
The Legal Protection of the Adhering Party in Contracts of Adhesion: A Comparative Study in the Egyptian & UAE Laws

Dr. Mahmoud Abdelhakam Alkhen

*College of Law - Al Ain University
United Arab Emirates*

Email: Mahmoud.elkhen@aau.ac.ae

Abstract

Originally, any contract shall be characterized by free bargaining and fair negotiations; as each party shall be granted a fair chance to convince the other party with his own best possible terms and conditions. That is to say, the ordinary model adopted for contracts in general is "free bargaining contracts", which shall be based on the agreement and assent of both wills, after the conclusion of fair bargaining and negotiation between the two contracted parties. However, there is another type of contracts that differs from this traditional model, where there is no bargaining or negotiations between the contract's parties. In this type of contracts, only one of the two parties is granted the advantage of stipulating the contract's terms and conditions in advance; while the other party's position is restricted within certain limits, mainly based on the principle of "take it or leave it". Hence, if the adhering party has accepted all terms and conditions, the contract may be concluded, and vice versa. In this case, it is safe to say that the adhering party has given in to the terms and conditions of the first party; therefore, this type of contract is known as "Contracts of Adhesion".

On this basis, Contracts of Adhesion may be defined as follows: "They are contracts where only one of the two contracted parties is entitled to stipulate the contract's terms and conditions, while the other party has no choice but either to accept or to reject all of those terms; i.e., the adhering party may not negotiate, add or omit any of the contractual terms". This type of contracting is usually fulfilled, when there is a discrepancy in the bargaining power of the two contracted parties; as one party enjoys the greater power, while the other party has a weaker bargaining power. Hence, the first party solely gets to set the terms and conditions of the contract, while the second party gets to choose either to accept all of these terms (hence concluding the contract), or to reject them (hence failing to conclude the contract).

In this regard, the legal validity of contracting used not to be compromised with this type of contracts; however, in his stipulations for the regulation of contracts, the legislator in most countries has not overlooked the reality of such unfair compliance; as the legislator has decided to provide a fair legal protection as required for the weaker party, hence rebalancing the contractual relationship. In other words, Contracts of Adhesion basically imply that the party with greater power alone gets to set the contract's terms and conditions, hence stipulating terms serving his interest at the expense of the adhering party; consequently, some of these terms could be characterized as being "arbitrary". Therefore, there is a real need to provide effective legal protection for the adhering party against any arbitrary terms.

As the case is with laws of most other countries, both the Egyptian and UAE Laws have adopted Contracts of Adhesion as legally valid; and that is based on the adhering party's voluntary approval and acceptance to submit to the will of the other party. Nonetheless, those two laws have not overlooked the fact that this type of contracting is characterized by a special nature, as it is based mainly on a great deal of discrepancy between the positions of each contracted party. That is to say, realistically, one party holds a position of power over the other party who has allowed the first party to dictate his own terms and conditions; while the second party has no choice but to submit to the will of the first party. On this basis, the Egyptian and UAE Laws have stipulated some private legal provisions for the purpose of protecting the adhering party.

Interestingly, pursuant to the old Egyptian civil legislation, judiciary has acknowledged Contracts of Adhesion as true and legally valid contracts that shall be respected and

honored. For instance, the terms and conditions printed in Lease Contracts or Insurance Contracts shall be honored; in addition, the printed regulations of some company, or the systems and regulations of the Railway Authority shall be respected. Nonetheless, in light of this old civil legislation, the Egyptian judiciary has adopted some controversial legal practices as follows: giving the written terms priority over printed terms; annulling the agreement by virtue of the exemption from liability; interpreting the contractual obligation in favor of the adhering party; and annulling the prior will by virtue of the subsequent will.

On the other hand, in light of the currently adopted civil legislation, the Egyptian legislator has stipulated a legislative protection for the adhering party, instead of the prior judicial one. Likewise, the UAE legislator has also adopted the same approach. That is to say, by virtue of the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, the following is stipulated: "In case of the stipulation of arbitrary terms in Contracts of Adhesion, the competent judge may amend these terms or release the adhering party from any obligations in this regard; and that is as required by virtue of justice, thus, any agreement to the contrary shall be considered as void".

In addition, pursuant to the provisions of Article (151) of the Egyptian Civil Law and Article (266) of the UAE Civil Transactions Act, the following is stipulated: "1- A doubt shall be interpreted in favor of the debtor; 2- However, the interpretation of ambiguous phrases in Contracts of Adhesion may not be damaging to the interest of the adhering party".

Keyword: Contracts of Adhesion - Adhering Party - Legal Protection - Arbitrary Terms - Insurance Contracts - Insured Person - Insured Party

I. Introduction & Research Subject

1. Originally, any contract shall be characterized by free bargaining and fair negotiations; as each party shall be granted a fair and complete opportunity to convince the other party with his own best possible terms and conditions.¹ That is to say, the ordinary model adopted for contracts in general is "free bargaining contracts", which shall be based on the agreement and assent of both wills, after the conclusion of fair bargaining and negotiation between the two contracted parties. However, there is another type of contracts that differs from this traditional model, where there is no bargaining or negotiations between the contract's parties. In this type of contracts, only one of the two parties is granted the advantage of stipulating the contract's terms and conditions in advance; while the other party's position is restricted within certain limits, mainly based on the principle of "take it or leave it". Hence, if the adhering party has accepted all terms and conditions, the contract may be concluded, and vice versa. In this case, it is safe to say that the adhering party has given in to the terms and conditions of the first party; therefore, this type of contract is known as "**Contracts of Adhesion**".

In light of the above, Contracts of Adhesion may be defined as follows: "They are contracts where only one of the two contracted parties is entitled to stipulate the contract's terms and conditions, while the other party has no choice but either to accept or to reject all of those terms; i.e. the adhering party may not negotiate, add or omit any of the contractual terms". This type of contracting is usually fulfilled, when there is a discrepancy in the bargaining power of the two contracted parties; as one party enjoys the greater power, while the other party has a weaker bargaining power. Hence, the first party solely gets to set the terms and conditions of the contract, while the second party gets to choose either to accept all of these terms (hence concluding the contract), or to reject them (hence failing to conclude the contract).

2. In this regard, it is estimated that Contracts of Adhesion have been introduced for the first time at the middle of the nineteenth century; as they have emerged as a result of the huge industrial revolution, accompanied by the emergence of formidable powers controlling most needs of people such as necessary commodities or basic services.
3. Interestingly, these emerging great powers have adopted this approach in their dealings and transactions with individuals, regarding the required necessary commodities or basic services. That is to say, they

¹ Abdelfattah Abdelbaki, "The Theory of Contract & Unilateral Will", N.P., 1984, Clause (92), p. 201.

have decided to offer these services and commodities by virtue of their own non-negotiable terms and conditions, while the individuals may only "take it or leave it".

4. In this way, the world of law has come to know a new type of contracting, which does not permit any bargaining or negotiation. In other words, it is a contract between two parties, where one party enjoys a great power socially and economically; while the other party is desperately weak and in dire need of this contract to the point that he has no choice but to accept all of its terms and conditions, and to submit to the will of the first party.²

In this context, apparently, the French lawyer **Raymond Saleilles** was the first jurist ever to draw attention towards this newly introduced type of contracts; thus, in his book "*De la Declaration de Volante*" (The Declaration of Will), he has pointed out that there are some contracts where the content is dictated by one of the contracted parties on the other party, as the role of the latter is merely limited to joining the contract without any negotiations or modifications; hence, these contracts are known as "Contracts of Affiliation".³

5. On the other hand, it is safe to say that Dr. **Abdulrazak Elsanhuri** was the first jurist to introduce the term "Contracts of Adhesion"⁴ to the Arab legal thought, instead of the term "Contracts of Affiliation" as used by the French jurist Saleilles. In this regard, Dr. Elsanhuri says: "However, we have preferred to refer to this type of contracts in the Arabic Language by the term (Contracts of Adhesion), in order to reflect the implied meaning of compulsion".⁵ Interestingly, this new designation has become the most commonly used term in the legal contexts of jurisprudence, judiciary and legislations.⁶
6. Naturally, Contracts of Adhesion have witnessed a constant spread and increase, taking into consideration that modern civic life requires numerous needs and services which have come to be basic necessities for everyday life. Consequently, the fulfillment of these increasing necessities requires great efforts and large funding, a task which may only be accomplished through huge projects of great economic powers. Of course, it would be preferable that these economic powers face no or minimum competition; thus, if there is actual competition, public peace shall be kept through the unification or approximation of terms concerning the provision of their services and commodities. For example, anyone could easily notice the several similarities between the terms of contracting offered by mobile phone companies in Egypt (e.g., Vodafone and Mobinil). In addition, the matter could go even further through the integration of these economic entities into each other, in order to form giant corporations that shall guarantee the lack of any real competition.
7. For instance, Contracts of Adhesion may include contracts for common services like phones, electricity, water, and rail transportation. Usually, all these contracts would involve a party who sets the contract's terms and conditions in advance (i.e. the company providing the services of landline phones, mobile phones, electricity, water or the Egyptian Railway Authority). On the other hand, the other party of these contracts (i.e. the user, consumer or passenger) may only choose between two options: either to accept the contract on those terms and conditions, hence concluding the contract; or to reject it, hence failing to enter into any agreement. Likewise, the same approach has been adopted by insurance companies in their contracts with the insured party; as the insurance company solely gets to stipulate the contract's terms and conditions, while the insured person gets only to decide whether to accept or to reject this contract without any negotiations or modifications.
8. As previously mentioned, the legal validity of contracting used not to be compromised with this type of contracts; however, in his stipulations for the regulation of contracts, the legislator in most countries has not overlooked the reality of such unfair compliance; as the legislator has decided to provide a fair legal protection as required for the weaker party, hence rebalancing the contractual relationship. In other words, Contracts of Adhesion basically imply that the party with greater power alone gets to set the contract's terms and conditions, hence stipulating terms serving his interest at the expense of the adhering party; consequently, some of these terms could be characterized as being "arbitrary".

