

Contrariness of Laws in Contractual Obligations and the Role of the Will in Determining the Applicable Law in the Jordanian Civil Law

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Abstract

In this research, the researcher dealt with the issue of contrariness of laws in contractual obligations and the role of the will in determining the applicable law in the Jordanian civil law. In addition, contrariness of laws requires several conditions to exist, including the legal relationship of a foreign element, the acceptance of countries to apply foreign law before their courts, and the difference in legislation between countries. The Jordanian private international law, like most of the world's legislation, has subjected the rules of attribution related to contractual obligations to the law chosen by the contracting parties, which is known as the law of will or the principle of the power of will, and the Jordanian legislator has subjected contractual obligations to the law of the country in which the joint home of the contracting parties is located if they are united. But in case they differ, the obligations are subject to the law of the country in which the contract was made. This means that the contracting parties are free to choose the law applicable to the contractual relations as soon as the offer is linked to the acceptance in the agreement concluded between the contracting parties when the terms and conditions of the contract are fulfilled.

Keywords: contrariness of laws, contract, will, applicable law

1. Introduction

Private international law is one of the branches of domestic law that includes a foreign element. It aims to regulate the relations of individuals, find solutions to contrariness of laws, determine the internationally competent court, and organize and implement foreign judgments. Private international law is the only reference for resolving any conflict that contains a foreign element, which cannot be subject to the laws relating to internal relations. These civil-legal relations with a foreign element go beyond the borders of the state by belonging to the element of a foreign state. As a result of the development of means of communication, transportation, commercial and industrial exchanges and tourism relations, this led to the existence of commercial exchanges between individuals from different countries. Therefore, any dispute that will arise regarding those relations, of course, will be governed by the rules of private international law, to arrive at defining the applicable law and thus determining the competent court.

Accordingly, the rules of attribution related to contractual obligations have been subjected by the Jordanian legislator in private international law, and like the majority of legislation in the world, to the principle of the authority of the will, that is, the law that is chosen by the contracting parties. The Jordanian legislator specified for contractual obligations an independent attribution rule in Article 20 of the Jordanian Civil Code, that is, the law of the country in which the contracting parties have a common domicile. This is unless the contracting parties agree otherwise.

1.1 Significance of the Research

The importance of this research comes from the fact that it deals with the issue of contrariness of laws in contractual obligations and the role of the will in determining the applicable law in the Jordanian civil law. And we know that contrariness of laws means the contention of two or more opposing laws for two or more countries regarding a ruling or legal relationship that includes in one of its elements a foreign element. Contractual obligations mean those obligations arising from an international contract, while an international contract is that contract that includes

a foreign element, whether this element relates to its parties, objectives, subject matter, subject, or place of implementation. The international contract is subject to the law of the contracting parties. Accordingly, the rule of the will of the contracting parties in international agreements has been established in the legislation of many Arab and foreign countries, and the legislator has also adopted it in the Jordanian Civil Law No. 43 of 1976. The international contract can be defined as a contract linked to legal systems belonging to different countries aimed at achieving profit and speculation or transfer of services and funds across borders or achieve the interests of international trade. Also, the law has become accustomed to determining the law applicable to the contract by the direct will of the contracting parties or the indirect will that can be deduced from the circumstances surrounding the contract.

1.2 Problem of the Research

The problem of the study lies in the contrariness of laws in contractual obligations and the role of the will in determining the applicable law in Jordanian law. We also note that through the text of Article (20) of the Jordanian law, which applies to contractual obligations, firstly, the law of the country in which the contracting parties have the same homeland, provided that the homeland is united, and secondly, in the case of a difference in the homeland of the contracting parties, the law of the country in which the contract is located is applied. And thirdly, the legislator gave complete freedom to the contracting parties based on the principle of the authority of the will when it mentioned in the legal text: "This is unless the contracting parties agree otherwise." Fourthly, it made an exception, as it stated in the second paragraph of Article (20) of the Jordanian Civil Code: "The law on the location of the property is the one that applies to the contracts concluded in the matter of this property." Through the legal text, contracts concluded regarding real estate, as well as real and personal rights that are received on the property, are excluded, as they are subject to the law of the location of the property, and are not subject to the law of will, i.e. the law of the contract.

2. Methodology

The descriptive analytical approach was followed by analyzing the texts of the Jordanian civil law and the relevant judicial rulings, in order to get acquainted with the legal texts related to the study and analyze them to clarify their words and objectives, by referring to the judicial rulings issued in this regard, to find solutions and elicit them from the rulings of the judiciary and their opinions in this aspect.

