5

Formality

5.1 INTRODUCTION

In Chapter 2, we discussed contract formation in general, whereas here we shall dive deeper into formality and delivery in particular. Before doing so, we need to lay the foundations by which to evaluate the legal impact of formality and delivery on civil and commercial contracts. It will be recalled that under the civil law tradition, contracts are predicated on three general pillars, namely (i) consent (الرضاء), consisting of offer, acceptance and intention to be legally bound; (ii) subject matter (المحل) and (iii) cause (السبب). In addition, there may, although not necessarily, exist two further requirements (special pillars), namely (iv) formality[1] (الشكلية) and (v) delivery (التسليم).[2]

[1] According to the Court of Cassation Judgment 20/2007, formality is a fundamental pillar for the formation of any *sale contract* concerning the sale of *retail stores*. Thus, the law requires such sale contract be notarised in an official document and issued by the concerned public body, that is, the Documentation Department of the Ministry of Justice. The contracting parties are prohibited from agreeing to circumvent this pillar and any contrary agreement is deemed null and void (absolute nullity). Moreover, the contracting parties cannot elect to authorise (affirm) the sale contract. However, once the contracting parties complete the statutory requirement of 'formality', then the sale contract becomes binding because all its pillars will have materialised.

[2] According to the Court of Cassation Judgment 274/2015, delivery is a fundamental pillar for the formation of any *sale contract* concerning the sale of *real estate* (immovable properties). Registering any property conveyance with the Real-Estate Registration Department of the Ministry of Justice, is a regulatory requirement for the completion of the conveyance but *it is not* a pillar serving the formation of the sale contract. This means that any real estate sale contract whereby the seller *does not* deliver the property to the buyer is invalid (absolute nullity) and the mere formality of completing the registration process *does not* authorise (affirm) this void contract. Thus, the seller is obligated by law to deliver the sold real estate to the buyer and in turn the buyer is obligated to make payment to the seller. Following this the sale contract becomes valid and produces full legal effects; see also G Mahgoub Ali, *The General Theory of Obligation:* Part One – *Sources of Obligation in Qatari Law* (Doha Modern Printing Press, 2016) 302.

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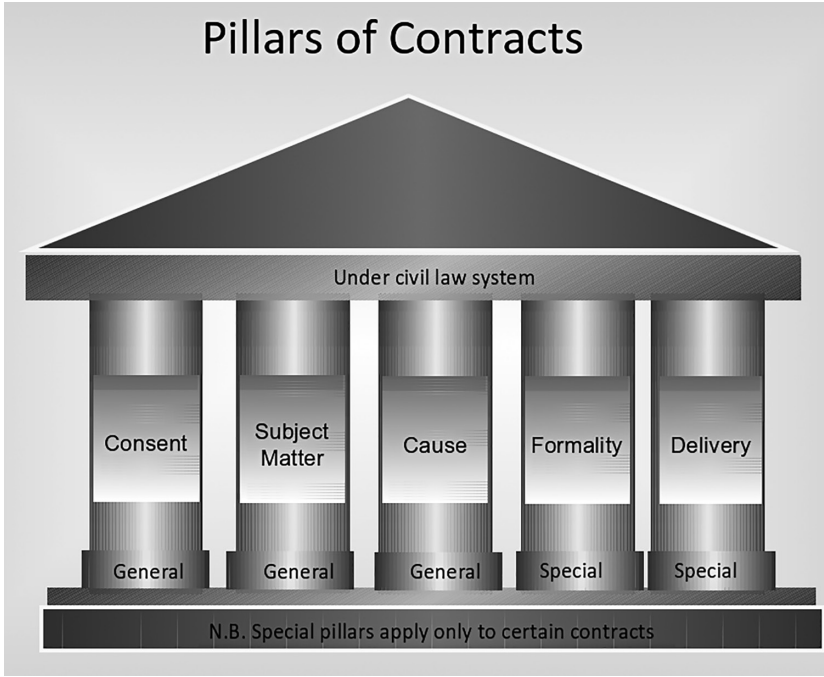

FIGURE 5.1 Pillars of contracts

The principle of formality in the civil law tradition is actually *an exception* to the general rule of 'informality', where the latter simply dictates that contracts may be concluded in any form. It makes sense that the law does not intend to further encumber civil and commercial transactions by requiring contracting parties to draft and execute all contracts, whether complex or simple, for example buying a cup of coffee. Although the general rule of 'informality' has not been codified in the French CC, from which both the Egyptian CC and Qatari CC were derived, the exception of formality is explicitly mentioned; whenever, it is required throughout the CC. Figure 5.1 will be provided as the discussion progresses in this chapter.

5.2 REASONS FOR FORMALITIES

In general, there are three rationales underlying the need for formality, namely (i) the warning function; (ii) information function and (iii) evidentiary function. For specific contracts only mandated by law, the requirement of such formality most likely encompasses a combination of more than a single rationale.