² Abdelfattah Abdelbaki, *Op. Cit.*, p. 201.

³ Mohsen Abdelhamid Elbeih, "Sources of Obligation – Part I: Voluntary Sources", Al-Galaa Library in Mansoura, N.D., Clause (89), p. 138.

⁴ Abdelfattah Abdelbaki, *Op. Cit.*, Footnote (2), p. 204.

- Mohsen Abdelhamid Elbeih, *Op. Cit.*, p. 138.

⁵ Abdelrazzak Elsanhuri, "Al-Waseit in New Civil Law – Part I: Sources of Obligation", Al-Halabi Legal Publications, Beirut, Lebanon, 2000, p. 245, Footnote (1).

⁶ Abdelrazzak Elsanhuri, *Op. Cit.*, p. 245.

Therefore, there is a real need to provide effective legal protection for the adhering party against any arbitrary terms.

9. As the case is with laws of most other countries, the Egyptian and UAE Laws have adopted Contracts of Adhesion as legally valid; and that is based on the adhering party's voluntary approval and acceptance to submit to the will of the other party. Nonetheless, those two laws have not overlooked the fact that this type of contracting is characterized by a special nature, as it is based mainly on a great deal of discrepancy between the positions of each contracted party. That is to say, realistically, one party holds a position of power over the other party who has allowed the first party to dictate his own terms and conditions; while the second party has no choice but to submit to the will of the first party.⁷ On this basis, the Egyptian and UAE Laws have stipulated some private legal provisions for the purpose of protecting the adhering party.
10. In this regard, pursuant to the old Egyptian civil legislation, judiciary has acknowledged Contracts of Adhesion as true and legally valid contracts that shall be respected and honored. For instance, the terms and conditions printed in Lease Contracts or Insurance Contracts shall be honored; in addition, the printed regulations of some company, or the systems and regulations of the Railway Authority shall be respected. Nonetheless, in light of this old civil legislation, the Egyptian judiciary has adopted some controversial legal practices as follows: giving the written terms priority over printed terms; annulling the agreement by virtue of the exemption from liability; interpreting the contractual obligation in favor of the adhering party; and annulling the prior will by virtue of the subsequent will.⁸

On the other hand, in light of the currently adopted civil legislation, the Egyptian legislator has stipulated a legislative protection for the adhering party, instead of the prior judicial one. Likewise, the UAE legislator has also adopted the same approach. That is to say, by virtue of the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, the following is stipulated: "In case of the stipulation of arbitrary terms in Contracts of Adhesion, the competent judge may amend these terms or release the adhering party from any obligations in this regard; and that is as required by virtue of justice, thus, any agreement to the contrary shall be considered as void".

In addition, pursuant to the provisions of Article (151) of the Egyptian Civil Law and Article (266) of the UAE Civil Transactions Act, the following is stipulated: "1- A doubt shall be interpreted in favor of the debtor; 2- However, the interpretation of ambiguous phrases in Contracts of Adhesion may not be damaging to the interest of the adhering party".⁹ Based on these two legal provisions, it is obvious that both the Egyptian and UAE legislators have provided a general protection for the adhering party in Contracts of Adhesion; and that is through the following two methods: first, Restriction of Arbitrary Terms (Part One); and second, the Interpretation of Doubt in favor of the Adhering Party (Part Two).

II. Research Methodology

This current study has adopted the Analytical-Comparative Approach. That is to say, it is an "Analytical Study"; as the authors have examined the general rules stated in Civil Law, regarding the protection of the adhering party in Contracts of Adhesion; and that is by adopting the model of "**Insurance Contracts**" as an example, where the insured party is represented as the adhering party. In addition, the study may also be considered as a "Comparative Study"; as it will provide a comparison between the Egyptian Civil Law and the UAE Civil Transactions Act; and that is in order to identify the points of similarities and differences between the two laws, especially with regard to their different sources officially and historically.

III. Research Plan

In order to fully and duly examine the subject in question, in a way that shall provide adequate answers for all various questions, this current study will be divided into two parts. At the first part, the authors will address the

⁷ Abdelfattah Abdelbaki, *Op. Cit.*, Clause (98), p. 211.

⁸ See: Abdelrazzak Elsanhuri, *Op. Cit.*, Clause (118), p. 247-248; as well as the provisions stated in the footnotes at the aforementioned two pages.

⁹ In this regard, Prof. Dr. Abdelfattah Abdelbaki has expressed his criticism to this regulation in the Egyptian Civil Law as follows: "It would have been better for the Egyptian legislator to stipulate all legal provisions concerning Contracts of Adhesion in one place, in order to avoid any confusion or dispersion"; Abdelfattah Abdelbaki, *Op. Cit.*, Clause (9), p. 206.

issue of "Restriction of Arbitrary Terms" (Part One); while the second part will discuss the issue of "Interpretation of Doubt in favor of the Adhering Party" (Part Two).

On this basis, the research plan consists of two parts as follows:

- Part One : Restriction of Arbitrary Terms.
- Part Two : Interpretation of Doubt in favor of the Adhering Party.

Part One

Restriction of Arbitrary Terms

By virtue of the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, the following is stipulated: "In case of the stipulation of arbitrary terms in Contracts of Adhesion, the competent judge may amend these terms or release the adhering party from any obligations in this regard; and that is as required by virtue of justice, thus, any agreement to the contrary shall be considered as void".

As previously mentioned, taking into account that the party with greater power is the party who gets to stipulate all terms and conditions of a Contract of Adhesion, it is conceivable that some terms could be considered as "**Arbitrary Terms**" that are unfair to the adhering party who has no choice but to accept them. In this sense, both the Egyptian and UAE legislators have decided that the competent judge shall be entitled to interfere in such case, in order to amend these terms or to release the adhering party from their obligations entirely. Hence, this legal provision is clearly an exception to the general legal rule: "*Pacta Sunt Servanda*" (Agreements must be kept and honored); as contracts in general may not be breached or amended, unless it is by virtue of the agreement of both contracted parties. [Article (147) of the Egyptian Civil Law and Article (267) of the UAE Civil Transactions Act]

On this basis, if an Insurance Contract has involved some arbitrary terms, the competent judge may - upon the request of the insured party - amend or cancel those terms. That is to say, the insured person may submit a request for permission to amend an arbitrary term; however, such motion does not mean that the judge is obligated to grant him this request, thus, pursuant to the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, the matter is permissible pursuant to the judge's discretion.

Furthermore, instead of asking for the amendment of an arbitrary term, the insured party may also ask for the term's cancellation entirely. In this case, the judge may not ignore the insured party's request, and order the amendment of the arbitrary term instead; as such action will be deemed as an invalid adjudication that is irrelevant to the plaintiff's request, which is not legally permissible.

In this way, pursuant to the Egyptian and UAE laws, the judge's jurisdiction is limited only to the amendment or cancellation of the contested arbitrary term; and that is on grounds that this term is causing damages to the adhering party, while fulfilling an unjustified interest to the party with greater power.¹⁰ On this basis, the judge may not rule the partial or total nullity of a Contract of Adhesion, due to the stipulation of arbitrary term(s) in this contract; i.e. the judge may not rule the termination of such contract entirely, hence maintaining the economic balance of contracting and guaranteeing justice for both contracted parties.¹¹

In addition, the same shall apply, if it is proven that the contested term is actually the main motive for the entire contract; thus, by virtue of the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, it is stated explicitly that the judge's jurisdiction to amend a Contract of Adhesion due to including arbitrary terms which are damaging to the interests of the adhering party, shall be limited to either amending the arbitrary term itself in a way that shall terminate such arbitrariness if possible, or releasing the adhering party from any liability in this regard. However, there is no mention or reference whatsoever to the judge's jurisdiction in ruling the contract's nullity.¹²

On the other hand, the provisions of Article (143) of the Egyptian Civil Law and Article (211) of the UAE Civil Transactions Act may not be invoked as legal grounds for the partial nullity of a Contract of Adhesion (i.e. the

¹⁰ Hossameldin Kamel Elahwani, "Sources of Obligation: Voluntary Sources", N.P., 1991-1992, Clause (329), p. 325.