3. The First Topic: The Law Applicable to Contractual Obligations

Since the Old Italian school, the contract has been governed by the law of the place of the conclusion, both with regard to its form and subject matter. The proponents of this school have justified this by saying that the implicit will of the parties made the law of the place of the conclusion the one that is competent in the rule of the contract. This matter remained in this case until the sixteenth century, when the French professor Demoulin decided that the parties can choose the law governing the subject of the contract, and as for the form of the contract, Demoulin kept it subject to the law of the place of the conclusion.¹ Like the majority of legislation in the world, Jordanian private international law has subjected international contracts to the principle of the authority of will, that is, to the law chosen by the contracting parties, which is called the law of will. The same rule applies to contracts concluded between the state and the individual, even if there is a tendency to remove them from the scope of the internal legislation of the states and to allow the parties to subject them either to public international law or the law of a state that is included in the contract itself or to both.²

The legal action is a manifestation of the will in order to achieve legal effects, while the contractual obligation is a legal situation that comes from the contract and in which a person has to do a specific act or not do a specific act of financial value. In the field of contrariness of laws, it means contracts tainted with a foreign element, in which any dispute that arises. It refers to the rules of attribution in private international law to determine the law to be applied to the dispute.³

Section one: Law applicable to international contracts

Article 20 of the Jordanian Civil Law No. 43 of 1976 stipulates the following:

1- The law of the state in which the contracting parties are located shall apply to contractual obligations, if they

¹ Amin Dawas, Conflict of Laws in Palestine, Dar Al-Shorouk, 2001, p. 137.

² Muhammad Al-Masry, The Concise in Explanation of Private International Law, A Comparative Study of Arab Legislation and French Law, House of Culture for Publishing and Distribution, 2016 p. 174.

³ International Jurisdiction and the Execution of Foreign Judgments, A Comparative Study, Fourth Edition, Wael Publishing House, 2005, p. 209.

belong to the same land. If they differ, the law of the state in which the contract was concluded shall apply, unless the contracting parties agree otherwise.

2- The law on the location of the real estate is applicable to the contracts concluded concerning such a real estate.

We note in the above text the use of the expression “applies to contractual obligations” without addressing non-contractual obligations, since these obligations arise from a unilateral will have a special attribution rule according to the text of Article (22) of the Jordanian Civil Code, which states:

1- Non-contractual obligations are subject to the law of the country in which the commitment was signed.

2- The provisions of the preceding paragraph do not apply to the obligations arising from the harmful act on facts that occur abroad and they are lawful in the Hashemite Kingdom of Jordan, even if they are considered illegal in the country in which they occurred.

There is no objection to the Jordanian legislator applying any rule of attribution related to any contractual obligation to any obligation related to the unilateral will in accordance with the nature of this obligation, except with regard to the existence of two identical wills for the establishment of the contract, according to the provisions of Article No. 251 of the Jordanian Civil Code, which states: “1- The provisions relating to contracts shall apply to unilateral action, except for those related to the necessity of two identical wills for the emergence of the contract. This is unless the law stipulates otherwise. 2- The offer in contracts remains subject to its own provisions.”

The second section: The concept of international contract

An international contract is a contract related to legal systems belonging to different countries and aims to achieve profit and speculation or transfer services and funds across borders or achieve the interests of international trade. It is up to the judge to determine the concept of the international contract and the extent to which it relates to the interests of international trade according to the circumstances of each case separately, based on the subject of the contract and its personal elements.⁴

The Jordanian legislator has followed the rule that the contract is subject to the law of the will, according to the text of Article 20/1 of the Jordanian Civil Code mentioned above. We note from this text that the Jordanian legislator is accustomed to determining the law applicable to the contract by the direct will of the contracting parties as a general rule or by their implicit will, which the judge seeks and discovers from the circumstances of the contract when the explicit will fails. We also note that the Jordanian legislator did not take into account the idea of the assumed will of the contracting parties, which requires that the judge applies the law that presumes the desire of the contracting parties’ will to implement its provisions, and which the contracting parties would have chosen if it became clear that it was necessary to choose a specific law.⁵

Section Three: Determining the Law Applicable to the Contract

Since the theory of the Italian school in the Middle Ages, which developed solutions to conflict of laws, this theory distinguished between the subject of conduct and the form of conduct and subject it to the law of the place of the conclusion of the act, i.e. the place of the conclusion of the contract, a number of legislations have been made to solve the problem of contrariness of laws. In this context, Article No. 21 of the Jordanian Civil Code stipulates “Contracts between people are in their form according to the law of the country in which they took place, and they may also be subject to the law that applies to their substantive provisions. They may also be subject to the law of the contracting parties’ homeland or their common national law. Through the text, it becomes clear to us that there are four attribution controls to determine the law applicable to the form of disposition, and this is by way of choice, knowing that this text does not apply to the form of a will, for example, and according to the expression at the beginning of the text of Article (20) “Contracts between neighborhoods.” Moreover, the second paragraph of Article (18) of the Jordanian Civil Code stipulates: “2- The law of the testator at the time of the bequest or the law of the country in which it took place applies to the form of the will, as well as the judgment in the form of all other actions added to after death.”

The first law mentioned in the text to govern the form of the contract is the law of the place of concluding the contract, as this is a traditional rule in private international law. This rule aims to facilitate contracting parties and enable them to conclude contracts wherever they are, because it makes it easier for them to know the form required by the law of the place of conclusion. Even if they know the form determined by another law, they cannot fulfill it

⁴ Edward Eid, *Encyclopedia of Civil Procedure, Evidence and Implementation*, Beirut, Part 12, 1989, p. 37.

⁵ Muhanad Ahmed Al-Sanuri, *Private International Law, study Comparison in Conflict of Laws*, Wael Publishing House, first edition, 2011, pp. 171, 170.

in the country of conclusion because the law of the country of conclusion is not known to such a form.⁶

4. The Second Topic: The Law Applicable to the Form of Legal Actions

Legal disposition requires a rule in which the will of the contracting parties is set, called the form of legal disposition. The Jordanian legislator singled out the form of legal action with the rule of attribution included in Article 21 of the Jordanian Civil Code.