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Starting with the warning function, it serves the purpose of 'alarming' potential contracting parties to the risks associated with entering a transaction deemed either legally or financially dangerous. Its objective is to incentivise the parties to pause and think about the consequences of such transaction prior to granting their consent. For example, consumer credit agreements in many jurisdictions are rightly viewed as financially dangerous because they typically subject the debtor to high interest rates, which in turn expose it to likely hardship over long periods. Another example concerns consumer guarantee agreements, whereby one party promises to repay the debts of its counterparty if the latter fails to perform its obligation to the creditor (a third party). This type of financial security is also deemed dangerous because the guarantor could be a 'victim' of potential exploitation of trust by the debtor, for example a mother providing financial security to guarantee the payment of her child's debt. Because family relationships involve emotional considerations, these play a major role in the decision-making process, which may lead to undesired consequences such as bankruptcy. Thus, the law intends to warn such individuals by mandating the formality process, in order to provide an opportunity to reconsider their position prior to finalising the 'dangerous' transaction.[3]

Moving to the second rationale, namely the information function, formality here serves the purpose of providing contracting parties with sufficient information. We can see this function visible in immovable property conveyance transactions, where it is mandatory for a civil law notary to draft the notarial deed and warn the contracting parties of the legal consequences. Lastly, the third rationale, the evidentiary function, as its name indicates serves the purpose of securing evidence of the contract in question. When a contract is put into writing, certainty about the mere existence and content of such contract are no longer disputed. However, the certainty of a written contract does not prevent the contracting parties from interpreting its terms and conditions differently in practice.[4] The types of formalities required under Qatari law will be discussed further in this chapter.

5.3 CONTRACTS TO BE MADE BY NOTARIAL DEED

5.3.1 *Gifts and Donations*

Gifts in the civil law tradition are encompassed under the umbrella of donation contracts, which include, among others, instruments such as wills, trusts,

[3] Mahgoub (n 2) 102.
[4] Ibid, 102–103.

loans, deposits without consideration and agency without consideration.[5] Formality by notarial deed is considered a condition for a valid gift contract in many civil law jurisdictions such as Egypt, Kuwait and the United Arab Emirates (UAE). Article 488 of the Egyptian CC states that 'A gift shall be put into a *notarial deed*, otherwise it is null and void with the exception of being disguised into another [type of] contract'. Article 525 of the Kuwaiti CC and article 615 of the UAE CC have followed suit.[6] However, the Qatari CC has deviated from this established tradition and did not mandate formality as a prerequisite for a valid gift contract. According to article 493(1) CC: 'A gift shall be valid by consent and acceptance and shall be completed by collection'. There is no explicit mention of formality in this provision. Furthermore, article 493(3) CC states that: 'The enforceability of a gift agreement shall depend on *any procedure to transfer title* in accordance with any laws. Either party may complete the required procedures'; thus, the Qatari legislator has mandated *an exception to the general rule* and demanded that contracting parties must comply with any registration and/or formality requirements concerning the conveyance of property, especially real estate. The Qatari Court of Cassation in its judgment 224/2016 held that: 'The legislator did not mandate that a gift shall be put into a notarial deed, but made it subject to the general rules of evidence, which are applicable to all contracts'.[7]

[5] The term consideration in this context *is not* tantamount to the common law doctrine of 'consideration' because the latter does not exist as a pillar for valid contracts under the civil law systems as discussed earlier. Consideration here means 'profit' and/or 'charging a fee', that is, the donor intends to expend wealth by giving up something of value (whether material or moral) to the donee without expecting something else in return for its generous act. However, this general rule *is not absolute* and is usually limited by applicable laws. For example, the rules governing gifts limit the prohibition of consideration. We will discuss this issue in a subsequent section.

[6] A Al-Sanhuri, *The Mediator in Explaining the Civil Code* (Egypt House for Publishing and Distribution, 2020) vol 5, at 37.

[7] Gifts under Qatari law are regulated by Arts 191 to 205 of the Family Law ('**FL**', Law no. 22 of 2006) and Arts 498 to 504 of the CC (Law no. 22 of 2004). As a rule of thumb, rules mandated by a special law supersede their counterparts. The courts apply the rules mandated by a general law only when (i) a special law is silent about a certain issue already regulated by the general law; or (ii) the case in dispute falls outside the ambit of the special law, hence the general rule shall apply (Court of Cassation Judgement 224/2016). The ambit of FL over disputes arising from gifts is directly linked to the definition of family under Qatari law. Surprisingly, the FL does not define 'family', and thus one must rely on Arts 45 to 48 CC. Art 45 CC states that '(i) The family of a person shall consist of the person's spouse and relatives; and (ii) persons having a common ancestor are deemed to be relatives'. So, it is clear that Qatari legislator defined the term 'family' to include both the person's (i) immediate family members (i.e. spouse and children); and extended family members (i.e. parents, siblings, uncles, and aunties). This is a reflection of collectivism as a main characteristic of the Qatari society compared to western societies, Thus, under Qatari law any dispute arising between contracting parties not recognised as family members falls under the terms of the CC.

