The Assignment of the Contract in the New French Contract Law of 2016/ an Analytical Comparative Study with the Iraqi Civil Law

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Abstract

This research is concerned with studying and investigating the assignment of the contract, regulated by the new French law of the contract, issued according to the ordinance n° 2016-131 dated February 10, 2016, concerning reforms of the law of contract, general regime and proof of obligations. This assignment is as an agreement by which a party to a contract, the assignor, may assign his or her status, quality or contractual position as party to the contract to a third party of the original contract, the assignee, with the agreement of his own contractual partner, the debtor of the assignment (the assigned). And the study compared it with the assignment of the right, regulated by the Iraqi civil code No. (40) of 1951. The problematization of the research lies in the shortage and insufficiency of the Iraqi civil code, as a result of the lack of both the principle of the assigner's co-obligations or joint obligations with the assignee, as well as the principle of the legal assignment of the contract, authorized by the law in some particular cases . This study has adopted to the analytical comparative methodology of the legal research, and the main finding of this study is the importance of both of the above-mentioned principles in the Iraqi civil law. The researcher

suggests some relevant recommendations to the Iraqi legislator, the most important of which is the advisable enactment of these two principles in the Iraqi law.

Keywords: assignment of the Contract, assigner, assignee, the debtor of the assignment (assigned), non-assignability, enforceability

التنازل عن العقد في قانون العقود الفرنسي الجديد لعام 2016 / دراسة تحليلية مقارنة بالقانون المدني العراقي

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المستخلص
يتناول هذا البحث بالدراسة والتقصي التنازل عن العقد التي نظمه قانون العقود الفرنسي الجديد لعام 2016, والصادر بمقتضى المرسوم المرقم **(2016-131),** والمؤرخ في العاشر من شباط/ فبراير عام 2016 الخاص بقانون العقود, والنظرية العامة للإلتزامات وإثباتها. وتعد هذه الحوالة عقداً يتنازل بمقتضاه احد الطرفين المتعاقدين وهو المتنازل صفته أو وضعه أو مركزه التعاقدي كطرف متعاقد إلى الغير الأجنبي عن العقد الأصلي وهو المتنازل له, بالإتفاق مع المتعاقد الآخر في العقد الأصلي وهو المتنازل لديه. وقد قارنت هذه الدراسة هذا العقد بحوالة الحق التي نظمها القانون المدني العراقي رقم (40) لسنة 1951. وتكمن مشكلة البحث في النقص والقصور الذي إكتنف أو إعترى موقف القانون المدني العراقي, نتيجة إفتقاره إلى مبدأين مهمين هما: مبدأ الإلتزام التضامني والمشترك للمتنازل مع المتنازل لديه, فضلاً عن مبدأ التنازل القانوني عن العقد التي تنعقد بتفويض قانوني في بعض الحالات الخاصة. وقد تبنت الدراسة منهج البحث العلمي القانوني التحليلي المقارن. أما أهم نتيجة توصلت إليها الدراسة فهي أهمية تبني المبدأين المشار إليهما أعلاه في القانون المدني العراقي. وإقترح الباحث بعض التوصيات ذات الصلة للمشرع العراقي, ومن أبرزها سن هذين المبدأين في القانون العراقي.

الكلمات المفتاحية: التنازل عن العقد, المتنازل, المتنازل له, المتنازل لديه, عدم إمكانية الحوالة, نفاذ الحوالة.

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Introduction

First: The Introductory Foreword to the Topic: The New French contract law, amended by the ordinance n° 2016-131 dated February 10, 2016 concerning reforms of the law of contract, general regime and proof of obligations, regulated the assignment of the contract, and defined it as as an agreement by which the party to a contract, the assignor, may assign his or her status, quality or contractual position as party to the contract to a third party, the assignee, with the agreement of his own contractual partner, the debtor of the assignment (the assigned). The modern attitude of the French jurisprudence considers the assignment of the contract as a complex but homogeneous combination (ensemble) of rights, obligation, prerogatives, privileges, as well as the quality, status and contractual position of the contracting party, known as the assigner. The Iraqi civil code No. (40) of 1951, regulated the assignment of the right, and the article (362) defined it as an agreement by which a creditor may assign whatever right is owing to him from his debtor to the assignee, except where the assignment is barred by a provision or text of the law an agreement of the contracting parties or the nature of the obligation.

Second: The aim of the study: The objective of this study is to benefit from some new rules regulating the assignment of the contract included in the French new law of contract, and make use of them to deal with some shortages in the regulation of the assignment of the right in the Iraqi civil law.