A. The law applicable to the form of contracts:

The form means the framework in which the will is represented, that is, its manifestation to the outside world, or the mold in which the element of consent is represented in the contract. The legislation of some Arab countries subject to the form of legal actions is governed by four legal controls: the law of the country in which the legal act was concluded, the law that regulates its substantive provisions, the law of the homeland of the joint contractors, and the common national law of the contractors. The Jordanian Civil Code does not go beyond the framework of these legislations, where Article 21 of it states the following: "Contracts between people in their form are subject to the law of the country in which they were made, and may also be subject to the law that applies to its substantive provisions, as well as the law of the contracting parties' homeland or their national law joint".⁷

Section one: The law of the country of the conclusion

Most contemporary jurists of private international law agree that this rule is based on practical considerations:

-Facilitating contractors by allowing them to conduct their actions in a local manner. There may be embarrassment in obligating the contracting parties to follow the form established in the law of their joint nationality or in their homeland, and it may reach the extent that it is not possible to proceed with the act either because one of the contracting parties is ignorant of the form prescribed in these two laws or because the two parties to the contract differ in nationality. It may happen that the foreign legislator does not take into account the form prescribed in the contracting nationalities law.

-The adoption of the local form means the necessity of reassurance about legal actions in terms of form, and then the provisions of local law related to this form are dictated by the necessities of civil security.⁸

- The formal conditions reflect morals and conscience in the state. The civilized state has the less formal requirements, and the underdeveloped state, in which there is no security and trust, the formal procedures are more necessary and burdensome, and this imposes the subordination of the form of conduct to the country of its conclusion.⁹

-The law of the place of concluding the contract is either between those present in the same place, i.e. the union of acceptance in the contract council between the seller and the buyer in the sale contract. The contract may take place between the parties in two different places so that the offer is in one state and the acceptance is in another. Article No. 101 of the Jordanian Civil Code mentions the following: "If the two contracting parties do not join at the time of the contract in one sitting, the contract shall be considered concluded in the place and at the time in which the acceptance was issued, unless there is an agreement or a legal text stipulating otherwise." Therefore, the rule that the form of conduct is subject to a law is considered an optional rule in most of the world's legislation

B. The law governing the subject matter of the contract

The contracting parties have the right to agree that their contract shall be subject in terms of form to the law governing the subject matter of the contract. Under this rule, the contracting parties have the right to subject their contract in terms of form to the law that governs the subject matter of the contract. Moreover, the jurisdiction of the subject law is closer to the nature of things and is guaranteed to achieve the unity of the law that applies to the subject of the contract to govern its form and determine the applicable law.¹⁰

C. The Law of the Common Homeland of Contractors:

The law agreed upon between the parties is not the dominant rule in all cases, but the second alternative is the law of the common homeland of the contracting parties, given that the supposed will of the two parties has gone to the application of the law of their common homeland as it is known to each of them, and it represents a practical

⁶ Amin Dawas, Conflict of Laws in Palestine, Dar Al-Shorouk, 2001, p. 151.

⁷ Abdul Hakim Atrush, Private International Law, in the Hashemite Kingdom of Jordan, Conflict of Laws and International Jurisdiction, Modern Book World, Irbid, Amman, 2017, p. 182.

⁸ Ibid, P. 183.

⁹ International Civil Laws and Pleadings, Dar Al-Nahda Al-Arabiya, Cairo, 2008, p. 989.

¹⁰ Ibrahim Ahmed Ibrahim, Private International Law, Center for Foreigners and Conflict of Laws, Part One, Cairo, 1992, p. 568.

solution and a middle ground.¹¹

Accordingly, if the work contract was signed in Amman between two Jordanian parties, and the work was terminated and the plaintiff was dismissed in Amman, the common home of the two contracting parties, then the applicable law is the law of the country in which the contracting parties live, which is the law of the Hashemite Kingdom of Jordan in accordance with the provisions of Article 20 of The Jordanian civil law... that is, in case of a difference of home, the contracting parties may agree to apply the rule of the law of the country of their choice, and to which the rule of conflict of laws is stipulated, which requires that the conflict include a foreign element.¹²

Article (38) of the Jordanian Civil Law (43) of 1967 states the following: "Every person shall have a name and a surname, and the surname shall be attached to the names of his children." Article No. 39 of the Jordanian Civil Code states: "1- Domicile is the place where a person usually resides. 2- A person may have more than one domicile at one time. 3- If the person does not have a place where he usually resides, he is considered homeless. Article (40) of the above law states, "The place in which a person conducts a trade or craft is considered a home for the management of business related to this trade or craft." Moreover, Article (17) of the Jordanian Code of Procedure No. (24) of 1988 and its amendments stipulates the following: "Domicile is the place where a person usually resides, and the workplace is the place where a person engages in a trade or craft, or manages his money therein. For the employee and the worker, it is the place in which they usually perform their work. Moreover, a person may at one time have more than one domicile or more than one workplace, and in cases of multiplicity, all are equal.