¹¹ Hossameldin Kamel Elahwani, *Op. Cit.*, p. 325.

¹² Ramzi Farid Mabrouk, "Consumer Protection in Light of the New Concept for Contracts of Adhesion", Al-Galaa Library in Mansoura, 2002, Clause (37), p. 81-82.

nullity shall be limited to the arbitrary term only, with the validity of the contract as a whole), unless it is proven that this arbitrary term is actually the motive for this contracting, hence ruling the nullity of the entire contract.¹³

Interestingly, these provisions have been already stated within the general rules of contracts; however, Contracts of Adhesion have their own private legal systems and exceptional rules of regulation; taking into consideration the legal principle "*Lex Specialis derogat Generali*" (Specific Rules shall prevail over General Rules). Furthermore, a ruling of full nullity will definitely waste the legal protection intended by the legislator for the adhering party; as it is in the interest of the adhering party to maintain the contract after its amendment in a way that shall eliminate the injustice against him, rather than cancelling the entire contract; taking into account that the adhering party has only agreed to enter into this type of contracts in the first place, in order to have commodities or services which he needs desperately.¹⁴

In this context, the insured party may submit such request to the competent judge of subject-matter; however, he may not claim such request for the first time ever before the Supreme Court; which is contradictory to what is stipulated by virtue of law.¹⁵ In addition, the judge's jurisdiction concerning the Restriction of Arbitrary Terms may not be just limited to arbitrary terms which have been missed or unknown to the adhering party; however, this jurisdiction shall also include other terms which have been fully known by the adhering party.

Therefore, it is safe to say that according to the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, both the Egyptian and UAE legislators have intended to provide the adhering party with effective legal protection against arbitrary terms, which used to be stated by insurance companies in their Insurance Contracts offered to the insured party who has no choice but to accept such terms and conditions without negotiation; as the legislators have not stipulated any distinction concerning whether the terms were known or unknown to the adhering party at the time of contracting.

Moreover, according to the consecutive developments of the abovementioned legal provision, it is obvious that the intention of the Egyptian legislator is to provide a comprehensive protection against all arbitrary terms without exceptions. That is to say, in the preliminary draft prepared for the Egyptian Civil Law, this legal provision was limited to protection against arbitrary terms, of which the adhering party had no knowledge at the time of contracting. However, the currently adopted provision has extended this legal protection to include all arbitrary terms, regardless to the extent of the adhering party's knowledge and attention in this regard, i.e. without any distinction concerning whether the terms were known or unknown to the adhering party.

In other words, the adhering party's protection against arbitrary terms shall be acknowledged and provided, even if this adhering party was fully aware and attentive to such terms at the time of contracting (i.e. these terms are actually covered by his approval and acceptance); as this protection is not just limited to the terms, of which the adhering party had no knowledge or attention; however, it also includes terms that were fully known to the adhering party at the time of contracting.¹⁶

In fact, this currently adopted legal protection may not be considered as contradictory to what is stipulated in the explanatory memorandum of the draft prepared for the Egyptian Civil Law. In this regard, the memorandum has stated the following:

"Originally, there shall be no need for interpretation, whenever the contractual phrase is obvious and clear; as in such case, the contract's terms and conditions shall be honored and applied as agreed. Nonetheless, the matter is different with regard to the permissible terms in Contracts of Adhesion; as the interpretation of such terms is obligatory, even if the phrases are clear within their context, taking into consideration that the judge in this case is required to verify whether the adhering party was aware and attentive to these terms or not.

¹³ By virtue of the provisions of Article (143) of the Egyptian Civil Law and Article (211) of the UAE Civil Transactions Act, "If part of the contract is considered as void or voidable, this part only may be annulled; unless it is found that the entire contract may not take effect without this void or voidable part, hence annulling the entire contract".

¹⁴ Ramzi Farid Mabrouk, *Op. Cit.*, Clause (37), p. 82.

¹⁵ Civil Cassation on 08/10/1966 - Technical Office Bureau, Record (17), p. 1543.

- Civil Cassation on 25/02/1960 - Technical Office Bureau, Record (11), p. 184.

- Also see: Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (101), p. 153; and Hossameldin Kamel Elahwani, *Op. Cit.*, Clause (328), p. 224.

¹⁶ Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (100), p. 152; and Hossameldin Kamel Elahwani, *Op. Cit.*, Clause (328), p. 224.

In this regard, if the judge has made sure of the adhering party's attention to these terms, which in turn implies that the adhering party has indeed taken precaution in this regard, hence making the terms as if they were handwritten in the printed contract; then, the judge shall acknowledge the validity of these terms, hence maintaining the stability of transactions. However, if it is found that the adhering party has failed to pay attention to these terms, then, the judge shall annul these terms pursuant to provisions of the general rules.

In this way, this exception may be applied within this narrow scope; as the matter may not extend to the point of excluding an unfair term on grounds that the adhering party has been forced to accept it, as long as this adhering party has indeed paid attention and accepted such term. In other words, adhesion may not be confused with coercion, in order to maintain the stability of transactions. In addition, the legal protection granted to the adhering party shall be subject to the general legislative provisions, as the case is with exploitation, private legislations, etc."¹⁷

The explicit rules mentioned in the above legal provision have stated that the legal protection granted by the legislator to the adhering party shall be limited only to those arbitrary terms, of which the adhering party has no knowledge or attention, but not other terms which are actually and fully known to the adhering party. Nonetheless, some Egyptian jurists believe that this legal protection shall include all arbitrary terms, even those which were fully known to the adhering party.

In this regard, it is worth mentioning that the stipulations mentioned in the explanatory memorandum are actually provided as an explanation for another provision which is totally different from what is stated in the final text of this legal provision as stipulated in Article (149) as follows: "In Contracts of Adhesion, if the adhering party has failed to pay attention to some arbitrary terms, stipulated in the contract which has been accepted by this adhering party without negotiation, the competent judge may reconsider the matter according to the judge's discretion". This provision is completely different from the text mentioned in the civil legislation.

In other words, the provision of Article (149) has granted the judge an extraordinary power, represented in either the amendment or the cancellation of arbitrary terms as required by virtue of justice; and that is without any distinction between the known and unknown terms to the adhering party; i.e. it is not permissible to invoke the provision of the explanatory memorandum, as it was provided as an explanation for another provision other than the one stipulated in Article (149).¹⁸

Furthermore, pursuant to the public legal system, the adhering party shall have the right to request the amendment or entire annulment of any arbitrary terms stipulated in a Contract of Adhesion; and that is in order to eliminate any injustice affecting this adhering party. This principle is mainly meant to protect the weaker parties from the injustice of great economic powers. On this basis, this right may not be denied by virtue of an agreement; thus, in case of concluding such agreement, it shall be considered as void due to contradicting the public legal system.¹⁹

In this regard, the provisions of both Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act have explicitly acknowledged the matter; as after specifying the judge's jurisdiction in either amending the arbitrary terms or releasing the adhering party from any liability in this regard, the legislators added the following phrase: "and any agreement to the contrary shall be considered as void".

In this sense, both the Egyptian and UAE legislators have guaranteed the seriousness of this legal protection; taking into consideration that a Contract of Adhesion is always set by the party with greater power, without any negotiations with the adhering party. Hence, if it was permissible to agree on the exclusion of judicial authority in this regard, such agreement would have been one of the most common terms in Contracts of Adhesion, especially Insurance Contracts, hence blocking the legal protection intended by the two legislators in these provisions, while the adhering party being left eventually without any protection.²⁰

¹⁷ Group of Preparatory Works for the Egyptian Civil Law, Part II, p. 292.

¹⁸ Abdelrazzak Elsanhuri, *Op. Cit.*, No.: (118), p. 297 et seq.; and Footnote (1), p. 299.

- Abdelfattah Abdelbaki, *Op. Cit.*, Clause (100), p. 213 et seq.

- Hossameldin Kamel Elahwani, *Op. Cit.*, p. 327.

- Mohsen Abdelhamid Elbeih, "The Two Issues of Approval: Silence & Adhesion", Dar Al-Nahda Al-Arabia Publications, 1985, Clause (100), p. 165 et seq.

- Ibrahim Eldessouki Abouellil, *Op. Cit.*, No.: 217, p. 181.

¹⁹ Abdelmonem Farag Elsada, *Op. Cit.*, Clause (181), p. 258.

²⁰ Mahmoud Gamaleldin Zaki, "Theory of Obligation in the Egyptian Civil Law – Part I: Sources of Obligation", N.P., 1976, Clause (172), p. 313.