Third: The problematization of the study: The problem of this study lies in the insufficiency of the Iraqi civil code, which is represented by the non-regulation of the assignment of the contract. Although the general rules of both the assignments of the right and debt can bridge the gaps of the insufficiency and the

lack of the regulation of the rules of the assignment of the contract, but the researcher shall recommend that the Iraqi legislator regulate and enact some special text and provisions as to the assignment of the contract. Besides the non-regulation of the legal assignment of the right. In some particular cases in which the assignment is authorized by the law or express legal texts, rather than by the agreement or mere autonomy of the will of the parties. Furthermore, the importance of the assigner's co-obligations or joint obligations with the assignee, particularly the fundamental obligation of the fulfillment or execution of the original contract formed between the assigner (creditor) and the debtor of the assignment (the assigned), if the person subject to assignment does not express his or her acceptance to liberate or discharge the assigner. Therefore, the assigner will remain jointly co-obliged with the assignee, and as a guarantor of the obligations of the assignee.

Fourth: The research methodology: This study has adhered to the comparative legal research methodology, by identifying the notion of the assignment of the contract in the French new law of contract and its legal effects, Compared with the situation of the Iraqi civil code concerning the assignment of the right.

Fifth: The structure of the study: in accordance with the above-mentioned research methodology, the study was divided it into two sections as follows:

First section: The concept of the assignment of the Contract in the French Contract Law Compared with the situation of the Iraqi civil Code.

Second section: The Legal Effects of the Assignment of the Contract in the French New Contract Law Compared with the Iraqi Civil Code.

First Section

The concept of the Assignment of the Contract in the French Contract Law Compared with the situation of the Iraqi civil Code

The studying of the concept of the assignment of the Contract in the French new law of Contract necessitates its definition, the distinctive features characterizing it, and clarifying and analyzing its legal nature. Compared with the situation of the Iraqi civil code as to the assignment of the right as follows:

First Topic

The definition of the Assignment of the Contract in the French law of Contract

The article (1216) of the new French law of contract defines the assignment of the contract (La cession de contrat) as an agreement (l'accord) by which a contracting party, the assignor, may assign his status, quality or contractual position as a contracting party to a third party, the assignee, with the agreement of his own contractual partner, the debtor of the assignment (the assigned). One of the contemporary French scholars or jurists(1) also defines the assignment of the contract as an agreement (l'accord) which seeks to operate the substitution or replacement of one of the contracting parties by a new party to a contract. It is also briefly defined(2) as a transfer of contractual position of one of the contracting parties by the substitution of a third party for that contracting party. It has been indicated from these definitions that the assignment (La cession) is the process of transference tasked with assigning or transferring the status, quality or contractual position of the contracting party, which requires special rules regulating the rights and obligations of the assigner (cédant), assignee (cessionnaire) and the person subject to assignment (cédé). It represents also the substitution of one of the

contracting parties with a third party[3], during the execution or fulfillment of the contract[4]. It is to be noted that the assignment of the contract in the the French laws can include a wide spectrum of contracts, such as the assignment of the contract of sale (la cession du contrat de vente), the assignment of the contract of lease (la cession de bail)[5] , the assignment of the lease for construction (la cession du bail à construction), the assignment by the purchaser in the contract of the sale of the real estate under construction (la cession par l'acquéreur du contrat de vente d'immeuble à construire)[6] . As well as the assignment of the hire-purchase contract of the real estate (La cession d'un contrat de crédit-bail immobilier). Although the assignment of the contract in the French civil code gathers together the features or traits of both the assignment of the right and the assignment of the debt, but this study will compare the assignment of the contract with the assignment of the right in the Iraqi civil code No. (40) of 1951, Which regulated the assignment of the right and the assignment of the debt. Although the Iraqi civil law encompasses or contains the rules of both the assignment of the right and the assignment of the debt, but we shall focus in this study only on the rules of the the assignment of the right, without under-estimating the importance of the rules of the assignment of the debt in underlying the assignment of the contract, together with the rules of the assignment of the right. Because the assignment of the right, as a part of the assignment of the contract, is frequently more important than the assignment of the debt. And at the same time it is more similar and compatible with the rules of the assignment of the right than those of the assignment of the debt[7]. Therefore, the article (362) of the Iraqi civil code defined the assignment of the right as the agreement by which a creditor may assign whatever right is owing to him from his debtor to the

assignee, except where the assignment is barred by a provision in the law an agreement of the contracting parties or the nature of the obligation; the assignment is completed without need for the consent of the person subject to assignment (debtor). Some Iraqi jurists and scholars(8) define the assignment of the right as the contract by which a person or a part to the contract, known as the creditor or the assigner transfers his or her right to another person, the new creditor known as the assignee, against a third party known as the debtor of the assignment (the assigned), or the debtor of the obligation. Another scholar defines(9) it as a contract formed between the creditor and a third party, to transfer or assign his or her right, which is in the patrimony of the debtor, to substitute the third party in the place of the creditor to enjoy all the components and characters of the right. Therefore, the creditor is the assigner, the new creditor is the assignee, and the debtor of the assignment (the assigned) is the debtor of the obligation. Whereas the the first paragraph of the article (339) of the Iraqi civil law defined the assignment of the debt as the transfer of the debt and the claim From the patrimony of the assigner to the patrimony of the assigned.