Through the legal texts above, the law of the common domicile of the contracting parties proves the natural and legal parties because every legal person has a domicile, and every person has his own domicile. Even the minor, the interdicted, the missing and the absent have a domicile, based on the provisions of Article (41) of the Jordanian Civil Code, which states, "The domicile of the minor, the interdicted, the missing and the absent is the domicile of those who legally represent them." The aim is to alleviate the contracting parties and given the importance of the domicile in the implementation of civil contracts, especially commercial contracts. The criterion of the common domicile of the contracting parties is no longer considered at the present time as it governs the international contract, and it may be considered within the internal or national contract because there is no difference in place for the parties to the relationship, and because the domicile is more important than the bond of nationality for the parties. The difference in the domicile of the parties to the international contract was considered by the Vienna Convention for the International Contract of 1980 as the basis for the international contract standard. Jordanian law considered the union of domicile for the seller and the buyer in an international contract of sale subject to the provisions of that law that governs the common domicile of the contracting parties, while such a contract must be considered internal and not international because there is no foreign element in it.¹³

The Fourth Section: Law of Joint Nationality for Contracting Parties:

Due to the contracting parties' knowledge of the nationality law more than the law of the subject matter of the act, the nationality law reflects the prevailing values in the state which is more stable and less subject to change and contributes to avoiding cases of fraud against the law that individuals resort to when they change their domicile with the intention of changing the relevant law. In addition, the Nationality Law is a much easier matter for the judge than determining the domicile because it is limited to the material element, which is the individual's enjoyment of the nationality of a country, while verifying the moral element, which is the intention to settle or the required residence that is available in the domicile, seems more difficult.¹⁴

C: Scope of application of the law governing the form of contracts

The form of the act is the outward manifestation of the will, and the will moves towards a legal effect by a physical act that the other contracting party or third party recognizes, which the law requires of conditions to show the will, so it is considered as the form. ¹⁵

The rule of form has two concepts: the narrow concept, the form of legal acts prevailing in the law of the place of their conduct (the place governs the conduct) and this concept was considered by the Lebanese Court of Cassation

¹¹ Mamdouh Armoush, *Private and Comparative International Law, Part One, Conflict of Laws, Jurisdiction, Execution of Foreign Judgments*, Dar Al Thaqa Library for Publishing and Distribution, Amman, 1998, p. 170.

¹² The decision of the Jordanian Court of Cassation in its human rights decision No. 67 of 1987, Issue 6 of 1990, p. 1080.

¹³ Mamdouh Armoush, *Private and Comparative International Law, Part One, Conflict of Laws, International Jurisdiction, Execution of Foreign Judgments*, Dar Al Thaqa Library for Publishing and Distribution, Amman, 1998, p. 171.

¹⁴ Muhammad Al-Masry, *Al-Wajeez in Explanation of Private International Law, A Comparative Study of Arab Legislation and French Law*, House of Culture 2016, pp. 101,100.

¹⁵ Mansour Mustafa Mansour, *Memoirs in Private International Law*, House of Knowledge, Egypt, 1957, p. 179.

as a general principle because the rule of form requires that every contract regulating a form under local law is considered a valid contract, as for the broad concept, the form of legal acts is dominated by freedom of choice (the place is not the only one that governs behavior), but is it unrestricted freedom?¹⁶

5. The First Topic: Contracts Outside the Scope of the Contract Law

Section one: Contracts that are outside the scope of contract law because of their legal nature

It was stated in the second paragraph of Article (20) of the Jordanian Civil Code: “The law on the location of the property is the one that applies to the contracts concluded in the matter of this property.” Through this legal text, contracts concluded regarding real estate, as well as in-kind and personal rights that are received on the property, are excluded.

It is noticeable from the above text that there is more than one attribution control in a gradual way, as it puts first an original control that is the will, and two other reserve controls are the joint domicile of the contracting parties and the place of conclusion. If the two parties choose a law to govern their contract, it is the one that applies even if they have a common home. If they do not choose, then we search for the law of the common domicile of the contracting parties, otherwise it applies the law of the country in which the contract was concluded.¹⁷

As for the movables in connection with the creation, transfer or elimination of a right, it falls outside the scope of the law of will, because it is subject to the law of the party in which this movable is located at the time of realization of the reason that resulted in the acquisition or loss of possession, ownership or other real rights, according to what is required. The text of Article (19) of the Jordanian Civil Code states: “...and the law of the party in which this movable is located shall apply to the law at the time of the realization of the reason that resulted in the acquisition or loss of possession, ownership or other rights in kind.” As for personal status issues (status, eligibility, marriage, birth, lineage, custody, alimony, inheritance, will, and guardianship), they are subject to personal law and these issues cannot be included in the law of will.

Despite the freedom of will in the field of contracting and contractual actions to be held as soon as the offer is linked to acceptance in the contract concluded between the contracting parties when this contract fulfills its elements and legal conditions, the law may impose a certain formality that must be taken into account to complete the final version of the contracts related to real estate and rights, so that the effect of the disposition relaxes. That is, it happens when completing this formality in order to alert the parties to the relationship to the importance and seriousness of this behavior that they took and to make others aware of its content.