Moreover, the Federal Supreme Court in the United Arab Emirates has ruled that the Insurance Contract shall be interpreted in favor of the adhering party (i.e. the Insured Person) as follows:

"By virtue of Article (46/1) of the Local Traffic Law of 1968 in Abu Dhabi Emirate, the insurance against car accidents is not an optional insurance, but rather a mandatory one stipulated by the legislator. Hence, the exclusion stated in the provision of Clause (1/A) of the Unified Insurance Policy, issued by virtue of Decree No.: (54) of 1987 by Minister of Economics & Trade, and amended by virtue of Decree No.: (81) of 1987, regarding the following persons from the coverage of this insurance: (the insured party; the vehicle's driver at the time of the accident; their family members of spouses, parents and children; as well as the insured person's employees), in case of their injury during or because of their work, shall be limited to those who actually use the insured vehicle itself, whether by driving or riding the vehicle (i.e. those who fulfill the conditions of accompaniment, companionship or communication); thus, in case of failing to fulfill the condition of accompaniment or companionship (i.e. the cause of exclusion), only the physically damaged person from the above mentioned shall be considered as a third party eligible for a mandatory compensation by the insurance company, without being included in the said exclusion.

That is to say, since the Insurance Contract is a contract of good will whose interpretation shall be subject to the provisions of interpretation concerning Contracts of Adhesion, it is unreasonable to think that the insured person (or any of the persons included in this exclusion) will be physically damaged by a car accident, while lacking the condition of accompaniment or companionship. In addition, if a car accident caused the decease of an employee working for the insured party, the deceased person shall be considered as a third party who shall be covered by the insurance policy in question; unless this deceased person was actually performing the dawn prayer, while being run over by the car."²¹

In this regard, a major question may be raised as follows:

- When could some terms be considered as arbitrary terms?

In general, any contractual terms may be considered as arbitrary terms, if those terms have been found contradictory to the spirit of justice and right that shall prevail over all transactions.²²

In other words, it is not good enough to consider some contractual term as arbitrary, just because it is imposed on the insured party who has no choice but to accept it, in order to acquire the service or benefit in question. However, such term shall be contradictory to the spirit of justice and right that shall prevail over all transactions; otherwise, all terms of Contracts of Adhesion will be deemed as arbitrary, taking into account that they were imposed on the adhering party who had no choice but to accept them, in order to acquire the required service or commodity; which is unreasonable and unacceptable.

For instance, arbitrary terms may include the stipulation of some terms ensuring the interest of one party at the expense of the other party (e.g. a release of responsibility, a breach to the agreed terms, or a stay of execution). In addition, arbitrary terms may also include the stipulation of illegitimate burdens on the adhering party, such

- Hossameldin Kamel Elahwani, *Op. Cit.*, Clause (327), p. 223.

- Abdelmonem Farag Elsada, *Op. Cit.*, Clause (181), p. 258.

- Abdelhai Hegazi, *Op. Cit.*, Part I, N.P., 1955, Clause (255), p. 163.

- Hamadallah Mohamed Hamadallah, "The Consumer Protection against Arbitrary Terms", Dar Al-Fekkr Al-Arabi Publications, 1997, Clause (92), p. 94.

- Mesaaed Zeid Abdallah Almoteri, "The Consumer's Civil Protection in the Egyptian and Kuwaiti Laws", a Doctorate Thesis, Faculty of Law – Ain Shams University, 2007, p. 369.

²¹ Federal Supreme Court, May 18th 1997, Appeal No.: 473 of the Judicial Year 18.

²² Abdelfattah Abdelbaki, *Op. Cit.*, Clause (100), p. 212; and for further details about the significance of Arbitrary Terms, see the following:

- Ayman Saad Selim, "Arbitrary Terms in Contracts: A Comparative Study", Dar Al-Nahda Al-Arabia Publications, 2011, p. 45 et seq.

- Mohamed Hussein Abdelaal, "Concept of the Weak Party in Contractual Bonds: An Analytical-Comparative Study", Dar Al-Nahda Al-Arabia Publications, 2011, Clause (55), p. 111 et seq.

- Boudali Mohamed, "Fighting Arbitrary Terms: A Comparative Study", Dar Al-Fagr Publications, 2007, p. 17 et seq.

- Hania Mohamed Ali Faqih, "The Judicial Oversight on Contracts of Adhesion", Al-Halabi Legal Publications, First Edition, 2014, p. 183 et seq.

as limiting his right to submit defenses, limiting his freedom to enter into contracts with third parties, stipulating the contract's implicit renewal, or breaching the rules of judicial jurisdiction.²³

In all cases, evaluating whether the contractual term challenged by the adhering party is arbitrary or not is a matter of reality; hence, the matter is left to the discretion of the competent judge of subject-matter, in order to decide on each matter in light of the contract's conditions as well as the dispute's circumstances; particularly, taking into account the nature of the disputed contract, as well as the type of its commodity or service; and that is without any jurisdiction for the Court of Cassation over his discretion in this regard, as long as the contract's phrases have indeed implied the meanings acknowledged by this judge.²⁴

On this basis, the competent judge represents the authority concerned with evaluating the legal capacity of arbitrariness in some contractual term; and that is in light of the conditions and circumstances of each case separately. In other words, it is left to the competent judge to decide whether the disputed term is arbitrary (hence ordering its amendment or cancellation), or not arbitrary (hence acknowledging the agreed term as legally valid).²⁵

In this sense, the burden of proving the legal capacity of arbitrariness falls on the plaintiff; as the term's validity is assumed originally, and he who claims otherwise shall submit his evidence of proof in support of his claim.²⁶

Therefore, in the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, both the Egyptian and UAE legislators have provided the competent judge with a powerful tool, in order to protect the insured party from any arbitrary terms that might be imposed on him by insurance companies in the concluded Insurance Contract. That is to say, upon the request of an insured party bound by an Insurance Contract, both legislators have entitled the judge either to amend the content of any arbitrary terms, or to release this insured person from any responsibility in this regard; taking into consideration that the legislators have not restricted the judge to any limitations in this regard, other than what is required by virtue of justice.²⁷

Hence, it seems that both the Egyptian and UAE legislators have intended, through provisions of the aforementioned two articles, to provide the adhering party in Contracts of Adhesion with effective legal protection against arbitrary terms. This fact is very obvious in the Egyptian Law, based on the developments of the provision of Article (149) of the Egyptian Civil Law. That is to say, in the initial draft prepared for the Egyptian Civil Law, the relevant provision has limited the judge's jurisdiction to considering the arbitrary terms in his ruling. In other words, the First Clause of Article (217) of this draft has stated the following: "In Contracts of Adhesion, if the adhering party has failed to pay attention to some arbitrary terms, stipulated in the contract which has been accepted by this adhering party without negotiation, the competent judge may reconsider the matter according to the judge's discretion".

Nonetheless, the review committee in Shura Council has permitted the competent judge either to amend the arbitrary terms, or to release the adhering party from their obligations. The committee has proposed to move the First Clause of Article (217), in order to be Article (214/Repeated) in the draft-law. In addition, they have also proposed that this provision shall be amended to be as follows: "In case of the stipulation of arbitrary terms in a Contract of Adhesion, the competent judge may amend these terms or release the adhering party from any obligations in this regard; and that is as required by virtue of justice, thus, any agreement to the contrary shall be considered as void"; i.e. the currently adopted provision has permitted the judge either to amend the arbitrary terms, or to release the adhering party from any obligations.

²³ Abdelhai Hegazi, *Op. Cit.*, Clause (255), p. 163.

²⁴ Mahmoud Gamaleldin Zaki, "Sources of Obligation", Part I, 2nd Edition, Cairo, Clause (172), p. 313.

- Mohamed Labib Shanab, "Sources of Obligation", 1976, Clause (205), p. 256.

- Abdelmonem Farag Elsada, "The Theory of Contract in Islamic Sharia & Statutory Law", Part I, Dar El-Nahda El-Arabia Publications, 1990, Clause (181), p. 258.

- Mohsen Abdelhamid Elbeih, *Op. Cit.*, p. 224; and also see the following:

- Egyptian Civil Cassation on 18/10/1960, p. 0; Egyptian Civil Cassation on March 26th 1989; and Appeal No.: (1556) of the Judicial Year 56, Clause (137), p. 840.

²⁵ Mohamed Almorisi Zahra, "Civil Protection of e-Commerce", 1st Edition, Dar El-Nahda El-Arabia Publications, 2008, p. 154.

- Mahmoud Gamaleldin Zaki, *Op. Cit.*, Clause (172), p. 313.

²⁶ Mohamed Almorisi Zahra, *Op. Cit.*, p. 154.

²⁷ Abdelrazzak Elsanhuri, *Op. Cit.*, Clause (118), p. 20.

- Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (101), p. 154.