Second Topic

The distinctive features of the assignment of the contract

The assignment of the contract according to the new French contract law is featured by many distinctive characteristics, the most significant of which are:

First: the assignment of the contract is characterized by its extensive and expansive feature, this means that it can be applied to a wide-spectrum of contracts, the most important of which are: the assignment of the contract of lease (la cession de bail), the assignment of the lease for construction (la cession du bail à construction), the assignment by the purchaser in the contract of

the sale of the real estate under construction (la cession par l'acquéreur du contrat de vente d'immeuble à construire)[10]. By contrast the Code of Napoléon of 1804 allowed the assignment of the contract, but in a very certain specific types of contracts[11] . The same is true for the assignment of the right in the Iraqi civil code, in which all the personal rights or debts can be assigned, whether they be simple or qualified. Due or future. But with three exceptions: the agreement between the creditor and the debtor to eliminate the assignment of the right. The nature of the right runs contrary to the assignment of the right. And the prohibition of the assignment of some types of rights by the law[12] . According to the article (362) which provides that (A creditor may assign whatever right is owing to him from his debtor except where the assignment is barred by a provision in the law, an agreement of the contracting parties, or the nature of the obligation; the assignment is completed without need for the person subject to the assignment (debtor's) consent).

Secondly: the assignment of the contract is characterized by the binary or bilateral feature. This can be elucidated by the fact that this type of assignments is applied to the bilateral contract (le contrat synallagmatique). This trait or feature is derived from both the rights and obligations of the assigner (le cédant)[13] . This means that the assignment of the contract gathers both the features of the assignment of the right (cession de créance) and the assignment of the debt (cession de dette). If we compare this this situation with that of the unilateral contract (le contrat unilatéral) such as the contract of loan (le prêt), we can find that one of the contracting partys can transfer or assign his or her rights only. Therefore, the loaner or lender (prêteur) can only exercise the assignment of the right. And the other party of the contract, the borrower (l'emprunteur) can only transfer his or her

debts by the assignment of the debt. Because the right (créance) is considered as the active or positive element of the patrimony, whereas the debt (dette) is regarded as the passive or negative element of the patrimony. This is the reason why some French jurists(14) emphasized that the mechanism of the assignment of the right can only be understood by referring back to the rules of both the assignment of the right and the assignment of the debt.

Thirdly: the assignment of the contract is also characterized by its qualitative or prerogative feature: the assignment of the contract is not only concerned with transferring rights and debts, but also the quality of the contracting party, particularly the assigner, and his or her contractual position, prerogatives and privileges such as judicial actions(15). The assignability of the quality of the contracting party and his or her contractual position (la cessibilité de la qualité de contractant ou de la position contractuelle) is different from that of the right or the debt, because the quality of the contracting party neither is considered as an active nor a passive element of the patrimony. As opposed to both the right and the debt, considered as an active and passive elements of the patrimony(16). Whereas the right in the Iraqi civil law can be transferred by the assignment from the assigner to the assignee with all of its characters, attributes, warranties, guarantees, whether they be personal like the suretyship, or real such as the privileges and mortgages(17), as depicted by the material doctrine in the civil law(18). According to the article (365) which provides that "the right is transferred to the assignee together with its attributes and warranties such suretyship, privilege, and mortgage, and the assignment is deemed to comprise interests and instalments which had fallen due".

Fourthly: the assignment of the contract in the new French law of the contract is also featured by its formal characteristic: the

formalization of the assignment of the contract is enshrined in the third paragraph of the article (1216) of the new French contract law, which necessitates that the assignment should be established in writing, otherwise it must be nullified and invalidated, and provides that "An assignment must be established in writing, on pain of nullity"[19]. It is clearly indicated from this paragraph that the necessity of the writing of the assignment of contract is considered as a condition of its validity[20]. It is to be noted also that the assignment of the contract was only a consensual contract, before the ordinance of february 10, 2016, and did not necessitate any form as a condition of validity[21], but is concluded only by the consent of the parties[22], and other basic elements except for the formality[23]. In the Iraqi civil code, although the assignment of the right is a consensual contract, not requiring a special form to be concluded validly[24]. But the enforceability of the assignment against the debtor of the assignment (assigned), requires that one of the following two procedures be made: the debtor's acceptance and the notification of the assignment delivered by the notary-public to the debtor. Whereas the enforceability of the assignment against the third party, can only be realized by notifying the debtor with the assignment ofiically or by official means[25]. Or by the debtor's acceptance of the assignment with a certified (established) date. According to the article (363) which provides that (An assignment shall not be enforceable against the debtor or a third party, unless it has been accepted by or notified on the debtor provided that the enforceability thereof against a third party with the debtor's acceptance makes it necessary that such acceptance has a certified (established) date).