And in application of this, Article (90) of the Jordanian Civil Code states the following: “The contract is concluded as soon as the offer is linked to the acceptance, taking into account what the law decides above that on certain conditions for the conclusion of the contract.” Article (1148) of the Jordanian Civil Code stipulates the following: “No ownership or other rights in real property may be transferred between the contracting parties and in the right of third parties except by registration in accordance with the provisions of the relevant laws.” Article (16/3) of Land and Water Settlement Law No. 40 of 1952 states that “sales, exchanges, sorting and sharing of land and water are not valid unless the transaction took place in the registration department.”¹⁸

The second section: Contracts that deviate from the law of will because they are related to the public order:

Several individual and collective attempts have been made in order to reach the adoption of a common definition of the idea of public order, but the efforts made in this regard did not achieve their desired goal, as the definitions were vague and did not specify precisely what is meant by public order. This is due to the broad scope of the general system, which prevents it from being fixed because the idea of the general system is changing, evolving and differing from place to place and from time to time.¹⁹

Public order has been defined as a weapon to defend against any foreign law whose application is originally necessary if its content appears to conflict with national concepts. And some English writers defined it as the principle that necessitates excluding the application of foreign law in cases where it contradicts the application of the policy of English law or the rules of public morals observed in England, or with the need to preserve the

¹⁶ Sami Mansour, Osama Al-Agouz, *Private International Law*, Zain Human Rights Publications, third edition, 2009, Lebanon, p. 365.

¹⁷ Jordanian Court of Cassation Decision No. 539/1983 published in the *Journal of the Bar Association* of 1983, p. 1505.

¹⁸ Ghaleb Al-Daoudi, *Private International Law, Book One on Conflicts of Laws, Conflicts of International Jurisdiction and the Execution of Foreign Judgments, Comparative Study*, Fourth Edition, Wael Publishing House, 2005, p. 221.

¹⁹ Abdul Majeed Al-Hakim, *Sources of Obligation*, National Printing and Publishing Company, Baghdad, 1960, p. 177.

political systems.²⁰

Article (29) of the Jordanian Civil Code stipulates that “the provisions of a foreign law specified by the previous texts may not be applied if these provisions violate public order or morals in the Hashemite Kingdom of Jordan.” And Article No. 163 in the second and third paragraphs of the Jordanian Civil Code stipulates that “2- If the public prohibits dealing in something or if it is in violation of public order or morals, the contract is void.” 3- The provisions relating to personal status such as eligibility, inheritance, provisions related to transfer, procedures necessary for disposing of endowments and real estate, disposing of quarrel’s money, endowment money, state money, compulsory pricing laws and all other laws issued for the needs of consumers in exceptional circumstances are considered part of the public order in a special way. Article No. 165, second paragraph of the Jordanian Civil Code states: “2- It must be present, valid and permissible and not in violation of public order or morals.”

It is self-evident for the Jordanian judge to reject the application of any foreign law that contradicts its provisions with the fundamental principles found in its national law. The Egyptian Court of Cassation defined public order by saying: Public order is the system that contains rules that aim to achieve the public interest of the country, whether politically, socially, or economically, and which relate to the physical and moral situation of an organized society and are superior to the interests of individuals.²¹

-The rules of legislation related to labor contracts, social security, health insurance, consumer protection and the protection of minors are considered to be an order or a prohibition. Individuals may not agree to the contrary and exclude their application at all. Therefore, legislative jurisdiction may not be transferred to any other law chosen by individuals. The Jordanian judge applies his law to everything related to work relations, including accidents, insurances, retirement, as well as social guarantees, and any law under which any worker is deprived of any of his rights is excluded, based on the provisions of Article No. (4), Paragraph B of the Jordanian Labor Law No. 8 of the year 1996 and its amendments, which stated: B- Every condition in a contract or agreement, whether concluded before or after this law, under which any worker waives any of the rights granted him by this law, shall be considered null.

- Among the matters that fall outside the scope of the law of will is everything related to the eligibility of the parties to the relationship, because these matters are related to the nationality law, based on the provisions of Article No. 12, first paragraph of the Jordanian Civil Code, which states, “The law of the state to which they belong shall apply to the civil status of persons and their eligibility by their nationality.

-With regard to taking educational and assistance measures for foreign minors who are in danger, their residence or their mere presence on the territory of the Hashemite Kingdom of Jordan requires subjecting them to the Jordanian police laws that aim to protect them and secure guarantees for them. It should be noted that the Hague Convention of 10/5 1961 grants jurisdiction to the law of the country in which the minor resides, article one.²²

- As for the protection of the Jordanian consumer, he cannot be deprived of the protection decided by the rules in the country in which he resides, because the Jordanian law applies to all consumers in the Hashemite Kingdom of Jordan, with the aim of protecting them from monopoly and fraud.

- As for marriage bonds, they are outside the scope of the ascribed idea and the law of each of the spouses applies to them, based on the first paragraph of Article (13) of the Jordanian Civil Code, which states: “1- In the objective conditions for the validity of marriage, the law of each of the spouses is referred to ”.