In a nutshell, a gift under Qatari law pursuant to article 191(1) FL is defined as a donation (a transfer of ownership for something of value) made by a donor *during his or her lifetime* to a *donee without consideration*. Thus, such a gift shall be offered to the donee while the donor is still alive and not in its deathbed;[8] otherwise, the gift will be deemed as constituting a will and consequently the rules of wills will apply,[9] pursuant to article 202 FL and article 497 CC. Furthermore, article 191(2) FL made it crystal clear that 'conditional' gifts, that is a gift with attached consideration will be deemed as a sale and consequently the rules of sales will apply. This strict prohibition of 'gifts with attached consideration' under the FL differs from the permissible approach adopted under article 492(2) CC, under which the latter permits a donor to offer a gift to a donee subject to fulfilling a specific obligation or condition in return. In this scenario, the value of such 'limited consideration' *shall not* exceed the actual value of the donation, otherwise the donee's liability will be capped to the actual value of the donation. Moreover, articles 500(2), 501, 503 CC and 504(1) CC regulate other matters associated with conditional gifts.

The gift is formed when a valid offer made by a donor meets a 'matching' acceptance that is expressed by the donee. The gift itself must be owned by the donor and exist at the time of making the offer. Compatibility with *Sharia* law is the main rationale behind this condition, since gifts cannot be constituted by something that the donor expects or foresees to own sometime in the future, such as money gained through derivative contracts (futures and forwards) and hedging activities.[10] As a general rule, the donee must express its intention to accept the gift offer, either explicitly or implicitly. However, the donee's silence *must not* be deemed as acceptance because the law here recognises that donees may have some reservations about the acceptance of a gift offer and, thus, must not be obliged to accept it in the first place. The only exception to this general rule is mandated in articles 195 FL and 493(2) CC, whereby the donee's acceptance *is not* mandatory when the donor is the parent or legal guardian/custodian of the donee. Lastly, the donor may unilaterally retract[11] the gift contract, if he or

[8] According to the Court of Cassation in Judgments 152/2012 and 187/2012, a gift contract that was concluded during the lifetime of the donor, but its essence was to divide the donor's estate among its wife and children in a specific manner must takes place after the donor's death. It concluded that this gift contract was actually a 'will' in disguise.

[9] Art 202 FL and Art 497 CC.

[10] Art 199 FL and Art 494 CC.

[11] According to the Court of Cassation Judgment 110/2008, retraction of a gift contract for an item that was not handed to the donee (no possession over the gift item) has a retroactive effect, that is, the gift contract is null and void from the date of its inception. The Court added that any gift contract concluded during the enforcement of the currently obsolete law (Law No. 16/1971 concerning the Law of Civil and Commercial Articles), that is, prior to the enactment of Qatar's CC, shall be governed by Islamic law.

she meets one of the legal conditions mandated by the law pursuant to articles 203 to 205 FL and articles 505 to 512 CC as applicable. Gift contracts are legally enforced upon taking possession of the gift item by the donee as stipulated in articles 192(2) FL ('A gift shall become enforceable only upon possession or delivery and receipt') and 194 FL. This is equally true in respect of article 493(1) CC, whereby, 'A gift shall be completed by collection' as applicable.[12] In addition, taking possession of the gift may substitute the donee's acceptance, if the latter was not expressed previously, because the donee's action in this scenario is more affirmative according to article 194(1) FL.

5.3.2 *Agency Contracts (Power of Attorney)*

Pursuant to Article 716 CC, an 'Agency shall be defined as a contract under which the agent undertakes to do any legal act for the account of the principal'. The Qatari legislator has defined the contracting parties (principal and agent) and the contractual obligations as an undertaking to do a 'legal act'. It is a crystal clear that agency contracts constitute a 'delegation' from a principal to an agent to do something on its behalf. It is worth noting here that the legal act itself could be either (i) civil or (ii) commercial. The differentiation between the two types of legal acts is important in order to distinguish the following: (i) which courts possess jurisdiction over a claim arising from an agency contract, that is civil courts or commercial courts and (ii) which statute is applicable to the claim, that is the Civil Code, or the Commercial Law.

