PERIODICA
Journal of Modern Philosophy, Social Sciences and Humanities
ISSN NO:2720-4030 Volume 16, March, 2023

Legal Basis for the Application of the Law of Will in Contractual Obligations

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A B S T R A C T

Despite the common circulation of the law of will, it sparked a jurisprudential debate about the legal basis on which the law of will was based, so there are different theories of jurisprudence as a basis for the application of the law of will in contractual obligations, including this personal theory and objective theory.

A R T I C L E I N F O

Received: 1st January 2023
Revised: 1st February 2023
Accepted:6th March 2023

K E Y W O R D S:

1. Introduction.

The jurisprudence had different theories on the basis of the law of the law of the will within the scope of contractual obligations, and these theories are the personal theory was this theory considers the contractual obligations as stand-alone exchanges independent of any national legal system or international convention. The contractual obligation is sufficient by itself statement of the obligations of the parties and their rights, either objective theory looks at the will of the contractors that they find their basis in the binding force of the law, which granted this will the right to choose the law applicable to contractual obligations Under a conflict rule.

2- The problem of Study.

The problem of research revolves around knowing what is the legal basis for the law of will within the scope of contractual obligations?

3- Personal Theory.

The personal theory relied on its own concepts regarding the will of individuals in choosing the law applicable to contractual obligations to the principle of the authority of the will, this theory considers international contractual obligations as stand-alone actions independent of any national legal system or international agreement, the contractual obligation is sufficient by itself to indicate the obligations of the parties and their rights without the need for the intervention of any specific legal system, the will of the parties is free to choose the law and there is no need to rely on a specific law in order to justify its existence, therefore, the jurisprudence in favor of this theory, including the Belgian jurist Laurent that the parties when choosing the law that governs their contractual obligations is a material choice that merges within the terms of the original contract to become provisions just contractual terms that the parties have the ability to agree on what is different even if they are characterized by the nature of the matter, so the international contract remains free, that is, without a law that controls it, which is thus taking out contractual obligations of an international nature from the field of conflict of laws (Shalaby and El-Shafei, 2017, p. 242-277).

According to this theory, the contractual obligation between two persons, one of whom is French and the other is of Dutch nationality, in order to export goods from France to the Netherlands, is a contract of an international character that does not lead to the effects of the problem of conflict of laws, as both French law and Dutch law do not claim that this contract is subject to their authority, so this contractual obligation escapes the provisions of the law to be subject to the law of the will of the parties. However, there is no obstacle according to this theory to the two contractors that prevents them from choosing one of the laws of the countries mentioned above, provided that it remains known that the choice for one of these laws was not based on a rule of conflict of laws rules, but rather the choice was based on the law of will (Al-Mutalqa, 2011, p. 143).

3.1. The Most Important Consequences of this Theory.

It does not restrict the will of the parties to the need for a link between the law of will and the contract concluded between the parties, it is possible for the parties to the contractual obligation to choose a specific law that has been famous for setting model contractual conditions for a certain type of contractual obligations, for example of these laws is the English law, it allows the parties to choose the law applicable to the contract even if there is no link between the law of will and the contract concluded between the parties (Kahit, 2011, p. 30).

According to this theory, the law of will merges into the original contract and is like contractual clauses, and this order that gives individuals the ability to exclude jus covens, and even in the event of amendments or changes in this law, these changes or amendments are not subject to the contractual obligation concluded between the parties and this is what is claimed by the time freeze in the contract or the condition of legislative stability, even if these changes enjoy the status of an order, the supporters of this view went that the parties have chosen the applicable law. They agreed to this law at the time of the conclusion of the contract, so it is not fair to apply to them a law after an amendment that the parties are not aware of, because if these changes and amendments in the law of will apply to the contracting parties, it will lead to surprising the parties with laws that they have not seen before and thus harm them (Al-Majeed, 1991, p. 83).