-With regard to inheritance, wills and other expenditures added to after death, in accordance with the provisions of Article (18) of the Jordanian Civil Code, which states: “1- The law of the testator or the inheritance shall apply to inheritance, wills and other expenditures added to after death. The person from whom the disposition was issued at the time of his death. 2- The law of the testator at the time of the bequest or the law of the country in which it took place shall apply to the form of the will, as well as the judgment in the form of all other actions added after death. Legal relations subject to the law of will should not be related to inheritance and will, such as an agreement on inheritance or on the division of the inheritance in violation of the law, especially if the agreement is related to

²⁰ Hassan Al-Hadawi, *Private International Law, Conflict of Laws, General Principles and Positive Solutions in Jordanian Law, A Comparative Study*, Dar Al-Thaqafa Library, 1997, p. 184.

²¹ Decision of the Court of Cassation. Al-Masriah, *Egyptian Civil Cassation, Collection of Judgments of the Court of Cassation*, for the year 1979, p. 277.

²² Muhammad Al-Masry, Al-Wajeez in *Explanation of Private International Law, A Comparative Study of Arab Legislation and French Law*, House of Culture 2016, p. 190.

immovable money.²³

The actions added to after death (the disease of death), which Article No. (543) of the Jordanian Civil Code defines as “the disease in which a person is unable to continue his usual activities, and in which death prevails, and he dies in that condition before the passage of a year, on one case without an increase of a year or more, his actions are like correct behaviors. The Jordanian law considers every act issued by a person in a dying illness intended to donate as a will, and therefore subject to the law of the testator or the person from whom the act was issued at the time of his death, based on the first paragraph of Article (18) mentioned above.

The third Section: Contracts related to marine agencies and marine bill of lading:

The national law shall be applied regardless of the presence of a foreign element in any of the commercial bills of lading contracts and commercial agency contracts, as these contracts relate to the higher economic interests of the Jordanian state.

B: Issues governed by the law of the contract

Eligibility is subject to the nationality law, and the form of the contract, whether it is real estate or movable, is subject to the law that governs the form of contracts, not to the law that governs the subject, by reviewing the texts of Articles No. (12, 19, 20, 21) of the Jordanian Civil Code.

Article (12), first paragraph states: “The civil status and eligibility of persons shall be subject to the law of the state to which they belong, by their nationality...). Moreover, Article No. (19) stipulates that “possession, ownership and other rights shall apply to the law of the site with regard to real estate, and the law of the area in which this movable is located shall apply to the law of the place where this movable is located at the time of realization of the reason that resulted in the acquisition or loss of possession, ownership or other rights.” Article No. (20), which stated: “1- The law of the state in which the contracting parties have the common domicile shall apply to contractual obligations, if they have the same domicile. If they differ, the law of the state in which the contract was concluded shall apply unless the contracting parties agree otherwise. The real estate is the one that applies to the contracts concluded in the matter of this real estate.” Article No. 21 states, “Contracts between neighborhoods are governed in their form by the law of the country in which they were made, and may also be subject to the law that applies to their substantive provisions, and may also be subject to the law of the contracting parties’ domicile or their common national law.” “A contract is the linking of the offer issued by one of the contracting parties to the acceptance of the other and their agreement in a manner that proves its effect on the contracted party and entails the commitment of each of them to what they owe to the other” Article (87) of the Jordanian Civil Code. According to the first paragraph of Article 12, both eligibility and form are excluded from the scope of the contract, as the Jordanian legislator decided for each of them a special attribution rule. As for the form and according to Article (21), the jurisdiction is assigned to the law of the state in which the contract was concluded. As for the first paragraph of Article (20), which came with a direct text, the contractual obligations are subject to the law of the state in which the contracting parties have a common domicile. The law of the state in which this contract was concluded is valid unless the contracting parties agree otherwise. We note that the effects of the contract are subject to the law that was specified in this article, and it is necessary to refer to the law of the will, because the obligations of the contracting parties are considered among the effects of the contract. As for Article 19, it explicitly and absolutely stated what is related to real estate from possession, ownership and other rights in the law of the location of the property, and the law of the place where the movable is located at the time of realization of the reason that resulted in gaining or losing possession or ownership or other rights in relation to the movable. And we know that for the formation of the contract, three pillars of the contract are required: consent, the subject of the contract or its subject matter, and the reason.

First: Consent

It is the compatibility of the contracting wills (the offer and acceptance), and it is expressed by wording, writing, and the customary sign, even without the dump one, and by the actual exchange indicating consent, and by taking any other course that does not leave the circumstances of the situation in doubt as to its evidence of consent. Article (93) of the Jordanian Civil Code states that it is necessary that the consent should be true, free from defects such as error, fraud and coercion, and subject to personal law. As for the lack of capacity or lack thereof due to youth, insanity, dementia, foolishness, and negligence, this deficiency is attached to a specific person who must be protected and therefore subject to his law, based on the provisions of Article (17) of the Jordanian Civil Code, which states that “it applies to objective issues related to guardianship and other systems.” The objectivity of

²³ Ghaleb Al-Daoudi, *The First Book on Conflict of Laws, Conflict of Jurisdiction and the Execution of Foreign Judgments, A Comparative Study*, Fourth Edition, Wael Publishing House, 2005, p. 217.

protecting the incarcerated and absentee is the law of the person to be protected. With regard to consent, the law of the contract applies with regard to everything related to the expression of the will, is the expression explicit or implicit, and is the apparent will or the inner will considered, and when does the expression of the will have its effect, as well as the rule of silence and whether it can be considered acceptance or not, and how to determine the time and the place of the contract made between absentees.²⁴

It also includes in the content of this idea and everything related to defects of the will and the extent of their impact on the validity of the contract. (Dr. Abdul Hakim Mohsen Atrush, *Private International Law, in the Hashemite Kingdom of Jordan, Conflict of Laws and International Jurisdiction*, Modern Book World, Irbid, Amman, 2017, p. 178).