In this way, it is obvious that at first, the provision stated at the initial draft has only allowed the judge to reconsider the arbitrary terms, when adjudicating the matter. Then, after its amendment by the review committee, this legal provision has permitted the judge only to release the adhering party from the execution of such terms. However, the final form of the provision has permitted the judge either to amend these arbitrary terms, or to release the adhering party from the term itself (not just its execution).²⁸

In this regard, there is no doubt that this new authority granted to the judge by virtue of the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, with regard to arbitrary terms that might be stipulated in Contracts of Adhesion, has significantly surpassed the normal judicial jurisdiction concerning the interpretation of contracts. That is to say, by virtue of provisions of the abovementioned two articles, the judge may amend any arbitrary terms, or even release the insured party from them entirely; and that is in accordance with what is required by virtue of justice. However, pursuant to the general rules, the judge's mission upon the adjudication of disputed contracts shall be limited to the interpretation of these contracts, in order to enforce the law without making any amendments or forfeiting any rights.²⁹

In fact, this authority granted to the judge in contradiction to the general rules, regarding the contract's legally binding power, may justify the privacy of Contracts of Adhesion; i.e. the fact that one of the contracted parties is at mercy of the other party. Therefore, some jurists in France have actually rejected to acknowledge these transactions as contracts. Hence, the Egyptian judiciary has sought legal protection for the adhering party through numerous means in light of the general principles.³⁰

By virtue of the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, the judge is authorized to change a Contract of Adhesion, if it has involved arbitrary terms compromising the interests of the insured party; and that is either by amending these terms themselves in a way that shall eliminate the capacity of arbitrariness, or by releasing the adhering party from such terms permanently. However, this authorization represents a serious legal precedent that is not consistent with the provisions of general rules, with regard to two aspects as follows:³¹

- **First:** This authority has significantly surpassed the ordinary judicial jurisdiction concerning the interpretation of contracts. That is to say, pursuant to the general rules, the judge's task shall be limited to investigating the common will of both contracted parties,³² without making any amendments or forfeiting any rights.³³ However, pursuant to the provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, the judge may interfere either by amending the arbitrary terms in Contracts of Adhesion, or by releasing the adhering party from such terms; and that is in accordance with what is required by virtue of justice.
- **Second:** This authority is not consistent with the legally stated basics of legal interpretation, which stipulate the judge's commitment to the meanings implied from the contract's phrases, whenever these meanings are obvious and clear for interpretation,³⁴ and that is in order to maintain the stability of all transactions,³⁵ from which the concerned parties may not deviate on grounds of the contract's interpretation.³⁶

²⁸ Group of Preparatory Works for the Egyptian Civil Law, Part II, p. 291 et seq.

²⁹ Abdelfattah Abdelbaki, *Op. Cit.*, Clause (100), p. 215.

³⁰ Mohamed Almorsi Zahra, *Op. Cit.*, Clause (172), p. 313.

³¹ See: Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (101), p. 154.

³² Abdelfattah Abdelbaki, *Op. Cit.*, Clause (265), p. 522-523.

³³ Abdelfattah Abdelbaki, *Op. Cit.*, No.: 100, p. 214 et seq.

- Ahmed Abdelaal Abukrein, *Op. Cit.*, p. 48.

- Hossameldin Kamel Elahwani, *Op. Cit.*, Clause (326), p. 223.

³⁴ Abdelfattah Abdelbaki, *Op. Cit.*, p. 214 et seq.

- Hossameldin Kamel Elahwani, *Op. Cit.*, No.: 361, p. 175 et seq.; and for further details, also see the following:

- Abdelhakam Fouda, "Contracts Interpretation in the Egyptian and Comparative Civil Laws", 1988, Monshaat El-Maaref Publications, Alexandria.

³⁵ See: Group of Preparatory Works for the Egyptian Civil Law, Part I, p. 296; and also see the following:

- Egyptian Civil Cassation on January 4th 1990, Technical Office Group, Record (41), No.: 288, p. 128;

- Egyptian Civil Cassation on June 12th 1988, Technical Office Group, Record (35), Part II, p. 1627; and

- Egyptian Civil Cassation on March 16th 1989, Technical Office Group, Record (40), No.: 139, p. 798.

³⁶ Abdelfattah Abdelbaki, *Op. Cit.*, p. 214 et seq.

Nonetheless, this authority granted to the judge by virtue of the abovementioned provisions, in contradiction to the general rules, regarding the contract's legally binding power, may actually be justified by virtue of the privacy of Contracts of Adhesion; i.e. the fact that the adhering party is at mercy of the other party with greater power, imposing the contract's terms and conditions without any negotiation. Therefore, some French jurists have rejected to acknowledge these transactions as contracts. Hence, before passing the new civil legislation, the Egyptian judiciary has sought legal protection for the adhering party through numerous means in light of the general principles;³⁷ and that is as an attempt to rebalance the contractual relationship through the judicial review of any arbitrary terms.³⁸

On the other hand, there are no credible fears concerning any unjust judicial control by judges, while practicing their authority of judicial oversight on arbitrary terms; even if there is a lack of specific legislative standards and controls for this supervisory authority. That is to say, the judge's role and mission is mainly represented in achieving justice between the two contracted parties of a Contract of Adhesion; and that is by restoring the missing contractual balance between them to the ordinary contractual association, binding and attracting them to each other. This purpose could only be achieved by eliminating any injustice or arbitrariness that might have inflicted the adhering party.

In addition, the power of judicial discretion has been lawfully granted to all judges by the legislator, so that it could be used with various cases; and that is without any objection by jurisprudence, with regard to any fears of malpractice. For example, these various cases may include the judge's discretion regarding the penalty clause, as well as his discretion with regard to granting the debtor some facilities upon fulfilling the requirements of such decision.³⁹ In addition, by virtue of the Theory of Unforeseen Circumstances, the judge may interfere to reduce the onerous obligation into the reasonable limits;⁴⁰ not to mention the judge's broad discretion regarding the interpretation of contracts,⁴¹ as well as completing any detailed or secondary issues that might have been overlooked by both parties of the contract.⁴²

On the foregoing, the original legal principle states the following: "*Pacta Sunt Servanda*" (Agreements must be kept and honored); as contracts in general may not be breached or amended, unless it is by virtue of the agreement of both contracted parties. Hence, neither party may amend any of the contract's terms and conditions separately; in addition, other than the explicitly stated cases of exception, the judge may not interfere to amend any contractual terms for any reasons whatsoever. Consequently, these legally stated cases of exception include Contracts of Adhesion; as the legislator has authorized the judge to the power of amendment and cancellation of any arbitrary terms in Contracts of Adhesion; which is consistent with the provisions of both the Egyptian and UAE Laws.

On this basis, if an Insurance Contract has involved any arbitrary terms, the competent judge may - upon the request of the insured party - interfere to amend or cancel such arbitrary terms.

Part Two

Interpretation of Doubt in favor of the Adhering Party

With Contracts of Adhesion, the legal protection stipulated by virtue of both the Egyptian and UAE Laws for the adhering party is not just limited to granting him the right to ask the competent judge either to amend the arbitrary terms that might be included in the contract, or even to release him from such terms entirely, according to the requirements of justice. However, another aspect of legal protection has also been added; thus, contrary to the originally stated legal principles, the legislators have decided that in case of the presence of any doubt, this doubt shall be interpreted in favor of the insured party, whether this adhering party is the debtor or creditor;

³⁷ Mahmoud Gamaleldin Zaki, *Op. Cit.*, Clause (172), p. 313.

³⁸ Ramzi Farid Mabrouk, *Op. Cit.*, p. 82.

³⁹ For further details, see the following:

- Ibrahim Eldessouki Abouellil, "The Penalty Clause in Contracts and Legal Transactions pursuant to the Egyptian and Kuwaiti Laws", extracted from the Seventh, Eighth and Ninth Issues of January, February and March 1981, the Lawyer Journal, Record (8), 1981, p. 9 et seq.; and

- Moustafa Elgammal & Mohamed Almorsi Zahra, "The Provisions of Obligations in Light of the UAE Civil Transactions Act", Journals at the Faculty of Sharia & Law - United Arab Emirates University, 1999, p. 63 et seq.

⁴⁰ Mohamed Ibrahim Bendari, "Grace Period: A Comparative Study", Dar El-Nahda El-Arabia Publications, 1997; see Article (346/2) of the Egyptian Civil Law and Article (359/2) of the UAE Civil Transactions Act.

⁴¹ Abdelrazzak Elsanhuri, "Al-Waseit", p. 851 et seq.; and see Article (147/2) of the Egyptian Civil Law and Article (359/2) of the UAE Civil Transactions Act.