The result of this merger is to strip the peremptory rules of this capacity and consider them as contractual clauses within the terms of the original contract, and thus prevents the invalidity of the contractual obligation, it is illogical that one of the clauses of the contract, i.e. (the law of the merged will) leads to its invalidity, the will of individuals cannot contradict itself, saying the opposite is that the will of the parties has wanted in advance to invalidate the contract, and the owners of this theory go that this result results only in the case of choosing the law by the parties explicitly or Implicitly, it is difficult to merge the law of will into the contract when there is no express and implied will of the parties, because the law governing the contract will be the law that appointed the judge who decides on the dispute, not the law of will(Al-Anbari, 2017, p. 53- 88).

3.2. Criticisms of this Theory.

The issue of granting individuals the freedom to choose the law applicable to their contractual obligations would not deprive the law of will of its own legal nature, to be just a condition of the original contract, but that the law retains its legal capacity, so saying that the contract is not subject to any law, but derives its strength from its texts and clauses certainly leads to its instability, then it is not possible to imagine that there is a contractual obligation that is not subject to any law (Al-Mujahid, 2001, p. 56-89). It is also criticism that the owners of the personal theory confirmed the agreement of individuals on the condition of legislative stability in terms of time because it is an essential element for the stability of contractual ties, it leads to the legal security of international contractual obligations, but this result has been severely criticized by jurisprudence because giving individuals the possibility of agreeing on the condition of the time freeze of the law will is a violation of the sovereignty of the state that has overcome the will of the parties to choose its law to apply to their contractual obligations, it cannot be said that the will has the authority In addition, the agreement of the parties to the time freeze of the law makes the contractual obligation not subject to any law and becomes free from any law governing it, in addition to that the non-application of subsequent legislative amendments to the completion of the contract leads to the application of rules that do not exist (Al-Rifai, 2011, p. 163).

Also, one of the criticisms of this theory is the idea of the integration of the law of will into the international contractual obligation adopted by the owners of the personal theory cannot be supported because

to say so leads to stripping the law of will of its nature as a law that has binding force, and then how can individuals in a contract be allowed to reduce the mandatory character of the law of will chosen by them under the pretext of integration, while they adhere to that binding character of the law and claim acts of rule rules that law if it comes to their own interests, so the parties' choice of the law applicable to contractual obligations is not based on the absolute authority of the will. Rather, the rule of law is the basis for it, the will be just one of the attribution controls referred to by the rule of conflict of laws in the judge's state, which guides to the law that governs the contract, the law of will is not applied as contractual clauses within the terms of the original contract as the owners of the personal theory went, but is applied to as a law that has a mandatory character, and this means that the will of the parties may not violate the peremptory rules in the law of will, otherwise the contract is considered invalid (Sadiq, 2014, p. 108-156).

3.3. Judicial Applications in Support of this Theory.

One of these applications is the judgment of the French Court of Cassation in 1910 on the lawsuit known as "AmericanTrading Company" and the facts of this lawsuit are summarized in a ship charter contract concluded in New York between a Canadian merchant and an American carrier regarding the transfer of goods from America to France, and the charter contract included a condition stating that the Canadian carrier is exempted from liability incurred, and after the arrival of the goods to the port (Quad Loup) in France, it became clear that there was damage to the goods, and when the dispute arose between the parties and was presented Before the French Court of Cassation, the carrier submitted a plea of non-liability contained in the charter party contract, while the carrier submitted a plea that the contract is expressly subject to American law issued in 1893, which determines the invalidity of any condition that provides for exemption from liability, but the court did not respond to this plea and decided the validity of the clause contained in the contract, which exempts the carrier from the liability resulting from it, and the merits of the court's decision (Yaqoot, 2004, p. 100).

1. The law applicable to the contract, whether with regard to its composition, effects or conditions, is the law adopted by the parties.
2. It results from the spirit and text of the agreement itself, and from the intention of the parties involved did not intend to submit to American law except for what they did not expressly agree upon in the charter contract for the charter of the ship", according to the court decision mentioned above, two things are clear: the first thing is that it spoke explicitly about the law of the contract, which is what the parties wanted, and the second thing is to acknowledge the validity of the exemption clause from liability as long as the parties expressly agreed on it in the contract "binds the parties by itself, and to refer to American law, it must the interaction of these two orders indicates that the law of will has merged into the contract and has become one of its original clauses, even if they involve exemption from liability.