Second: The subject matter of the contract

One of the conditions for forming a contract is that the subject matter of the contract be specific, possible and legitimate. Thus it is subject to contract law. However, there are some contracts that are excluded from this principle and are subject to the rules of direct application in the judge's law, for example work contracts that are subject either to the law of the place of their implementation in order to achieve the necessary protection for workers or to the personal law according to the law that provides the greatest protection. In application of this, the court's decision stated the following: "...in the labor contract concluded in France between two Frenchmen to be executed in the Kingdom of Saudi Arabia, and in which the parties thereof expressly declared not to be subject to French law without specifying another law for a ruling, it is possible to specify the law applicable to this contract. Through the elements of the case, the contract cannot be interpreted without referring to a national law, and that the combination of the various elements of the relationship - the parties' nationality is French, their place of residence is France and the wage is paid in French francs - makes the relationship related to France. The general International French system imposes the application of protection rules for workers..."²⁵

Third: The Reason

The reason is the direct intended purpose of the contract. It must be present, valid and permissible and not contrary to public order or morals. Article (165) of the Jordanian Civil Code. Therefore, the reason is subject in terms of quality and legitimacy to the law of the contract. As for the effects of the contract for people, they are subject to the law governing the contract, and the same applies to the subject matter of the contract, the implementation of contract obligations, and the claim for compensation for breaching the obligations imposed by the contract in contractual liability. The contract law applies to the reasons for the expiration of the obligation in relation to the fulfillment or voluntary execution, the impossibility of implementation, the request for the termination of the contract, the prescription, its effects and duration, and the reasons for each of the cases of interruption and suspension.²⁶

6. The Fourth Topic: The Role of the Will in Determining the Applicable Law in the Jordanian Civil Law

A: What is the principle of the law of the will?

The contract theory is one of the most important manifestations of the principle of the authority of the will, which became very popular in the nineteenth century. And this principle has exercised an influence on the mechanism of private international law, which when the contracting wills meet is sufficient in itself to be a source of commitment. When the contracting parties choose a law to govern their contractual relationship, this law becomes part of the terms of the contract. The principle of choosing the will is the basis, if you wish, the contract is not subject to any law, and if you wish, the contract is not subject to any law, and if you wish, you subject it to a law of your choice. The rules of attribution in most legislations have recognized the role of the will in determining the law of the contract, such as Egyptian legislation, Article 19/1, civil, Kuwaiti law, Article 59/1, Libyan law, Article 19, civil, and Iraqi law, Article 255/1, civil. This principle was taken by French jurisprudence and the majority of Western laws.²⁷

²⁴ Ezz El-Din Abdullah, *Private International Law, Part Two, Conflict of Laws and Conflict of International Jurisdiction*, Cairo, 1977, p. 144.

²⁵ Muhammad Al-Masry, Al-Wajeez in Explaining Private International Law, a comparative study of Arab legislation and French law, House of Culture for Publishing and Distribution, 2016, pp. 192,193.

²⁶ Abdul Hakim Atrush, *Private International Law, in the Hashemite Kingdom of Jordan, Conflict of Laws and International Jurisdiction*, Modern Book World, Irbid, Jordan, p. 179.

²⁷ Muhammad Al-Masry, Al-Wajeez in Explanation of Private International Law, A Comparative Study of Arab Legislation and French Law, House of Culture, 2016, pp. 181,180.

B: The scope of the principle of the authority of the will

The principle of the authority of the will is one of the results of the sanctification of the individual doctrine, which considers the individual and the satisfaction of his needs as the ultimate concern, and the will alone is sufficient to establish the contract and determine its excitement freely and without restrictions. The contract is the law of the contracting parties, and it is not permissible to revoke or amend it except with the agreement of the two parties.²⁸

And based on the provisions of Article No. (241) of the Jordanian Civil Code, which states: "If the contract is valid and binding, none of the defaulters may revert to it, amend it, or rescind it, except by mutual consent, litigation, or in accordance with a provision in the law," the rule of the authority of the will is possible to conclude as many contracts as it wants, and the rule of consent in contracts, which was inspired by the Jordanian legislator from the provisions of Islamic jurisprudence that individuals have the freedom to establish contracts, and this is a firm and stable principle.

Section one: The content of the principle of the authority of the will at the stage of forming legal action

The principle of the authority of the will is manifested at the stage of contract formation in two ways, the person's freedom in the origin of the legal act, and his freedom to express the will of this act. The individual has the right to reject compulsory contracts and create named contracts and non-named contracts through a legal disposal of a unilateral will and contract. However, this freedom is not absolute. Rather, it is restricted not to harm others, "no harm, no harm," as stated in the noble hadith.