⁴² See Article (95) of the Egyptian Civil Law and Article (141) of the UAE Civil Transactions Act.

which is contradictory to the general rule stipulating that a doubt shall always be interpreted in favor of the debtor.⁴³ In other words, originally, in case of any doubt, the ambiguous phrase shall be interpreted in favor of the debtor; however, Contracts of Adhesion are excluded from this rule; as this interpretation shall always be in favor of the adhering party, whether he is the debtor or creditor.⁴⁴

In this regard, the provisions of Article (151) of the Egyptian Civil Law and Article (266) of the UAE Civil Transactions Act have stipulated the following: "1- A doubt shall be interpreted in favor of the debtor; 2- However, the interpretation of ambiguous phrases in Contracts of Adhesion may not be damaging to the interest of the adhering party."⁴⁵

On this basis, if a Contract of Adhesion has involved an ambiguous term, and the competent judge could not unravel such ambiguity through the use of all possible methods of interpretation, hence indicating the presence of a doubt about the actual intention of both contracted parties from the phrases of this term, then, this doubt shall always be interpreted in favor of the adhering party. That is to say, this principle shall be applicable in all cases, even if the general rules have stipulated the interpretation of a doubt in favor of the other party; as if this ambiguous term is actually restricting his liability for stipulations of the general rules of law.⁴⁶

Consequently, if an Insurance Contract has included an ambiguous term, and the competent judge could not unravel such ambiguity through the different means of interpretation, then, the judge shall interpret this term in favor of the insured party who represents the adhering party in this Insurance Contract; and that is whether this insured party is debtor or creditor. On this basis, if a contractual term may imply two meanings, the judge shall acknowledge whichever is better for the insured party, even if this insured party is actually a creditor in this term.⁴⁷

In this regard, the Court of Cassation in Dubai has ruled the following: "Upon the presence of a doubt concerning the interpretation of meanings and implications of certain phrases stated in an Insurance Contract, such doubt may not result in any damages to the insured person or the beneficiary; taking into account this contract is a Contract of Adhesion."⁴⁸

In addition, the explanatory memorandum of the preliminary draft prepared for the Egyptian Civil Law has stated the following in this regard: "On the other hand, it shall be taken into consideration that originally, if there is a contractual phrase involving ambiguity in a way that cannot be resolved, then, the doubt shall be interpreted in favor of the debtor. However, the legislator has excluded Contracts of Adhesion from this original principle, stipulating that any doubt shall be interpreted in favor of the adhering party, whether this adhering party is a debtor or a creditor."⁴⁹

In this sense, it seems that the provisions of Article (151/1) of the Egyptian Civil Law and Article (266/1) of the UAE Civil Transactions Act is merely required in case that the insured party is actually a creditor. That is to say, by virtue of the general rules, a doubt shall be interpreted in favor of the debtor. However, contrary to the general rules, the abovementioned two provisions stipulate that a doubt shall always be interpreted in favor of

⁴³ Mahmoud Gamaleldin Zaki, *Op. Cit.*, Clause (167), p. 306.

⁴⁴ Abdelmonem Farag Elsada, *Op. Cit.*, Clause (181), p. 258.

- Ahmed Shawki Abdelrahman, "The General Theory of Obligations: Contracts & Unilateral Will", Monshaat Al-Maaref Publications, 2005, Clause (47), p. 66.

⁴⁵ See the following criticism in Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (103), p. 157; and Abdelfattah Abdelbaki, *Op. Cit.*, Clause (101), p. 215: "It is notable that the provision has been drafted poorly. The provision states that it is prohibited to interpret ambiguous phrases in a way that could be damaging to the adhering party. Of course, this is not what is actually meant here; however, the legislator means that the doubt implied by ambiguous phrases shall not be interpreted, after the judge has already completed its interpretation in order to identify the intentions of both contracted parties".

⁴⁶ Mohamed Labib Shanab, *Op. Cit.*, Clause (199), p. 247.

⁴⁷ Mohamed Almorsi Zahra, *Op. Cit.*, p. 313.

- Hamdy Abdelrahman, "Al-Waseit in the General Theory of Obligations: Book I - Voluntary Sources of Obligation: Contract & Unilateral Will", 1st Edition, Dar Al-Nahda Al-Arabia Publications, 1999, p. 440.

- Also see: Ruling of Mixed Court of Appeal, issued on May 28th 1941, and referred at Abdelrazzak Elsanhuri, *Op. Cit.*, Clause (118), p. 251-252, stating that the Insurance Contract shall be interpreted in favor of the Insured Party.

⁴⁸ See the following criticism in Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (103), p. 157; and Abdelfattah Abdelbaki, *Op. Cit.*, Clause (101), p. 215: "It is notable that the provision has been drafted poorly. The provision states that it is prohibited to interpret ambiguous phrases in a way that could be damaging to the adhering party. Of course, this is not what is actually meant here; however, the legislator means that the doubt implied by ambiguous phrases shall not be interpreted, after the judge has already completed its interpretation in order to identify the intentions of both contracted parties".

⁴⁹ Group of Preparatory Works for the Egyptian Civil Law.

the adhering party, even if this adhering party is actually the creditor. On the other hand, if the insured party is the debtor, then, there is no need for the abovementioned two provisions to invoke his legal protection by interpreting the doubt in his favor, which is already stipulated by virtue of the general rules. Hence, both provisions of Article (151/1) of the Egyptian Civil Law and Article (266/1) of the UAE Civil Transactions Act are only invoked exceptionally, if the insured party is the creditor; however, if this insured party is the debtor, the general rules shall take effect spontaneously.

In this context, a jurist has provided an interesting explanation for the provisions of Article (151/2) of the Egyptian Civil Law and Article (266/2) of the UAE Civil Transactions Act concerning the interpretation of doubt in favor of the adhering party (whether this adhering party is a debtor or a creditor) as follows: "The adhering party has not participated in drafting the contract's phrases; therefore, he may not be held accountable for any ambiguity thereof. However, the other party with greater power is the one who shall be held accountable in this case, as he has solely controlled the process of stipulating and drafting the contract terms and conditions. Hence, it is reasonable, logical and just to interpret any ambiguous phrases in favor of the adhering party, whether this adhering party is a debtor or a creditor. In fact, this rule shall prompt the party with greater power in Contracts of Adhesion to pay much attention to accuracy and clarity, when drafting the phrases of their contracts."⁵⁰

In other words, it shall be taken into consideration that in Contracts of Adhesion, the party with greater power gets to stipulate all terms and conditions of the contract alone, not to mention that this party usually possesses all possible means that shall enable him to draft and stipulate his terms in extremely clear and accurate phrases; hence, if those phrases are involving any ambiguity, such shortcoming shall be attributed to this party solely including any accountabilities in this regard.⁵¹ In this sense, this rule could be attributed to the following legal principle "a violation by the stipulation against the requirement of clarity in expression".

In fact, the accountability for ambiguity of expression does not represent the major basis behind the contract's interpretation against the party who has drafted and stipulated the contract's terms and condition; however, the legal protection of the contract's weaker party (i.e. the Adhering Party) represents that basis. In other words, the basis of interpretation is justice, not accountability; as the main purpose of law is to protect and defend the weaker party against any injustice by the party with greater power. Therefore, law has stipulated this rule as follows: "The interpretation of ambiguous phrases in Contracts of Adhesion may not be damaging to the interest of the adhering party"; which is a clear indication for the legal grounds for this rule, rather than referring to the contract's interpretation against the party who has stipulated its terms and condition.⁵²

In this regard, the explanatory memorandum of the preliminary draft prepared for the Egyptian Civil Law has stated the following: "The party with greater power is supposed to possess all possible means that shall enable him to impose clear and obvious terms on the adhering party; otherwise, he shall be held accountable for such error or shortcoming, mainly for being the one who has caused this ambiguity."⁵³

In other words, since the party with greater power has solely controlled the process of drafting and stipulating all terms and conditions of the Contract of Adhesion, taking into consideration that this party usually possesses all possible means that shall enable him to draft his terms in clear and accurate phrases; hence, if those terms and phrases have involved any ambiguity in a way that could not be resolved by the competent judge through the use of all possible methods of interpretation, such shortcoming by this party shall be considered as a deviation from the normal behavior; and as a result, this party with greater power shall be held accountable, and shall be abided by compensating any resulting damages affecting the adhering party consequently. Therefore, in this case, the most suitable compensation will definitely be to interpret any doubt concerning the ambiguous term in favor of this adhering party, whether this adhering party is the debtor or the creditor.⁵⁴

On this basis, as the case is with the amendment or annulment of arbitrary terms, the insured party may also invoke this legal rule stipulating the interpretation of any doubt in his favor, regardless to the status of his claim

⁵⁰ Mohamed Labib Shanab, *Op. Cit.*, Clause (199), p. 247.

⁵¹ Abdelmonem Farag Elsada, *Op. Cit.*, Clause (181), p. 259.

- Ahmed Shawki Abdelrahman, "Contracts & Unilateral Will", Monshaat Al-Maaref Publications, 2005, Clause (47), p. 66.

- Abdelkhalek Hassan Ahmed, "Sources of Obligation", Dubai Police Academy Publications, 1st Edition, 1424 A.H. - 2003 A.D., Clause (122), p. 195.

⁵² Abdelhai Hegazi, *Op. Cit.*, Clause (277), p. 181; as well as the following for the same meaning:

- Ramadan Abouelsouad, "Sources of Obligation", Dar Al-Gamaa Al-Gadida Publications, 2007, p. 84.

- Abdelmonem Elbadrawi, "The General Theory of Obligations in the Egyptian Civil Law", Part I, 1971, p. 53.

⁵³ Group of Preparatory Works for the Egyptian Civil Law, Part II, p. 300.

⁵⁴ Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (104), p. 157.

before the competent judge of subject-matter. However, this insured party may not invoke this rule for the first time ever before the Court of Cassation; as such action will involve submitting a new defense that has not been duly submitted or invoked before the court of subject-matter.