Fifthly: the assignment of the contract is characterized by the conventional feature: this feature is considered as a complex one,

since it is derived from the agreement of two parties, as well as the acceptance of the third party. The agreement is represented by the contract concluded between the assigner and the assignee(26). But this agreement can only be valid and enforceable by the acceptance (l'accord) of the person subject to assignment or the debtor(27). This conventional feature of the assignment of the contract is embodied or enshrined in the first paragraph of the article (1216) of the new French law of contract, which provides that "A contracting party, the assignor, may assign his status as party to the contract to a third party, the assignee, with the agreement of his own contractual partner, the debtor of the assignment"(28) . The same is true for the Iraqi civil code, in accordance with its rules the assignment of the right is considered as a consensual contract formed between the assigner and the assignee, but its enforceability against the debtor of the assignment (the assigned) requires his or her acceptance or being notified by the assignment , According to the above-mentioned article (363).

Sixthly: the assignment of the contract is characterized by the legal feature: if the conventional feature of the assignment of the contract is considered as the origin of the conclusion the assignment(29), the legal feature will be an exception to this general rule (droit commun)(30) . In some particular cases the assignment of the contract is authorized by the law or express legal texts rather than the agreement or mere autonomy of the will of the parties. For example the purchaser of the real estate (l'acquéreur d'un immeuble) should respect or abide by the leases concluded by the buyer. And the assignee of the company should respect or abide by the labour contracts or the contracts of employment concluded before the assignment. If we compare the situation of the French law regarding the legal assignment or the

authorization of the law for the conclusion of the assignment of the contract by the force of the law, with that of the Iraqi civil code. We can find unfortunately the the Iraqi law in general and the Iraqi civil code in particular lack the legal assignment of the right as an exception of the traditional conventional assignment of the right. Therefore, the researcher will suggest in the recommendations that the Iraqi law-maker adopt this type of exceptional assignments.

Seventhly: the non-assignable feature of some contract: as an exception to the assignability (Cessibilité) or assignable characteristic of the contracts. The non-assignability of the contract (l'incessibilité) or the non-assignable contracts (Contrats incessibles) are categorized into three sub-categories: 1- the contracts based on personal considerations (intuitus personae)(31) , or taking into account the personality of the contracting party(32), such as the contract of agency (mandate), and (le contrat d'entreprise)(33) , 2- the contracts which are non-assignable by the operation of the law. Such as the rural lease (bail rural), which the rural code has regulated, and the article (411-35) authorized the judge to permit the assignment of the rural lease to the heirs and successors of the purchaser(34). and the contract of lease of habitation (bail d'habitation)(35) . 3- The third sub-category is considered as non-assignable by the agreement, in which case the parties to a contract can agree not to assign their contract. This type of non-assignability can be realized or materialized by inserting or incorporating the non-assignability clause (Clause d'incessibilit) into their contract(36). If we compare this situation with that of the Iraqi civil code, we may find that it includes three exceptions which prohibit the assignment of the right according to the above-mentioned article (362) : First the agreement between the creditor and the debtor to eliminate the assignment of the

right. Secondly if the nature of the right runs contrary to the assignment of the right. Third if the law prohibits the assignment of some types of rights by the law(37).

Third Topic

The legal nature of the Assignment of the contract in the French law of contract

The traditional attitude of the French jurisprudence(38) concerning the legal nature (Nature juridique) of the assignment of the contract considered it as an agreement made up of both the assignment of the right and the assignment of the debt.this combination of both of these types of assignments is based upon the legal position of the assigner (le cédant), who enjoys a group of rights and is obliged with another group of obligations. Both of these two groups can be transferred to the assignee by a process of conventional transfer (Transfert conventionnel). The traditional jurisprudence does not consider this process as a violation of the principle of the relative effect of the contract (l'effet relatif), because the initial parties of the contract, that is to say, the assigner (creditor) and the person who will be subject to assignment later (debtor) normally give their consent (consentement) in the moment when the main contract is concluded. And the assignee gives his or her acceptance (l'accord) in the moment when the assignment is concluded(39). But the modern French jurisprudence(40) refused this combination of both the assignment of the right and that of the debt, based upon the rights and obligations of the assigner. And rather adopted and embraced another opinion which considers the assignment of the contract as a complex but homogeneous combination (ensemble) of rights, obligation, prerogatives, privileges, as well as the quality, status and contractual position of the contracting party, namely the assigner. This means that the assignability includes