Formality in agency contracts depends on the legal requirements for the legal act itself in accordance with article 718 CC, which states that 'The agency contract shall have such form as required to be available in the subject-matter of the legal act'. Thus, we may conclude here that 'formality' is *an exception* to the general rule, which is not *a prerequisite* from the outset for most agency contracts. An important example of 'an exception' relates to gift contracts. As discussed earlier, gifts do not require formality under Qatari law in order to be legally binding. However, an agency contract in circumstances where the legal act consists of a donation from the principal's assets (in whole or in part)

[12] According to the judgment of the Court of Cassation 110/2008, the rules of gift pursuant to the Hanbali school mandate that title (ownership) of a gift item passes from a doner to a donee only upon the latter taking possession of it. Thus, a gift transaction entails two stages; namely (i) a 'pre-possession' stage where the gift contract is not legally binding, hence no transfer of title (ownership) and the donor may retract it unilaterally; and (ii) 'post-possession' stage where the gift contract is legally binding, and transfer of title (ownership) materialises. The only exception to the 'post-possession' stage is the permissible retraction of a gift contract where the donor is the parent of the donee.

to a third party does require formality pursuant to article 721 CC, that is a private power of attorney made on a notarial deed. The rationale behind this exception is to protect principals from the misuse or abuse of a 'non-authenticated' agency contracts by their agents, where the latter donate the estate to a third party without consent. Another legal act that requires formality is related to a company's articles of association. According to article 515(1) CC, 'The contract of the company shall be in writing, otherwise it shall be invalid. Any amendments to the contract not reflected on such form as applicable in the contract shall be also be invalid'. Thus, an agency contract (power of attorney) concerning a company's association articles *must be made in writing* but not necessarily in a notarial deed.

In general, there are two types of agency contracts (power of attorney) namely (i) general power of attorney and (ii) private power of attorney. The general power of attorney grants the agent authority to administer the principal's affairs without the power to transfer title/ownership of the principal's assets, unless these are necessary as a matter of administration as may be required of the agent. According to article 719 CC,

> Agency in general, without specific designation of the subject-matter of the agency, shall not grant the agent any capacity other than in administrative acts. The term 'administrative act' shall include lease, provided that it does not exceed three years; maintenance and safekeeping works; collection of rights; and repayment of debts. This expression shall also include any disposition as required for management.

The law here provided a list of legal acts that are deemed administrative in nature, which include (i) rent of real estate or chattel that does not exceed three years in period; (ii) maintenance works; (iii) collection of rights, for example collection of credits lent to third parties; and (iv) repayment of debts owed to third parties. Furthermore, the law is very strict about adherence to the wording of agency contracts, where the rights are delegated from the principal to the agent. Article 720 CC states that

> The agency contract shall not grant the agent any capacity other than to do such acts as stated therein and any ancillary things in accordance with the nature of such acts and the applicable practice.

Thus, agents shall not be granted authority that goes above and beyond the scope of the legal act that the principal was intended to grant in the first place, that is managing the principal's estate rather than transferring the ownership of such estates.[13]

[13] See Court of Cassation Judgment 174/2018.

The second type of agency contacts is the private power of attorney. In this context, article 721 CC states that

> (i) Any act other than administrative acts shall require a special agency, particularly for gifts, sale, reconciliation, mortgage, acknowledgment, arbitration, oaths and pleading before the courts of law; (ii) A special agency shall be valid in a particular type of legal acts, even if the subject-matter of such act is not specifically determined, unless it is an act of gift.

The Qatari legislator has emphasised the risk associated with delegating legal acts pertaining to donations, sales or mortgage of the principal's estate to its agent (substantive), where transfer of title would most likely occur. Thus, the law intends to *warn the principal* by requiring it to issue a private power of attorney through a notarial deed. Another type of legal act granted equal importance is associated with legal actions before the courts (procedural), such as making of oaths, giving testimony, acknowledging a material fact, pleading before the court, or even reconciling a legal dispute out of court. All these legal actions create a significant impact on the principal's rights, all of which are protected by law. If the principal is not warned beforehand about the consequences of delegating such legal acts, it may consequently be severely disadvantaged.

Lawyers in the State of Qatar cannot represent their clients before the courts or other governmental authorities without an 'authenticated' agency contract (power of attorney), that is in this scenario, the law requires the 'private' agency contract to be made in a 'notarial deed' as a general rule. Pursuant to article 54 of the Code of Law Practice,[14]

> (i) The lawyer shall represent his client by virtue of a power-of-attorney authenticated pursuant to the law, and he shall deposit the power-of-attorney in the case file if belonging thereto, but if the power-of-attorney is of a general nature, it shall be sufficient for the court to review and record its number, date and authenticating authority in the hearing's transcript and enclose a photocopy thereof in the case file'. (ii) If the client appears in a court accompanied by the lawyer, the court shall record such appearance in the hearing's transcript, and such appearance shall be deemed as an authenticated power-of-attorney, and the fees prescribed for authenticating the power-of-attorney shall then be charged.

The law here prescribes *two exceptions* to the general rule whereby lawyers may legally represent their clients before the courts and/or public authorities. First, if a lawyer possesses an authenticated 'general' power of attorney, it may

[14] Law No 23/2006.

request the court to be granted with the right to legally represent the client. The lawyer must file the authenticated 'general' power of attorney to the court, whereupon the court will review such request in the hearing's transcript and grant such power. A copy of the authenticated general power of attorney will be enclosed in the case file. Secondly, another exception applies when neither 'private' nor 'general' power of attorney exists beforehand between lawyer and client. In this scenario, the law will deem their *appearance together* before the courts as a legal act of granting the lawyer a specific power of attorney. Consequently, the lawyer will be granted the right to legally represent its client and the court will charge the authentication fees to the client.