On the foregoing, the Egyptian Court of Cassation has ruled the following: "It is inadmissible to invoke for the first time ever before the Court of Cassation the impermissibility of interpreting an insurance policy in a way that is damaging to the interest of the adhering party, pursuant to the provision of Article (151) of the Egyptian Civil Law; as such action will represent submitting a new defense that has not been duly submitted or invoked before the court of subject-matter."⁵⁵

Finally, it is worth mentioning that the competent judge of subject-matter does indeed enjoy the judicial discretion of the contract's interpretation, taking into account that the matter is related to objective issues which are essentially based on evaluating the facts, circumstances and phrases of the contract in question. On the contrary, applying the rules of interpretation - including the rule stipulating that in Contracts of Adhesion, any doubt shall be interpreted in favor of the adhering party - is actually a legal action, where the judge of subject-matter is subject to the supervision of the Court of Cassation.⁵⁶ Therefore, if the court of subject-matter has interpreted any doubt against the interest of the insured party in an Insurance Contract, the Supreme Court may in this case overturn this court ruling on basis of breaching a legally stated rule of the rules of interpretation.⁵⁷

In this sense, if an Insurance Contract has involved a term that is deemed as ambiguous to the point that the competent judge could not resolve such ambiguity through the use of all possible means of interpretation in order to identify the intention of both contracted parties, then, any doubt shall always be interpreted in favor of the insured party in all cases; even if the general rules of interpretation are stipulating that the doubt shall be interpreted in favor of the other contracted party with greater power, due to being the debtor in the disputed ambiguous term involving the doubt in question.

Moreover, since the contract's interpretation is considered to be an objective matter that is based mainly on the facts, circumstances and phrases of the contract, the judge of subject-matter shall not be subject to supervision of the Supreme Court while interpreting the contract; and that is as long as the judge has fulfilled the following actions: following the stated rules of interpretation, concluding the results from real existing sources (not fictional) that are not contradictory to the facts and circumstances of the dispute, and making sure that the concluded meanings are consistent with the content of the contract's phrases; taking into consideration that applying the rules of interpretation is a legal action that is subject to oversight by the Supreme Court.

Conclusion

In light of the above examination for the subject of legal protection of the insured party by virtue of the Egyptian and UAE Laws, some major results have been concluded as follows:

1. According to the original legal principle, "*Pacta Sunt Servanda*", agreements must be kept and honored, thus, it is not permissible to make any amendments, unless it is by virtue of the agreement of both contracted parties together; hence, neither party may solely introduce any amendments or modifications to the contract's terms and conditions. In addition, other than the explicitly stated cases of exception, the judge may not interfere to amend any contractual terms for any reasons whatsoever. Naturally, these legally stated cases of exception include Contracts of Adhesion, as the legislator has authorized the judge to the power of amendment and cancellation of any arbitrary terms in Contracts of Adhesion; which is consistent with the provisions of both the Egyptian and UAE Laws.
2. If a Contract of Adhesion has involved a term that is deemed as ambiguous to the point that the judge could not resolve such ambiguity through the use of all possible means of interpretation in order to identify the intention of both contracted parties, then, the judge shall always interpret any doubt in favor of the adhering party in all cases; even if the general rules of interpretation have stipulated that doubt shall be interpreted in favor of the other party with greater power, due to being the debtor in the disputed ambiguous term involving this doubt. In addition, since the contract's interpretation is considered to be an objective matter that is basically dependent on the facts, circumstances and phrases of the contract, the judge of subject-matter shall not be subject to oversight of the Supreme Court while interpreting the contract; and that is as long as the judge of subject-matter has duly followed the rules of

⁵⁵ Egyptian Civil Cassation on 31/12/1970, Technical Bureau Group, Record (21), p. 1305.

⁵⁶ Mohamed Labib Shanab, *Op. Cit.*, Clause (200), p. 248; Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (104), p. 158; and also see the provisions mentioned at Footnote (2) in the above mentioned.

⁵⁷ Mohamed Labib Shanab, *Op. Cit.*, Clause (200), p. 248.

interpretation, has concluded his results from real existing sources (not fictional) that are not contradictory to the facts and circumstances of the dispute, and has made sure that the concluded meanings are consistent with the content of the contract's phrases; taking into account that applying the rules of interpretation is a legal action, where the judge is subject to supervision of the Supreme Court.

3. By virtue of the general provisions of Article (149) of the Egyptian Civil Law and Article (248) of the UAE Civil Transactions Act, the competent judge is granted the authority to amend or cancel any arbitrary terms as required by virtue of justice, with the nullity of any other provisions that might deny the judge this authority. Furthermore, pursuant to the provisions of Article (750) of the Egyptian Civil Law and Article (1028) of the UAE Civil Transactions Act, concerning the general rules of Insurance Contracts, both the Egyptian and UAE legislators have also decided to stipulate the nullity of certain terms and conditions that are usually included in insurance policies; and that is due to their violation to the public legal system. That is to say, any terms stipulated for the purpose of forfeiting or diminishing the rights of the insured party, or even restricting his right to resort to judiciary, have been annulled by virtue of provisions of the abovementioned articles.

References

1. Abdelfattah Abdelbaki, "The Theory of Contract & Unilateral Will", N.P., 1984, Clause (92), p. 201.
2. Abdelfattah Abdelbaki, Op. Cit., p. 201.
3. Mohsen Abdelhamid Elbeih, "Sources of Obligation – Part I: Voluntary Sources", Al-Galaa Library in Mansoura, N.D., Clause (89), p. 138.
4. Abdelfattah Abdelbaki, Op. Cit., Footnote (2), p. 204; and Mohsen Abdelhamid Elbeih, Op. Cit., p. 138.
5. Abdelrazzak Elsanhuri, "Al-Waseit in New Civil Law – Part I: Sources of Obligation", Al-Halabi Legal Publications, Beirut, Lebanon, 2000, p. 245, Footnote.(1)
6. Abdelrazzak Elsanhuri, Op. Cit., p. 245.
7. Abdelfattah Abdelbaki, Op. Cit., Clause (98), p. 211.
8. Abdelrazzak Elsanhuri, Op. Cit., Clause (118), p. 247-248; as well as the provisions stated in the footnotes at the aforementioned two pages.
9. In this regard, Prof. Dr. Abdelfattah Abdelbaki has expressed his criticism to this regulation in the Egyptian Civil Law as follows: "It would have been better for the Egyptian legislator to stipulate all legal provisions concerning Contracts of Adhesion in one place, in order to avoid any confusion or dispersion"; Abdelfattah Abdelbaki, Op. Cit., Clause (9), p. 206.
10. Hossameldin Kamel Elahwani, "Sources of Obligation: Voluntary Sources", N.P., 1991-1992, Clause (329), p. 325.
11. Hossameldin Kamel Elahwani, Op. Cit., p. 325.
12. Ramzi Farid Mabrouk, "Consumer Protection in Light of the New Concept for Contracts of Adhesion", Al-Galaa Library in Mansoura, 2002, Clause (37), p. 81-82.
13. By virtue of the provisions of Article (143) of the Egyptian Civil Law and Article (211) of the UAE Civil Transactions Act, "If part of the contract is considered as void or voidable, this part only may be annulled; unless it is found that the entire contract may not take effect without this void or voidable part, hence annulling the entire contract."
14. Ramzi Farid Mabrouk, Op. Cit., Clause (37), p. 82.
15. Civil Cassation on 08/10/1966 - Technical Office Bureau, Record (17), p. 1543; Civil Cassation on 25/02/1960 - Technical Office Bureau, Record (11), p. 184; and also see: Mohsen Abdelhamid Elbeih, Op. Cit., Clause (101), p. 153; and Hossameldin Kamel Elahwani, Op. Cit., Clause (328), p. 224.
16. Mohsen Abdelhamid Elbeih, Op. Cit., Clause (100), p. 152; and Hossameldin Kamel Elahwani, Op. Cit., Clause (328), p. 224.
17. Group of Preparatory Works for the Egyptian Civil Law, Part II, p. 292.