not only the active and passive elements of the patrimony, but also extends to include the personal traits and prerogatives of the contracting party. Fortunately, this new analysis (analyse renouvelée) of the French jurisprudence has been strongly adhered to and adopted by "the ordinance n° 2016-131 dated February 10, 2016", which has taken fundamentally into account the assignment of the quality of the party or his or her contractual position (la cession de la qualité de contractant u de la position contractuelle),without any violation or prejudice to the doctrine of the relative effect of the contract (le principe de l'effet relatif du contrat). This new idea or opinion of the assignment of the quality of the party or his or her contractual position is considerably different in its nature from the assignment of the right or the debt. Because the quality of the party and his or her contractual position are not classified as elements of the patrimony (éléments du patrimoine). As opposite to rights and obligations which are categorized as active and passive elements of the patrimony subsequently. As far as the situation of the Iraqi civil law from the legal nature of the assignment of the contract is concerned, it can be said that this law does not include absolutely any legal text or provision regulating the assignment of the contract in general, and the legal nature of the assignment of the contract in particular. But most of the legal rules of the assignment of the contract are contained, included or distributed to the legal rules of both the assignment of the right and the assignment of the debt. Although the general rules of both the assignments of the right and debt can bridge the gaps of the insufficiency and the lack of the regulation of the rules of the assignment of the contract, but the researcher shall recommend that the Iraqi legislator regulate and enact some special text and provisions as to the assignment of the contract.

Second Section

The Legal Effects of the Assignment of the Contract in the French New Contract Law Compared with the Iraqi Civil Law

The legal effect of the assignment of the contract in the new French law of contract, after the reform made by "the ordinance n° 2016-131 dated February 10, 2016", can be analyzed into three types of relations: the relation between the assigner and the assignee, the relation between the assigner and the debtor of the assignment (the assigned), and the relation between the assignee and the debtor of the assignment (assigned) as follows:

First Topic

The Relation Between the Assigner and the Assignee

Concerning this legal relation between the assigner and the assignee, the assignment of the contract is considered as a contract concluded between these two parties(41) , in accordance with the above-mentioned first paragraph of the article (1216) of the new French law of contract. This contract will enable the assignee to acquire from the assigner his or her rights, obligation, prerogatives, privileges, as well as the quality, status and contractual position(42), which will be transferred to the assignee. It is to be noted also that the assigner will remain jointly co-obliged in solidarity with the assignee, if the debtor of the assignment (the assigned) does not liberate or exonerate the assigner from these obligations, particularly the fundamental obligation of the fulfillment or execution of the original contract formed between the assigner (creditor) and the debtor of the assignment(43) , in conformity with the first paragraph of the article (1216). It should be noted here that the acceptance of the debtor of the assignment (assigned), will not liberate the assigner from the obligations, unless there is an agreement otherwise

between the assigner and the person subject to assignment. As to the situation of the Iraqi civil code regarding the legal effects of the relation between the assigner and assignee, the main effect is the transfer of the assignable right from the assigner to the assignee with all of its inherent characters and defenses(44). After the assignment becomes enforceable against the debtor. Therefore it will be transferred with all of its qualifications or characters, whether it be civil or commercial. As well as its defenses, so the debtor can set up against the assignee the same defenses which he or she can set up against the assigner. And this relation is also characterized by two fundamental obligations to be performed by the assigner in his or her relation with the assignee(45): the obligation of the delivery, and the obligation of the guarantee(46). The assigner should deliver to the assignee the document or deed of the right, as well as the means of its proving or establishing(47). According to the article (367) of the Iraqi civil code which provides that (The assignor shall deliver to the ssignee the title deed of the subject matter of the assignment and must provide him with the means of establishing this right and any particulars which may be needed to enable him to acquire his right). As far as the obligation of the guarantee is concerned, the assignment can either be made with a valuable consideration or without consideration. If the assignment is made with a valuable consideration, the assigner will not guarantee except the existence of the right assigned at the time of the assignment save where there is an agreement otherwise. And If the assignment is made without a valuable consideration, the assigner will not guarantee even of the existence of the right(48). In conformity with the article (368) of the Iraqi civil law which provides that (1-Where the assignment is for valuable consideration the assignor shall not guarantee

except the existence of the right assigned at the time of the assignment save where there is an agreement otherwise. 2- Where the assignment has no valuable consideration the assignor shall not be guarantor even of the existence of the right). The guarantees can be classified into either legal or conventional. They can also be categorized into personal such as the surteyship, and real like mortgages and real estate securities and their accessories(49).