5.3.3 *Immovables (Real-Estate Conveyance and Mortgage)*

Contracts concerning conveyance and mortgage of immovable properties are subject to strict formality due to the associated high risk and value of these transactions in addition to their impact on the economy at large. The law intends to fulfil the public policy of stabilising transactions between all stakeholders. In order to achieve these objectives, the Qatari legislator has mandated several conditions, as set out in articles 919 and 246 CC.

5.3.3.1 Real-Estate Conveyance

Article 919 CC states that,

> As in the case of other rights in kind,[15] title to a movable asset and real property shall be transferred by any legal act, provided that the disposing party is the owner of the disposed right, subject to the provisions of article 246 and 247 herein.
>
> This provision is complemented more specifically by article 246 CC, which goes on to stipulate that
>
> The obligation to transfer title or any other right in kind shall automatically transfer such right, provided that the subject-matter of the obligation is a self-identified thing held by the obligor and subject to the rules in connection with registration.[16]

[15] According to Art 837 CC, ownership *in rem* encompasses the following exclusive rights: (i) use; (ii) utilisation or exploitation; and the (iii) disposal (sell or lease).

[16] For real estate registration, see Court of Cassation Judgments: 227/2015 and 180/2015. Art 247 CC states that: '(i) Where the obligation relates to the transfer of a right in kind to a thing identifiable only by its kind, such right shall not be transferred until such thing is apportioned. (ii) Where the obligor fails to perform his [or her] obligation, the obligee may, with the permission of the court, or without its permission in the case of emergency, obtain a thing of the same kind at the expense of the obligor. The obligee may also demand the value of the thing, without prejudice in either event to his [or her] right to indemnity'.

Here, the first condition concerns the 'absolute' and 'untarnished' ownership of a property by the disposing party or the seller. In common law jurisdictions, this is known as 'Fee Simple Absolute' under the law of property. This condition is essential for the transfer of title and risk to the receiving party or the buyer. However, anything less than absolute ownership, such as the right to possess or the right to use said property may be transferred by a third party who holds such right *in rem*. For example, a tenant with a right to possess and use a property may sublease it to a sub-tenant unless the tenancy contract prohibits this. Also, the general rule of conveyance does not entail that a property which is encumbered with a particular right *in rem*, such as easement or mortgage cannot be transferred. The law permits such transactions under specific rules.

The second condition is essential to the validity of property conveyance, namely 'the legal act' to initiate such transaction. In the civil law tradition, legal obligations arise from (i) legal acts or (ii) legal facts law (legislation). Legal acts are defined as manifestations of will intended to produce legal effects. They may be based on agreement [bilateral or multilateral] or unilateral disposition. Legal acts are subject, as to their validity and effects, to the rules governing contracts. Legal facts are defined as 'behaviours or events to which legislation attaches legal consequences'. Legal facts are governed, according to the circumstances, by the sub-title relating to extra-contractual liability or the sub-title relating to other sources of obligations.[17] The above definition of both legal acts and legal facts are obtained directly from articles 1100, 1100(1), and 1100(2) of the French CC as amended by Ordonnance No 2016-131 of 10 February 2016. Neither the Qatari CC nor the Egyptian CC contains any explicit definition of legal acts and legal facts. However, both Egyptian and Qatari jurisprudence acknowledge these definitions despite the lack of statutory text.

Abdulrazzaq Al-Sanhuri, the 'god father' of civil codes in the Middle East, has explained that a legal act is a voluntary performance made by a person (natural or legal) intended to create legal consequences. Unlike legal acts, legal facts arise from either an (i) event (natural or man-made) creating legal consequences or (ii) performance made by a person (natural or legal) *without intention* to create legal consequences, such as civil wrongdoings (delicts) and enrichment without cause.[18] When the Qatari legislator was in the process of drafting article 919 CC, it deliberately deviated from the original text of article 932 of the Egyptian CC. The key difference here is apparent by substituting

[17] J Cartwright, B Fauvarque-Cosson and S Whittaker, 'French Civil Code of 2016' (English translation) www.trans-lex.org/601101 accessed 26 October 2022.

[18] Al-Sanhuri, (n 6) vol 1, Part 1, at 112–114 and 141–142. See also M Al-Ouji, *The Legal Basis of the Civil Code (Al-Halabi Law Publications*, 2010) 221 and 261.

the word 'contract' with the word 'legal act'. The rationale behind this change from the Qatari perspective is that the term 'legal acts' cover both contracts and unilateral dispositions. Thus, its use in the statutory text is more accurate than limiting this condition to property conveyance arising from contracts only.