As for the position of the Iraqi legislator, he certainly rejects this theory because it does not consider the law of will as legal rules of a mandatory nature, so the parties can violate these mandatory rules and consider them as contractual clauses that merge into the terms of the original contract, the original contract, and what confirms the Iraqi legislator's rejection of this theory is Article Thirty-Two of the Iraqi Civil Code (Al-Shafei, 2015, p. 86-104).

4- Objective Theory.

This theory is the other legal basis for the application of the law of will in contractual obligations, and the origin of this theory goes back to the German jurist "Savigny", but it developed and grew at the hands of Professor "Batifol", the will of the contractors according to this theory finds its basis in the binding force of the law, which granted this will the right to choose the law applicable to contractual obligations under a rule of conflict in the state of the judge who adjudicates the dispute, and thus the invalidity of all conditions or clause included in the contract violates the peremptory provisions of this law (Khalil, 2002, p. 127).

4.1. Objective Theory Results.

The non-domination of the parties to international contractual obligations over the law of will and its conversion to mere contractual clauses that merge within the terms of the original contract, so the law retains its legal capacity, i.e. the law of will governs the international contract as a law and not a clause within the

clauses of the contract, and this results in the parties not violating the peremptory rules in the judge's state, so the judge who adjudicates the dispute before him deals with the provisions of the law of will as legal texts that have a binding character.

Also, one of the consequences of this theory is that international contractual obligations are subject to any amendments or changes to the law of will, as the parties cannot agree on the condition of legislative stability or the so-called time freeze of the law when the legal texts of the law of will are characterized by a peremptory character, according to this theory, the parties have the right to agree on the condition of legislative stability in one case, which is when the legal texts of the law of will have a complementary or interpreted character (Salameh,1988, p. 95).

In addition, the law of will must be closely related to the international contract, and jurisprudence differed about the nature of this link between the law of will and the international contract, some of them intended this link to be a material link between the law of will and the contract and derives this link from one of the elements of contractual links such as the nationality of the parties or their domicile or the place of conclusion or implementation of the international contract, and others intended the link between the law of will and the international contract is that the parties have a legitimate interest in choosing this law, and in In the absence of such a link between the law of will and the international contract, this choice of law is a fraud towards the law (Yaqoot, 2000, p. 81-143).

The most important consequence of this theory is that the will of the parties to the contractual obligation is just a tool to focus the international contract in a state, and it does not choose the law that governs the contract, the parties do not choose a specific law in itself binding on the judge who adjudicates the dispute, but they focus the contract concluded between them in a particular country as this focus of the contract represents a center of gravity, the will of the parties, although it has determined a specific law in itself, it is considered just a will to localize the contract or a revealing will The place of the contract based on the circumstances and circumstances surrounding the contract, and where the law expressly assigned by the parties does not correspond to the actual focus of the contract, the judge is obliged to invalidate this choice of law and to seek the actual focus of the contract that represents a center of gravity through the circumstances surrounding it in order to find the law applicable to the contract, But if the parties did not specify the law of will explicitly, the judge is looking for their implicit will, avoiding the application of a law that leads to the invalidation of the international contract, the will of the parties to international contractual obligations according to this theory cannot choose the law that governs the contract, but only its role is to focus the international contract in a particular state, that is, it reveals the actual location of the center of gravity of the contract in order to determine the applicable law (Yaqoot, 2004, p. 100).

One of the results is the rejection of the idea of assignment by which the owners of the objective theory agreed with the owners of the personal theory, but they differed in the legal basis for their rejection of the idea of assignment in international contractual obligations, the owners of the personal theory justify their rejection of the assignment by assuming that the choice of parties to the law applicable to international contracts is based on a rule of conflict of laws and not based on the principle of absolute authority of the will, as for the owners of the personal theory, they justify their rejection of the referral as it contradicts in itself with the attribution controls contained in the conflict rule in the state of the judge's law, which gave the parties the right to choose the law that governs their international contractual obligations, so consulting the rule of attribution in the law of will certainly lead to the subjection of the international contract to a law other than the law to which the will of the parties was directed (Al-Anbari, 2017, p. 53-88).