Second Topic

The Relation Between the Assigner and the Debtor of the Assignment (Assigned)

As far as the legal relation between the assigner and the debtor of the assignment (assigned) is concerned, there should be an express acceptance of the debtor of the assignment (the assigned) in order to liberate the assigner or assigning party from his or her obligations(50). Some contemporary French jurists(51) and scholars think that two types of consent (consentement) must be expressed by the debtor of the assignment (cédé), and known as the double consent (Un double consentement du cédé): The first is the explicit acceptance expressed by the debtor of the assignment (the assigned) in order to liberate or discharge the assigner from his or her co-obligations or joint obligations (obligation solidaire) with the assignee, particularly the fundamental obligation of the fulfillment or execution of the original contract formed between the assigner (creditor) and the debtor of the assignment(52), in conformity with the first paragraph of the article (1216). And the second is the acceptance which the person subject to assignment expresses in order to allow or permit the assignee to replace or supersede the assigner in the relation with the person subject to assignment. In conformity with this legal analysis it seems that the second type of the acceptance is more important than the first,

and an important question should be posed here. Can this second type of acceptance be considered as an essential element of the validity of the assignment, or mere a simple prerequisite required for the enforceability of the assignment of the contract?. It seems obvious from the second paragraph of the article (1216) of the new French law of contract that this type of acceptance can only be considered as a mere condition for the enforceability of the assignment with regard to the person subject to assignment(53). This means that this acceptance is a condition for his or her intervention in the assignment. And the assignment will not be enforceable and produce its effects with regard to this person, unless he or she is notified with the assignment or to have knowledge of it. This second paragraph provides that "This agreement may be awarded in advance, notably in a contract formed between the future assignor and the debtor of the assignment (the assigned), in which case assignment takes effect as regards the debtor of the assignment when the contract formed between the assignor and the assignee is notified to him or when he acknowledges it"(54). As far as the first type of the acceptance is concerned, if the debtor of the assignment (assigned) does not express his or her acceptance to liberate or discharge the assigner from his or her co-obligations or joint obligations with the assignee, particularly the fundamental obligation of the fulfillment or execution of the original contract formed between the assigner (creditor) and the debtor of the assignment(55) , The assigner will remain jointly co-obliged with the assignee(56), and as a guarantor of the obligations of the assignee(57), in accordance with the first paragraph of the article (1216) which provides that "If the debtor of the assignment (assigned) has explicitly consented to it, assignment of contract discharges the assignor for the future. In its absence, and subject to any term to the contrary,

the assignor is liable jointly and severally to the performance of the contract"[58]. It can be added also that the real security (les sûretés réelles) agreed upon to guarantee the debt will remain and continue, if the the debtor of the assignment (the assigned) does not liberate or discharge the assigner. By contrast, if the assigner is liberated or discharged, the agreed upon security can only remain and continue by the acceptance of the assigner[59]. In conformity with the third paragraph of the article (1216) of the new French law of contract, which provides that "If the assignor is not discharged by the debtor of the assignment (the assigned), any securities which may have been agreed remain in place. Where the assignor is discharged, securities agreed by third parties remain in place only with the latter's agreement. If the assignor is discharged, any joint and several co-debtors remain liable to the extent which remains after deduction of the share of the debtor who has been discharged"[60]. As for the Iraqi civil code rules concerning the relation between the assigner and the person subject to assignment, the legal effects of the assignment are determined in two distinctive periods: in the first period before the enforceability of the assignment against the debtor of the assignment (assigned) by notification or acceptance, the assigner is still the creditor, and can dispose of the assignable right with all the types of dispositions[61]. But if the debtor of the assignment (the assigned) pays the debt, he or she shall be relieved and discharged from the debt. This rule has been mentioned in the first paragraph of the article (372) which provides that (the person subject to assignment shall be relieved if he has not accepted the assignment and had paid the debt to the assignor before being notified of the assignment). If the debtor of the assignment (the assigned) is aware at the time of payment of the conclusion of the assignment, but despite this fact pays the

debt to the assigner. He or she will not be relieved and discharged from the debt(62). Because the payment to the assigner with the full awareness of the presence of the assignment, will be considered as a collusion of the debtor of the assignment (the assigned) with the assigner to harm the assignee. This rule has been declaired by the second paragraph of the article (372) which provides that (the person subject to assignment (debtor of the assignment) shall not however be relieved by such payment if the assignee has established that the debtor had been aware at the time of payment of the conclusion of the assignment). In the second period after the enforceability of the assignment against the debtor of the assignment (the assigned) by notification or acceptance, the assigner will become a third party against the debtor of the assignment (the assigned), and will not be able to demand the payment from the debtor of the assignment (the assigned). And will not also be able to dispose of the assignable right with all the types of dispositions, and even reassign it to the second assignee by sale of gift (63).