The third condition is formality that manifests in the process of registration. Besides the mandatory requirement of registration as stipulated in article 246 CC, which is general in its application, Qatari legislators have enacted a special law to deal specifically with the Real-Estate Registration System ('RERS').[19] Here, we highlight the relevant provision that mandates formality, namely article 4, which states that

> All [legal] acts that would create, remove, or change a property right or another property right-in-kind, as well as final judgements confirming the same, shall be registered. The lack of registration shall mean that the aforementioned rights shall not be moved, transferred, or changed whether between the stakeholders or third-parties. Non-registered contracts shall have no effect other than the personal obligations between the contracting parties.

Thus, the law makes it crystal clear that title (ownership) and other rights *in rem* cannot be transferred between contracting parties until the formality of registration is complete.[20] Once the formality condition is met, the legal effect of such transaction is deemed from the effective date of the legal act (whether it is a contract or a unilateral disposition) and not from the registration date. The rationale behind this is that the legal act is the main source of obligation for such transaction (conveyance or mortgage), and the registration project is a mere formality to 'activate' its legal effects upon all stakeholders.[21]

5.3.3.2 Real-Estate Mortgage

In the civil law tradition, there are two types of mortgages namely (i) official mortgage; and (ii) possessory mortgage.[22] In the context of this chapter, we will be focusing on the former because as the name indicates, this contractual obligation requires formality to manifest its legally binding effects. According to articles 1058 CC and 1059 CC, an official mortgage is defined as follows:

> An official mortgage shall be defined as *a contract* in which the creditor requires *a right over real property for the settlement of a debt* owed to him [or her] by the debtor. This right entitles the creditor *to take precedence* over ordinary creditors and over creditors who are lower rank to him [or her] in

[19] Qatar Law No. 14 of 1964, as amended.
[20] See Court of Cassation Judgments 142/2018 and 420/2017.
[21] Al-Sanhuri (n 6), vol 9, Part 1, a 299–307.
[22] For further discussion on possessory mortgages, see Al-Sanhuri, ibid, 511.

> the settlement of his [or her] right out of the proceeds of the sale of such property, no matter who purchases it [emphasis added]

In-line with article 1058 CC, article 1059 CC reads as follows:

> (i) An *Official mortgage* shall not be established unless made under *an official paper*[23] reviewed and signed according to the law. (ii) The mortgagor shall bear the costs of the mortgage contract unless there is an agreement to the contrary.

The statutory texts describe the rules which govern an official mortgage under Qatari law. First, an official mortgage is a contract between a mortgagor and mortgagee; henceforth, the general rules of contract law apply to their relationship during the term of the agreement. Second, it is important to note that an official mortgage as a legal instrument can be created for real-estate properties exclusively, that is chattels (movable properties) are not included.

Third, an official mortgage is used as a 'collateral' to secure payment of a debt between the contracting parties. The mortgagor (the debtor) grants the mortgagee (the creditor) a right in kind over a real estate that is owned by the former in order to secure a loan borrowed from the latter. The loan becomes a 'secured credit', and the mortgagee (the creditor) acquires a 'security interest' over the mortgaged property (right in kind). Fourth, an official mortgage must be issued on a notarial deed and properly filed with the real-estate registration system in accordance with the Qatari CC and RERS. This prerequisite of formality serves multiple purposes, namely to (i) protect the interests of all stakeholders for this transaction; (ii) warn the mortgagor of the potential risk of losing the mortgaged property due to default payments, even though the said property remains under his or her ownership and possession during the term of the contract; (iii) grant the mortgagee enough information to make an informed choice about the transaction prior to its conclusion; (iv) grant the mortgagee a notarial deed, which it may use to settle the default payments without the need to seek a court order; (v) allow the mortgagee to register its right in kind with the relevant authorities in order to protect their rank in the secured credit and (vi) allow potential new creditors to retrieve any previous mortgages made on the said property from the public registration in order to figure out their rank among secured creditors and consequently estimate the potential risk of such transaction. It is worth highlighting that only the first mortgagee who registers or files its right in kind with the real property registration system will be granted the right to 'perfection' among the other secured creditors. Perfection means that in the case at hand, the mortgagor becomes

[23] See Court of Cassation Judgment 167/2016.

unable to settle the secured credit, and then the creditor will have a 'supreme' security interest in the settlement of its credit over any other secured creditors who are in lower rank, or against ordinary creditors.