Section two: the principle of the authority of the will in determining the effects and content of the legal act

The two contracting parties may, by their agreement, contradict the effects of the named contracts arranged by law, because the principle in them is that they are not preemptory, but rather they are complementary rules that may agree on what contradicts the provisions contained in them, so they are not effective except where there is no conflicting agreement, except what was from Judgmental texts, the evidence of which is based in their words or in the purposes of their legislation, is that it is not permissible for the contracting parties to agree on anything that contradicts its ruling. In Islamic jurisprudence, there are many texts in the Prophet's Sunnah that indicate two things: The first is that there are conditions that are considered a vast field for the will of the contracting parties, in which the Shari'a released their will within the limits of their rights. (This result is indicated by his saying: "The Muslims are bound by their conditions." Narrated by Abu Dawad in his Sunan. And the second, that there are conditions that are forbidden by Sharia and there is no authority for the will of the contracting parties because they are called basic provisions that are considered among the purposes of the general Sharia, including the Prophet's saying: "Every condition that is not in the Book of God is void." Islam and its system.

Section three: The view of the Jordanian legislator on the role of the will

Contemporary legislation has known the principle of consensual contracts, and as a result of changing economic and social conditions that led to the flourishing of the principle of the power of the will, it took into account the interest of the group over the interest of individuals in large companies that employ employees and workers greatly, which caused an imbalance in the economic balance in countries. This required the intervention of the legislator to protect the weak party when concluding contracts. It is based on the provisions of Article No. (241) of the Jordanian Civil Code, which states: "If the contract is valid and binding, none of the defaulters may revert to it, nor amend it, nor rescind it, except by mutual consent or litigation or according to a provision in the law." Accordingly, the contract is the law of the contracting parties. It is not permissible to repeal or amend it except with the agreement of the two parties. Individuals are free in their agreements. They are the ones who specify in the sales contract, for example, the thing sold, the price, and so on. It is also based on the authority of the will to conclude as many contracts as it wants, that consent is a sufficient unity, whatever the means of expressing the will, there is no specific form in which that will should be poured.²⁹

And through the text of Article (20), the first paragraph of the Jordanian Civil Code, "the law of the state in which the contracting parties have the common domicile shall apply to contractual obligations, if they have the same domicile, but if they differ, the law of the state in which the contract was concluded shall apply, unless the two contracting parties agree otherwise." We note through this text that there is more than one attribution control, and the jurisdiction in relation to contractual obligations must be given first to the law chosen by the parties to the

²⁸ Amjad Mansour, *The General Theory of Obligations, Sources of Commitment, Study in Jordanian, Egyptian and French Civil Law and the Journal of Judicial Provisions and Islamic Jurisprudence*, House of Culture for Publishing and Distribution, 2006, p. 32.

²⁹ Amjad Mansour, *The General Theory of Obligation, Sources of Commitment, Study in Jordanian, Egyptian and French Civil Law, Journal of Judicial Judgments and Islamic Jurisprudence with Judicial Applications of the Courts of Cassation*, International Scientific House for Publishing and Distribution and House of Culture for Publishing and Distribution, first edition, 2001, p. 32.

relationship (the chosen law), and this is the first attribution control between them, then the law of the state in which the contracting parties have a common domicile will be applied, and this is the second attribution control. And if the parties do not agree on a law governing their relations and they do not have a common domicile, the law of the country in which the contract was concluded (the place of concluding the contract) shall be applied and this is the third attribution control.

7. Conclusion

Our study revealed the contrariness of laws in contractual obligations and the role of the will in determining the applicable law in the Jordanian civil law, on which the Jordanian legislator relied to determine the law applicable to the contract with the will of the contracting parties, whether the will is explicit or implicit, which the judge discovers from the circumstances and conditions of the contract when there is no direct will. If the judge is not able to do so, then he applies the controls of attribution, which is the common domicile of the contracting parties if they have the same domicile, but if this rule is not found, the law of the country in which the contract was concluded shall apply if the domicile of the contracting parties differs, unless otherwise agreed between the contracting parties. Accordingly, the rules of attribution related to contractual obligations, which the Jordanian legislator subjected to in private international law, and like most legislation in the world, to the principle of the authority of will, that is, the law chosen by the contracting parties, the Jordanian legislator has singled out an independent attribution rule in Article (20) of the Civil Code, Jordanian law, noting that the position of Jordanian law, as well as jurisprudence, is more responsive to the requirements of international transactions, which require the parties to submit to the law of the contract in terms of ease of dealing. At the end of this study, a set of results and recommendations are presented:

8. Results

- The contracting parties may abandon the law chosen by the two parties and choose another law applicable to the contract.
- The Jordanian legislator has singled out a special text regarding the location of the real estate for the contracts that have been concluded regarding this real estate.
- We note that the Jordanian legislator has established a primary reference control, which is the will of the contracting parties, and two secondary controls in the absence of the will of the parties.
- We note that the Jordanian legislator has become accustomed to specifying the law applicable to the contract due to the direct and indirect will of the contracting parties.
- We note that the Jordanian legislator did not accept the idea that the judge applies the law, which presupposes the will of the contracting parties.

9. Recommendations

- We hope that the Jordanian legislator will draw up a special text that includes a rule of attribution for the obligation arising from a unilateral will.
- We wish the Jordanian legislator to subject the obligation arising from the unilateral will to the law in which the obligation originated.
- We wish the Jordanian legislator to apply a special attribution rule to both contractual obligations and obligations arising from a unilateral will.

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