Third Topic

The Relation Between the Assignee and the Debtor of the Assignment (Assigned)

In the relation between the assignee and the debtor of the assignment (the assigned), the assignee can set up against the debtor of the assignment the defenses which are inherent in the debt itself, such as nullity, the defence of non-fulfillment, termination of the contract, or the right to set off related debts. But he cannot set up against him personal defenses closely related to the personality of the assignor(64). According to the second paragraph of the article (1216) of the new French law of contract which provides that "The assignee may set up against the debtor of the assignment (the assigned) the defenses inherent in the debt

itself, such as nullity, the defence of non-fulfillment, termination or the right to set off related debts. He cannot set up against him defenses personal to the assignor"[65] . This paragraph obviously indicates that the the debtor of the assignment (the assigned) can set up against the assignee all the defenses he or she can set up against the assigner[66]. But it can be inferred from from the argument au contrario that the debtor of the assignment (the assigned) can set up against the assignee the personal defenses closely related to the personality of the assignee[67], rather than the personality of the assignor[68]. In the Iraqi civil code the legal effects of the relation between the assigner and the debtor of the assignment (the assigned) can also mark two important periods: in the period before the notification or the acceptance of the assignment, it will be unenforceable against the debtor of the assignment (the assigned), and the assigner will remain the creditor of the debtor of the assignment (assigned), because of the unenforceability of the assignment[69]. In the second period after the notification or the acceptance of the assignment, it will be become enforceable against the debtor of the assignment (assigned). The assignable right will be transferred from the assigner to the assignee, and the debtor of the assignment (the assigned) can set up against the assignee the same defenses he could set up against the assigner[70]. According to the article (366) of the Iraqi civil code which provides that "The debtor of the assignment (assigned) may set up against the assigne the defences which he might set up against the assignor at the time when the assignment became enforceable against him; he may also invoke the defences which are strictly personal to the assignee".

Conclusions

The conclusion of this study includes both the findings and recommendations and as follows:

First: Findings: The ensuing findings have been reached:

1- The New French law of the contract, amended by the ordinance n° 2016-131 dated February 10, 2016 regulated the assignment of the contract, and defined it as as an agreement by which a party to the contract, the assignor, may assign his or her status, quality or contractual position as party to the contract to a third party, the assignee, with the agreement of his own contractual partner, the debtor of the assignment (person subject to assignment).

2- The assignment of the contract in the new French contract law is featured by many distinctive characteristics, the most significant of which are: the wide-spread application of this type of assignment on a wide variety of contracts. It is not only concerned with transferring rights and debts, but also the quality of the contracting party, particularly the assigner, and his or her contractual position, prerogatives and privileges such as judicial actions.

3- The assignment of the contract should satisfy the formal requirements, necessitating its validity, in conformity with the third paragraph of the article (1216) of the new French law of contract.

4- One of the most important findings this study has reached is that the French law regulated the legal assignment of the contract, In some particular cases in which the assignment is authorized by the law or express legal texts, rather than by the agreement or mere autonomy of the will of the parties.

5- There are three exception to the assignability of the contract according to the French new law of contract: 1- the contracts based on personal considerations (intuitus personae), or taking into account the personality of the contracting party. 2- the contracts which are non-assignable by the operation of the law. 3- the agreement of the contracting parties not to assign their contract.
6- The modern attitude of the French jurisprudence considers the assignment of the contract as a complex but homogeneous combination (ensemble) of rights, obligation, prerogatives, privileges, as well as the quality, status and contractual position of the contracting party, known as the assigner.
7- Another important findings this study has reached is that if the person subject to assignment does not express his or her acceptance to liberate or discharge the assigner from his or her co-obligations or joint obligations with the assignee, particularly the fundamental obligation of the fulfillment or execution of the original contract formed between the assigner (creditor) and the debtor of the assignment (assigned), The assigner will remain jointly co-obliged with the assignee, and as a guarantor of the obligations of the assignee, in conformity with the first paragraph of the article (1216).