Failure to comply with the formality requirement will nullify the official mortgage transaction; however, the loan agreement between the contracting parties remains valid because the latter does not require formality. The creditor may sue the debtor (as an ordinary creditor) for damages under the general rules of contracts which govern loan contracts but cannot claim a right in kind on the property as collateral.[24]

5.4 CONTRACTS TO BE MADE IN WRITING

5.4.1 *Company Articles of Association*

Articles of association constitute a supreme contract acting as the company's 'constitution' or 'charter' and its rules supersede any other internal contract or agreement made by the company. A company's articles of association include, but not limited to, the name of the company as a legal person, its nationality (place of domicile), its commercial activities, the company's capital, the type of company as per the Qatar Companies Law ('**QCL**') (Law No. 11 of 2015), or any other relevant law passed by the government, the name of the owners or shareholders, their share of the capital, their role in the company, their authorisations to sign and approve, and the appointed managing directors (senior management). Furthermore, the articles of association are governed by multiple pieces of legislation under Qatari law, namely (i) the CC, (ii) QCL and Commercial Registry Law ('**CRL**') (Law No. 25 of 2005 as amended by Law No. 20 of 2014). Articles of association are known to have a relatively 'long-term' lifespan and protect the rights of both owner(s) (among themselves) and third parties (others) who may engage with the company in a potential business transaction, knowing that the said company is well established in accordance with the law.[25]

Article 513 CC has defined the company's article association as follows:

> a company is a contract between two or more persons to contribute money or work to a financial project and to divide the profit or loss that may arise therefrom.

Thus, the law makes it a crystal clear as a general rule that a company must be established through a contract between the parties (bilateral or multilateral) for the purpose of collaborating in a business endeavour in which the parties will

[24] Al-Sanhuri (n 6), vol 10, 199–203.
[25] Y Al-Shazhly, *Qatar Corporate Law* (LexisNexis, 2017, in Arabic) 83.

share both resulting profits and losses. However, article 2 CL has established *an exception to the general* rule in accordance with article 513 CC by stating that

> (i) A commercial company is an agreement under which two or more natural or legal persons commit to contribute to a profit-generating project, by way of providing capital or work and sharing the profit generated or loss sustained from the project. (ii) The company may comprise only one person in accordance with the provisions of Chapter 8 of this law.

Reading Article 228 CL states that

> '(i) A limited liability company is a company that consists of one or more persons and the number of partners shall not exceed fifty (50) persons. (ii) A partner will only be liable up to their share in the capital. The shares of the partners shall not be negotiable securities'.

Henceforth, a limited liability company ('**LLC**') can be established by one person only. It is worth noting here that an LLC under Qatari law differs from the common law business organisation that is known as 'sole proprietorship'. The key difference can be summarised as follows: (i) a sole proprietorship[26] *does not* create a legal person that is separate from its owner (natural person); thus, risk and liability in case of the owner's bankruptcy pass to its estate; whereas, (ii) the LLC *creates* a legal person[27] that is separate from its owner (natural person); thus, the risk and liability in case of the company's insolvency are limited to its capital as per the company's article of association, that is risk and liability *do not* go all the way to the owner's estate (due to the protection of the legal principle of 'corporate veil', which may only be pierced by a court order.[28]

Formality is an important prerequisite for the validity of a company's articles of association.[29] In accordance with article 515 CC

> (i) The contract of the company shall be in writing, otherwise it shall be invalid.[30] Any amendments to the contract not reflected on such form as applicable in the contract shall also be invalid. (ii) However,

[26] See Court of Cassation judgments on sole proprietorship, 42/2016; and 19/2016.

[27] See Court of Cassation Judgments 347/2015; 138/2016; 91/2008; and 49/2010.

[28] According to Court of Cassation Judgment 306/2019, the liability of a limited liability company shareholder is limited to its share of the company's capital. The law aims to protect third parties who intend to engage in a potential business venture with the company by adding the abbreviation (L.L.C.) to the company's name, so others from the outset become aware of the company's legal form and its limitations.

[29] See Court of Cassation Judgment 352/2016.

[30] The Court of Cassation in Judgment 5/2007, held that 'when the legislator mandated a particular formality for a specific contract [i.e. company's article of association] to be valid, such formality becomes mandatory and without it the said contract is null and void. This nullity

> such invalidity may not be held thereto by the shareholders against third-parties and such invalidity shall not be effective as between the shareholders themselves, other than from the time a shareholder demands that invalidity be ruled.

Article 6 CL added more rules governing the formalities of the company's articles of association as follows

> (i) Except for joint venture companies, a company's contract as well as any amendment thereto shall be in Arabic and authenticated; otherwise, the company's contract or the amendment shall be invalid. (ii) The procedure for the authentication of the company's contract shall be set by a decision of the competent authority in liaison with the Minister. (iii) The company's contract or any amendment thereto may be accompanied by a translation in any other foreign language, and in the event of discrepancy, the Arabic version shall prevail.

It is worth highlighting here that the formality of 'writing' is a condition for the validity of the company's articles of association (substantive) and not proof of its existence (procedural). The lack of this particular formality serves to render the contract null and void (absolute nullity). Moreover, the Qatari legislator mandated that any amendment to an existing company's articles of association must be made under the same formality requirements (i.e. writing). The official language of a company's articles of association must be Arabic. However, article 6(2) of CL has granted *an exception to the general* rule as mandated in article 515 CC, whereby foreign language translations may accompany the Arabic original version. In the event of discrepancy between the original version and its translations, the original version in Arabic supersedes other translations.