4.2. Criticisms of this Theory.

The focus itself is overcome by confusion and ambiguity, it may mean an actual and realistic circumstance that calls for a review of all the elements that have a link to the international contract in various countries to choose one element of them through which the law of a particular country is determined to govern the contractual relationship, the focus here is a major reason for the jurisdiction of the law of this state, and it may also mean the legal links through which a particular state is linked to international contractual obligations represented in the jurisdiction of its law to govern the contractual relationship, the idea of focus can be revealed Easily in a certain type of contract as in contracts related to real estate, However, there are international

contracts whose concentration is difficult to detect in a particular place, as in the case of rights that relate to trademarks or patents (Al-Shafei, 2015, p. 86- 104).

Also, that it cancels all the role of the will of the parties in the choice of law, the will according to this theory does not strengthen the right to choose the law, but rather concentrates the contractual obligation in a specific place and thus the role of the will is just a reserve or secondary role or a tool to localize contractual obligations, so there is no lesson in differentiating between the explicit choice of the law and the implicit choice because the will in the foundations does not have the right to choose, and give the authority to the judge to modify the choice of parties to the law when the choice of parties is not compatible with the actual focus this leads to a breach of the predictions of the parties and legal insecurity because the parties to the international contractual obligation are puzzled and surprised when they know that their international contractual relations when determining the law applicable to them are limited only to the concentration of the state contract in the territory of a particular state (Sadiq, 2014, p. 108-156).

In addition, one of the criticisms that was also directed at it is that the idea of assignment is completely excluded in the principle of the law of will, so there is no respect for the will of the parties if the idea of assignment is applied, because this will always lead to the application of a law other than the law of will that was chosen explicitly or implicitly by the parties, the theory of concentration ignores a basic rule whose content is that the conflict-of-laws rule is what gives individuals the power to choose the law that governs their international contractual obligations, and to say that the judge is given the power to choose a law other than the law chosen by the parties certainly leads to a derogation from the right to grant it and approved by the legislator (Shalaby and El-Shafei, 2017, p. 242-277).

4.3. Judicial Applications to Support this Theory.

The judgment of the French Court of Excellence in 1960 on a case related to a commercial representation contract concluded in France between two people, one of whom is a French commercial representative and the other is a Czechoslovak company, so the commercial representation contract included a condition that the French commercial representative represent the company and sell its products in France, and the parties agreed explicitly and clearly that Czechoslovak law is the one that governs the commercial representation contract, but when the dispute arose between the parties and was presented to the French judiciary, it was applied The French Court of Cassation ignored the express will of the parties, reasoning that French law is the place of performance of the contract and in which the main elements of the contract were concentrated (Al-Mujahid, 2001, p. 56-89).

As for the position of the Iraqi Civil Code on this theory, it did not take the theory of objective focus in the absence of the express will of the parties, but rather emphasized the adoption of the rule of prior attribution to the contracting process, which is the common home of the contractors or the place where the contract was concluded (Yaqoot, 2000, p. 81-143).

Conclusion

After completing this study, we reached a number of conclusions and proposals as follows:

First: Results.

1. The personal theory of the freedom of individuals to choose the law applicable to contractual obligations was based on the principle of the authority of the will, as this theory considers international contractual obligations as stand-alone acts independent of any legal system.
2. The objective theory of the freedom of individuals to choose the law applicable to contractual obligations was based on the binding force of the law that granted this will the right to choose the law applicable to contractual obligations under a rule of conflict in the judge's State.

Second: Recommendations.

1. We suggest to the Iraqi legislator to state his position clearly and explicitly on the legal basis for the entry of the law of will within the scope of contractual obligations.
2. We suggest that the legislator give the greatest amount of freedom to individuals in choosing the contractual bond that is binding on them which is tantamount to the binding force of the law that gives this right to choose the law applicable to contractual obligations under the rule of conflict in the state of the judge.

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