Second: Recommendations: After indicating the findings and outcomes of the study, the author put forward the ensuing recommendations:

1- The researcher recommends that the Iraqi law-maker make use of the the first paragraph of the article (1216) of the new French contract law, and adopt the principle of the assigner's co-obligations or joint obligations with the assignee, if the

debtor of the assignment (person subject to assignment) does not express his or her acceptance to liberate or discharge the assigner from his or her co-obligations or joint obligations with the assignee, particularly the fundamental obligation of the fulfillment or execution of the original contract concluded between the assigner (creditor) and the person subject to assignment (debtor), The assigner will remain jointly co-obliged with the assignee, and as a guarantor of the obligations of the assignee,. Therefore the author suggests that the ensuing text be adopted by the Iraqi law-maker of the Iraqi civil law: (The assigner will remain jointly co-obliged with the assignee, if the person subject to assignment does not express his or her acceptance to liberate or discharge the assigner from his or her co-obligations or joint obligations with the assignee, particularly the fundamental obligation of the fulfillment or execution of the original contract formed between the assigner (creditor) and the debtor of the assignment).

2- The author also recommends that the Iraqi law-maker adopt the doctrine of the legal assignment of the contract, and permit in some particular cases the assignment to be authorized by the law or express legal texts, as well as by the agreement or mere autonomy of the will of the parties. Therefore the author suggests that the ensuing text be adopted by the Iraqi law-maker of the Iraqi civil law: (if necessary the assignment of the contract can be authorized by texts of laws in some particular cases. as well as by the agreement or mere autonomy of the will of the parties).

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([16]) François Terré, Philippe Simler, Yves Lequette, François Chénedé. ibid. p.1740.
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([19]) Article (1216/3) "La cession doit être constatée par écrit, à peine de nullité".

([20]) Stephanie Porchy-Simon, op Cit. p.548.

([21]) Stephanie Porchy-Simon, ibidt. p.548.

([22]) Philippe Malaurie et Laurent Aynès. Droit Civil. Les contrats spécieux. DEFRENOIS, Edition juridique associées. 2003. p.52.

([23]) Annick Batteur. Droit Civil Des Obligations, Les Annales Du Droit. DALLOZ. . 2017. p.137.

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(25) Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, Part two, op. Cit. P.239.

([26]) Stephanie Porchy-Simon, op Cit. p.547.

([27]) François Terré, Philippe Simler, Yves Lequette, François Chénedé. op Cit. p.1741.

([28]) Article (1216/3) "Un contractant, le cédant, peut céder sa qualité de partie au contrat à un tiers, le cessionnaire, avec l'accord de son cocontractant, le cede".

([29]) Alain Bénabent. op Cit . p.117.

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([51]) François Terré, Philippe Simler, Yves Lequette, François Chénedé. op Cit. p.1744.
([52]) Stephanie Porchy-Simon, op Cit. p.546.
([53]) John Cartwright, Stefan Vogenauer & Simon Whittaker. Reforming the French law of Obligations, Comparative Reflections on the Avant-Projet de Reforme du Droit des Obligations et de la Prescription (the Avant-projet catala) . Hart Publishing Oxford. 2009. p.218.
([54]) Article (1216/2) "Cet accord peut être donné par avance, notamment dans le contrat conclu entre les futurs cédant et cédé, auquel cas la ession produit effet à l'égard du cédé lorsque le contrat conclu entre le cédant et le cessionnaire lui est notifié ou lorsqu'il en prend acte".
([55]) Stephanie Porchy-Simon, op Cit. p.546.
([56]) François Terré, Philippe Simler, Yves Lequette, François Chénedé. op Cit. p.1744.
([57]) François Terré, Philippe Simler, Yves Lequette, François Chénedé. ibid. p.1745.

([58]) Article (1216/1) "Si le cédé y a expressément consenti, la cession de contrat libère le cédant pour l'avenir. A défaut, et sauf clause contraire, le cédant est tenu solidairement à l'exécution du contrat".

([59]) François Terré, Philippe Simler, Yves Lequette, François Chénedé. op Cit. p.1745.

([60]) Article (1216/3) "Si le cédant n'est pas libéré par le cédé, les sûretés qui ont pu être consenties subsistent. Dans le cas contraire, les sûretés consenties par le cédant ou par des tiers ne subsistent qu'avec leur accord. Si le cédant est libéré, ses codébiteurs solidaires restent tenus déduction faite de sa part dans la dette".

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([65]) Article (1216/3) "Le cessionnaire peut opposer au cédé les exceptions inhérentes à la dette, telles que la nullité, l'exception d'inexécution, la résolution ou la compensation de dettes connexes. Il ne peut lui opposer les exceptions personnelles au cédant. Le cédé peut opposer au cessionnaire toutes les exceptions qu'il aurait pu opposer au cédant".

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