Article 8 CL places great emphasis on the company's veil and legal personality, by stating that,

> Except for joint venture companies, a company shall not have a legal personality until it is declared in accordance with the provisions of this law. The company's manager or members of its board, as the case may be, shall be jointly liable for the damages caused to third parties due to their failure to declare the company.

The above article must be read in conjunction with article 7 CRL, which states that

> extends to those contract's amendments that did not fulfil the formality'. Formalities mandated by the law *aim to protect public interest*, and any failure thereof serves to nullify the contract from its effective date (retroactively)'.

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> No natural or legal person may engage in trade or establish a business unless it is entered in the Commercial Registry.

The formality concerning the registration[31] of a company as a legal person with the relevant authority (i.e. the Department of Commercial Affairs at the Ministry of Economy and Commerce) aims to create a public database for all Qatari legal persons authorised to conduct business transactions domestically and abroad. Thus, all third parties who intend to engage with Qatari companies in potential business ventures, may have access to such a commercial registry from the outset. Concerns about 'real' or 'sham' companies is rife before the courts; pertinent public policy through such formality thus aims to (i) minimise this risk of dispute; (ii) stabilise all business transactions and (iii) protect the Qatari economy at large.[32]

5.5 CONTRACTS TO BE EVIDENCED IN WRITING

5.5.1 *Guarantees (Suretyship)*

In the civil law tradition, a guarantee is considered a contract (commonly bilateral but also multilateral), where the guarantor promises to settle the outstanding debt of the borrower (debtor) in the event the debtor defaults in its credit agreement with the creditor. It is worth highlighting that the *contracting parties* in this legal instrument are the guarantor and the creditor. Consequently, the debtor who is the main beneficiary is not a contracting party, but a mere third party to the agreement. Article 808 CC defines a guarantee contract as follows:

> A guarantee shall be defined as a contract under which a person undertakes to the creditor to accept responsibility for the performance of an obligation by the debtor where the debtor fails to perform such obligation.

The guarantee as a contract *does not* require *formality* to become legally binding. Consent between the guarantor and the creditor is sufficient. However, the law mandates that *a guarantee contract must be evidenced in writing* in accordance with article 809 CC, which states that 'a guarantee shall be evidenced[33] in writing, even if the original obligation may be established by

[31] For the role of the commercial registry, see Court of Cassation Judgments 127/2015 and 167/2015.

[32] Al-Shazhly (n 25), 88–90.

[33] In the original Arabic text of Art 809 CC the Arabic word (تثبت) was mistranslated to 'made' instead of the correct word 'evidenced'. The English translation with this error is available on the official Al-Meezan portal (Qatar's Ministry of Justice). Also, the Arabic word (بينة) in the

proof'. For example, if a guarantor's offer to settle a debt was met with the creditor's acceptance during the contract session, then the guarantee contract is legally formed without the need to put it in writing. However, if a dispute arises from an oral guarantee contract, then the claimant may file to the court any official correspondence that was made in writing between the contracting parties, in which it makes an explicit reference to the valid guarantee agreement, that is the correspondence proves the existence of such a guarantee contract in the first place. The type of correspondences that may be included encompasses notice letters, registered mails, e-mails (subject to the rules of evidence in accordance with civil procedure rules) and others.

One visible characteristic of the guarantee contract is that it encumbers one party only, that is the guarantor to settle the debt to the creditor. Hence, the creditor has no obligation to fulfil. However, this *does not mean* that a guarantee as a contract may be formed by a unilateral disposition because the consent of both the guarantor and the creditor is mandatory for its valid. It is worth highlighting that despite the general rule governing guarantees, which mandates that the obligation to fulfil the main undertaking is unilateral (by the guarantor), the law does not prohibit a bilateral undertaking, especially if the contracting parties elect to do so. This is especially so where the creditor promises to grant the debtor a specific amount of money in exchange for the guarantor's promise to settle the outstanding amount in case of default by the debtor.[34] Another characteristic of the guarantee contract is that the debtor's knowledge of it is not required. In fact, the contract may be formed even against the debtor's consent. According to article 811 CC: 'The debtor may be guaranteed without his [or her] knowledge or without his [or her] consent'. Moreover, a guarantee contract may take the form of a commercial instrument such as a promissory note.[35] Last but not least, as discussed earlier, the formation of a guarantee does not require formality, but must be evidenced in writing. The public policy behind this rule is that the guarantor's consent must be evidenced in writing in order to warn of the high risk associated with such legal instrument.[36]

second part of the legislative text was translated as 'evidence', which does not flow well with the first part of the article, thus it has been substituted with the word 'proof'.

[34] Al-Sanhuri (n 6), vol 10, at 20.

[35] Ibid, at 60.

[36] Ibid, at 62.