العقود الإدارية والعقود المدنية على السواء . (الطعن رقم 621 لسنة 45 ق عليا جلسة 2002/3/26)

retirement of 1200 workers." This means that Anwal approved the workers' early retirement in compliance with the contract clause, upon the employer's request,¹³¹ and under the worker's syndicate supervision. Moreover, the company subsequently appointed 413 new employees to work in the company. This proves that the company played an important role in decreasing unemployment. The judgement has ignored the obligation of Omar Effendi Company to accept the workers resignation in compliance with the law and the contract clauses. It stated that the workers should return to their jobs and receive their rights. To sum up, the employer is not obligated to reappoint the resigned/retired employees; and for this reason, the Omar Effendi judgment may be further challenged.

H. Anwal Company obligation to settle Omar Effendi debts.

Each company is legally obligated to settle its debts according to the law and the Court of Cassation judgements. In Omar Effendi, the judge obligated the Anwal Company to settle the Omar Effendi Company's debts in contradiction with the law. Omar Effendi may be challenged on this basis.

In Omar Effendi, the loan lent by Ahli United Bank and Audi Bank to Omar Effendi was used to settle the Company's taxes, debts, employees' salaries and to finance the Company's capital expenditures. In this way, the loan became an element in Omar Effendi assets via adding it to its accounts."¹³²

Though these facility agreements were signed by the legal representative of Omar Effendi Company, the judgement obligated Anwal to settle these facilities. This judgement contradicts with article 85 of the Law no.159/1981 which states that:

The board of directors appoints a chairman from its members and it has the authority to appoint a deputy for the chairman to replace him in case of his absence. Moreover, the board of directors may entrust the chairman with the competencies of the managing director including the authority of the chairman to represent the company legally before litigation. The internal rule of the company determine the authorities of the chairman, the members, and the employees¹³³

¹³¹ *supra* note 129, at 10

¹³² *supra* note 70, at 14

¹³³

The original Arabic reads as follows:

This means that the chairman legally represents the company before any party, so the company is responsible for executing all the contracts that are signed by the chairman as he represents the stockholders.

The responsibility of the company for representative acts was confirmed by the Court of Cassation. It stated that "According to article 105 of the Egyptian Civil law "When a contract is concluded by a representative in the name of his principal within the limits of his authority, the rights and obligations resulting from it shall be attributed to the principal."

Jurists supported the application of article 105 of the Civil law in order to protect the interests of bona fide third parties. This protection is achieved via legalizing the acts that are held by the party and appear as if he/she is the true owner. In this case, these acts are considered to be right provided that the third party hold the transactions with the apparent party due to his appearance.¹³⁴ This means that the contract that was concluded by the chairman within limits of his authority shall be attributed to Anwal Company but shall not be attributed to Omar Effendi.¹³⁵

Omar Effendi debts resulted from contracts that were signed by the Omar Effendi chairman, who is registered in the Omar Effendi Commercial register, within the limits of his authority. Consequently, Omar Effendi is responsible for settling these debts.

The company is liable for all the obligations which have resulted from this act. Consequently, The legal representative is responsible for settling the company's obligations . This is provided that the following conditions are met: The chairman commits the acts in the name of the entity;

تنص م85 من قانون الشركات " يعين مجلس الإدارة من بين أعضائه رئيسا، كما يجوز له أن يعين نائبا للرئيس يحل محل الرئيس حال غيابه. ويجوز للمجلس أن يعهد الى الرئيس بأعمال العضو المنتدب. ويمثل رئيس المجلس الشركة أمام القضاء، ويحدد نظام الشركة ولوائحها الداخلية الإختصاصات الأخرى المقررة لرئيس المجلس والأعضاء الموظفين."

¹³⁴ *supra* note 70, at 13

¹³⁵

The original Arabic reads as follows:

قضت محكمة النقض بأنه"

من مقتضى القواعد العامة فى النيابة حسبما يبين من نص المادة 105 من القانون المدنى إضافة الحقوق والإلتزامات التى تنشأ عن التصرفات التى يبرمها النائب بأسم الأصيل الى هذا الأخير أخذا بأن إرادة النائب وأن حلت محل الأصيل إلا أن الأثر القانونى لهذه الإرادة ينصرف الى شخص الأصيل، كما لو كانت الإرادة قد صدرت منه هو وبالتالي فإن إستيفاء الديون المترتبة فى ذمته بناء على تصرف النائب عنه يكون إما بأدائها أختيارا أو بطريق التنفيذ الجبرى ثم الوفاء بها من حصيلة هذا التنفيذ مما لازمه الا يوقع الحجز الا على ما هو مملوك للمدين دون النائب إذ لا يسأل هذا الأخير فى أمواله عن أثار التصرفات التى يبرمها بأسم الأصيل"

the third party deals with the chairman in good faith; and the occurrence of an act which proves that the chairman works in the name of the entity within the limits of its authority.¹³⁶

Consequently, Omar Effendi is responsible for settling these debts as it is the entity that signed the contracts and received the money. It is illegal to obligate Anwal to settle Omar Effendi debts as it is considered to be a stockholder in it.