18. Abdelrazzak Elsanhuri, Op. Cit., No.: (118), p. 297 et seq.; and Footnote (1), p. 299; Abdelfattah Abdelbaki, Op. Cit., Clause (100), p. 213 et seq.; Hossameldin Kamel Elahwani, Op. Cit., p. 327; Mohsen Abdelhamid Elbeih, "The Two Issues of Approval: Silence & Adhesion", Dar Al-Nahda Al-Arabia Publications, 1985, Clause (100), p. 165 et seq.; and Ibrahim Eldessouki Abouellil, Op. Cit., No.: 217, p. 181.
19. Abdelmonem Farag Elsada, Op. Cit., Clause (181), p. 258.
20. Mahmoud Gamaleldin Zaki, "Theory of Obligation in the Egyptian Civil Law – Part I: Sources of Obligation", N.P., 1976, Clause (172), p. 313; Hossameldin Kamel Elahwani, Op. Cit., Clause (327), p. 223; Abdelmonem Farag Elsada, Op. Cit., Clause (181), p. 258; Abdelhai Hegazi, Op. Cit., Part I, N.P., 1955, Clause (255), p. 163; Hamadallah Mohamed Hamadallah, "The Consumer Protection against Arbitrary Terms", Dar Al-Fekkr Al-Arabi Publications, 1997, Clause (92), p. 94; and Mesaaed Zeid Abdallah Almoteri, "The Consumer's Civil Protection in the Egyptian and Kuwaiti Laws", a Doctorate Thesis, Faculty of Law – Ain Shams University, 2007, p. 369.
21. Federal Supreme Court, May 18th 1997, Appeal No.: 473 of the Judicial Year 18.
22. Abdelfattah Abdelbaki, Op. Cit., Clause (100), p. 212; and for further details about the significance of Arbitrary Terms, see: Ayman Saad Selim, "Arbitrary Terms in Contracts: A Comparative Study", Dar Al-Nahda Al-Arabia Publications, 2011, p. 45 et seq.; Mohamed Hussein Abdelaal, "Concept of the Weak Party in Contractual Bonds: An Analytical-Comparative Study", Dar Al-Nahda Al-Arabia Publications, 2011, Clause (55), p. 111 et seq.; Boudali Mohamed, "Fighting Arbitrary Terms: A Comparative Study", Dar Al-Fagr Publications, 2007, p. 17 et seq.; and Hania Mohamed Ali Faqih, "The Judicial Oversight on Contracts of Adhesion", Al-Halabi Legal Publications, First Edition, 2014, p. 183 et seq.
23. Abdelhai Hegazi, Op. Cit., Clause (255), p. 163.
24. Mahmoud Gamaleldin Zaki, "Sources of Obligation", Part I, 2nd Edition, Cairo, Clause (172), p. 313.; Mohamed Labib Shanab, "Sources of Obligation", 1976, Clause (205), p. 256.; Abdelmonem Farag Elsada, "The Theory of Contract in Islamic Sharia & Statutory Law", Part I, Dar El-Nahda El-Arabia Publications, 1990, Clause (181), p. 258; Mohsen Abdelhamid Elbeih, Op. Cit., p. 224; and also see: Egyptian Civil Cassation on 18/10/1960, p. 0; Egyptian Civil Cassation on March 26th 1989; and Appeal No.: (1556) of the Judicial Year 56, Clause (137), p. 840.
25. Mohamed Almorsi Zahra, "Civil Protection of e-Commerce", 1st Edition, Dar El-Nahda El-Arabia Publications, 2008, p. 154; and Mahmoud Gamaleldin Zaki, Op. Cit., Clause (172), p. 313.
26. Mohamed Almorsi Zahra, Op. Cit., p. 154.
27. Abdelrazzak Elsanhuri, Op. Cit., Clause (118), p. 20; and Mohsen Abdelhamid Elbeih, Op. Cit., Clause (101), p. 154.
28. Group of Preparatory Works for the Egyptian Civil Law, Part II, p. 291 et seq.
29. Abdelfattah Abdelbaki, Op. Cit., Clause (100), p. 215.
30. Mohamed Almorsi Zahra, Op. Cit., Clause (172), p. 313.
31. Mohsen Abdelhamid Elbeih, Op. Cit., Clause (101), p. 154.
32. Abdelfattah Abdelbaki, Op. Cit., Clause (265), p. 522-523.
33. Abdelfattah Abdelbaki, Op. Cit., No.: 100, p. 214 et seq.; Ahmed Abdelaal Abukrein, Op. Cit., p. 48; and Hossameldin Kamel Elahwani, Op. Cit., Clause (326), p. 223.
34. Abdelfattah Abdelbaki, Op. Cit., p. 214 et seq.; Hossameldin Kamel Elahwani, Op. Cit., No.: 361, p. 175 et seq.; and for further details, also see: Abdelhakam Fouda, "Contracts Interpretation in the Egyptian and Comparative Civil Laws", 1988, Monshaat El-Maaref Publications, Alexandria.
35. Group of Preparatory Works for the Egyptian Civil Law, Part I, p. 296; and also see: Egyptian Civil Cassation on January 4th 1990, Technical Office Group, Record (41), No.: 288, p. 128; Egyptian Civil Cassation on June 12th 1988, Technical Office Group, Record (35), Part II, p. 1627; and Egyptian Civil Cassation on March 16th 1989, Technical Office Group, Record (40), No.: 139, p. 798.
36. Abdelfattah Abdelbaki, Op. Cit., p. 214 et seq.

37. Mahmoud Gamaleldin Zaki, *Op. Cit.*, Clause (172), p. 313.
38. Ramzi Farid Mabrouk, *Op. Cit.*, p. 82.
39. For further details, see: Ibrahim Eldessouki Abouellil, "The Penalty Clause in Contracts and Legal Transactions pursuant to the Egyptian and Kuwaiti Laws", extracted from the Seventh, Eighth and Ninth Issues of January, February and March 1981, the Lawyer Journal, Record (8), 1981, p. 9 et seq.; and Moustafa Elgammal & Mohamed Almorsi Zahra, "The Provisions of Obligations in Light of the UAE Civil Transactions Act", Journals at the Faculty of Sharia & Law - United Arab Emirates University, 1999, p. 63 et seq.
40. Mohamed Ibrahim Bendari, "Grace Period: A Comparative Study", Dar El-Nahda El-Arabia Publications, 1997; and see Article (346/2) of the Egyptian Civil Law and Article (359/2) of the UAE Civil Transactions Act.
41. Abdelrazzak Elsanhuri, "Al-Waseit", p. 851 et seq.; and see Article (147/2) of the Egyptian Civil Law and Article (359/2) of the UAE Civil Transactions Act.
42. See: Article (95) of the Egyptian Civil Law and Article (141) of the UAE Civil Transactions Act.
43. Mahmoud Gamaleldin Zaki, *Op. Cit.*, Clause (167), p. 306.
44. Abdelmonem Farag Elsada, *Op. Cit.*, Clause (181), p. 258; and Ahmed Shawki Abdelrahman, "The General Theory of Obligations: Contracts & Unilateral Will", Monshaat Al-Maaref Publications, 2005, Clause (47), p. 66.
45. See the following criticism in Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (103), p. 157; and Abdelfattah Abdelbaki, *Op. Cit.*, Clause (101), p. 215: "It is notable that the provision has been drafted poorly. The provision states that it is prohibited to interpret ambiguous phrases in a way that could be damaging to the adhering party. Of course, this is not what is actually meant here; however, the legislator means that the doubt implied by ambiguous phrases shall not be interpreted, after the judge has already completed its interpretation in order to identify the intentions of both contracted parties."
46. Mohamed Labib Shanab, *Op. Cit.*, Clause (199), p. 247.
47. Mohamed Almorsi Zahra, *Op. Cit.*, p. 313; Hamdy Abdelrahman, "Al-Waseit in the General Theory of Obligations: Book I - Voluntary Sources of Obligation: Contract & Unilateral Will", 1st Edition, Dar Al-Nahda Al-Arabia Publications, 1999, p. 440; and also see: Ruling of Mixed Court of Appeal, issued on May 28th 1941, and referred at Abdelrazzak Elsanhuri, *Op. Cit.*, Clause (118), p. 251-252, stating that the Insurance Contract shall be interpreted in favor of the Insured Party.
48. See the following criticism in Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (103), p. 157; and Abdelfattah Abdelbaki, *Op. Cit.*, Clause (101), p. 215: "It is notable that the provision has been drafted poorly. The provision states that it is prohibited to interpret ambiguous phrases in a way that could be damaging to the adhering party. Of course, this is not what is actually meant here; however, the legislator means that the doubt implied by ambiguous phrases shall not be interpreted, after the judge has already completed its interpretation in order to identify the intentions of both contracted parties."
49. Group of Preparatory Works for the Egyptian Civil Law.
50. Mohamed Labib Shanab, *Op. Cit.*, Clause (199), p. 247.
51. Abdelmonem Farag Elsada, *Op. Cit.*, Clause (181), p. 259; Ahmed Shawki Abdelrahman, "Contracts & Unilateral Will", Monshaat Al-Maaref Publications, 2005, Clause (47), p. 66; and Abdelkhalek Hassan Ahmed, "Sources of Obligation", Dubai Police Academy Publications, 1st Edition, 1424 A.H. - 2003 A.D., Clause (122), p. 195.
52. Abdelhai Hegazi, *Op. Cit.*, Clause (277), p. 181; as well as the following for the same meaning: Ramadan Abouelsouad, "Sources of Obligation", Dar Al-Gamaa Al-Gadida Publications, 2007, p. 84; and Abdelmonem Elbadrawi, "The General Theory of Obligations in the Egyptian Civil Law", Part I, 1971, p. 53.
53. Group of Preparatory Works for the Egyptian Civil Law, Part II, p. 300.
54. Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (104), p. 157.
55. Egyptian Civil Cassation on 31/12/1970, Technical Bureau Group, Record (21), p. 1305.

56. Mohamed Labib Shanab, *Op. Cit.*, Clause (200), p. 248; Mohsen Abdelhamid Elbeih, *Op. Cit.*, Clause (104), p. 158; and also see the provisions mentioned at Footnote (2) in the above mentioned.
57. Mohamed Labib Shanab, *Op. Cit.*, Clause (200), p. 248.