I. Invalidity on ultra vires grounds.

The Omar Effendi judgement stated that the sales contract contradicts articles 15, and 35 of the Auctions and Tenders law no.89/1998 as there was no transparency in holding them. In fact, these auctions were held numerous times and all of the submitted offers did not meet the minimum requirements. In addition, Anwal Company was the best offer which met the minimum requirements. This means that the Omar Effendi judgement may be challenged on this ground. This, in turn, confirms the importance of competition and transparency in holding the tender in order to allow many tenderers to participate in the tender, which will positively affect the prices and the conditions of the tenders.¹³⁷ This reasoning is illegal for the following reasons:

Article 29 of the executive regulations of the Auctions and Tenders Law, which was issued by a decision from a minister of finance no.1367/1998, contradicted that. It stated that “The auction may be accepted even if it was the only offer that was presented. This is provided that: there is an urgent need for the offer and if there is no hope for getting better results than the dominant results; the only offer comply with the conditions and the prices which are included in the documents of the auction.”¹³⁸

¹³⁶ MOHAMED KAMAL ABD EL AZIZ, THE CIVIL LAW FROM JURISPRUDENCE PERSPECTIVE657 (Dar El Nahda press 1990) (1990).

¹³⁷ MOHAMED KAMAL ABD EL AZIZ, THE CIVIL LAW FROM JURISPRUDENCE PERSPECTIVE657 (Dar El Nahda press 1990) (1990).

¹³⁸

The original Arabic reads as follows:

طبقاً لنص المادة 29 من اللائحة التنفيذية لقانون المناقصات والمزايدات الصادر بقرار من وزير المالية رقم 1367/1998 أنه يجوز قبول العطاء الوحيد إذا توافرت فيه الشروط الآتية:
أ- أن تكون حاجة العمل لا تسمح بإعادة طرح المناقصة أو لا تكون ثمة فائدة ترجى من إعادتها
ب- أن يكون العطاء الوحيد مطابقاً للشروط ومناسباً من حيث السعر

The conditions of the tender also allows the competent authority to freely choose the best offer. This was clearly described in the tender conditions stating that “The competent committee reviews the offers technically and officially, prepares a final report about them and chooses the best one. This committee has the right to compare the best offers from the technical and financial perspectives.”

Anwal Company and other companies offered to buy Omar Effendi. Anwal’s offer was the best at hand, so the competent authorities including the Ministry of Investment and the Central Auditing Organization agreed to sell the company to Anwal after getting the approval of the General Assembly.

Omar Effendi was sold for a low price because it was in a bad condition due to the Egyptian government’s mismanagement of it. For instance, the board of directors of the Omar Effendi Company was not aware of the accurate number of the Omar Effendi branches owned - whether there were 82 or 85 branches and whether they were owned or leased.¹³⁹

In addition, the company was offered for sale many times but the offers that were submitted did not meet the minimum requirements of the auction except for Anwal’s offer. It was the best offer as per what was stated in the extraordinary meeting of the Holding Company dated September 25, 2006. This was also stated on page 15 of the Auction Documents, stating that “the last auction that was offered to Anwal Company was the fourth Auction as the previous Auctions failed to meet the minimum price and requirements of the Omar Effendi Company evaluation.”

To sum up, Anwal Company’s offer was the best offer as per what was stated by Mr. Hady Fahmy, the Chairman of the Holding Company for Construction and Development, to an extent that it exceeded the price that was determined by the government, so the judgment violated articles 15 and 35 of the Auction and the Tender Law.

¹³⁹ *supra* note 129, at 7

V. Conclusion

The public sector has played a historically important role in developing the Egyptian economy, in the industrial field as well as infrastructure, telecommunications and other commercial fields including food and clothing commodities. This role decreased in the free market era because of the mismanagement, indeed corruption of the Egyptian government prior to the January 25h Revolution.¹⁴⁰

The Omar Effendi case is a prominent example of this mismanagement, as the government failed to appoint a competent board of directors to meet the Egyptian people's needs and serve the market to its public good. It also misapplied the privatization process which is considered to be an important mechanism in the free market era.

This failure to manage and privatize Omar Effendi properly was exacerbated by the issuance of a procedurally and substantively faulty judgment from the Egyptian State Council, against a foreign investor who had invested its money in cooperation with legitimate Egyptian authorities following proper procedures and all. This has certainly augmented foreign investment fears that the application of the law in post-Revolution Egypt is affected by political circumstances.

¹⁴⁰ *El Desouky v. Anwal*, *supra* note 1, at 21