THE LAW APPLICABLE TO TECHNOLOGY TRANSFER CONTRACTS: A CONTRACTUAL CHOICE OR A LEGAL IMPOSITION ?

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ABSTRACT
The world has become a small village linking its north with its south and east with its west as a result of the scientific development, especially the technological one, which the world is still witnessing its prosperity day after day, where contracts for the transfer of technology of all kinds have become one of the necessary fields in the transactions of people from all over the world. The disputes that bring together the parties to this type of contract are one of the tangled issues that arouse the interest of the lawman, especially the subject judge who is looking to resolve the dispute before him so that he does not follow up with the crime of denial of justice by defining the applicable law, which prompts him to raise a legal question about the status of the will of the parties to the technology transfer contract in determining the law applicable to the dispute, and this will be discussed in the analysis within this research.
KEYWORDS: The Will; The Applicable Law; The Two Contracting Parties; The Technology Transfer Contracts.

INTRODUCTION:

The contract is regarded as one of the most significant and substantial sources of obligation[1]. A technology transfer contract refers to the legal agreement centered around technology, wherein the owner of the technology (the transferring party) agrees to transfer it to the receiving party in exchange for a mutually agreed compensation[2]. According to established legal principles, the subject matter of this agreement must be legally permissible and meet other general contractual requirements, such as being specific or determinable and existing[3].

Given the pressing need for technology, especially in developing nations, the concept of technology transfer has evolved from merely possessing technology to a focus on control and technological empowerment. This shift aims to enable these nations to achieve comprehensive manufacturing and production capabilities.

Given the aforementioned issues and the crucial role technology transfer contracts play in a nation's progress, growth, and regulation of production and marketing resources, this issue demands a thorough legal analysis. This involves identifying the relevant law governing technology transfer contracts in disputes between parties, particularly when such agreements include many international entities.

This scenario raises a legal question regarding the governing law for technology transfer contracts: do they follow the principle of contractual freedom and thus the doctrine of autonomy of will, or are they subject to mandatory legal provisions?

To address this question, the following approach will be pursued:

[1] Belhadj El-Arabi, Sources of Obligation in Algerian Civil Law, Part 1,Dar Houma , Algeria, 2016, p 87.
[2] Elmouajda Mourad Mahmoud, Civil Liability in Technology Transfer Contracts, Dar al-Thaqafa, Jordan, 2010, p 41.
[3] Elkelyoubi Samiha, Technology Transfer Contract, International Journal of Jurisprudence, Judiciary and Legislation. Vol. 3, issue 2, 2022, p 230.

- **Section One: Examines the role of the parties' will in determining the applicable law for technology transfer contracts.**
- **Section Two: Explores the judge's role in determining the applicable law for technology transfer contracts, including cases where the law chosen by the parties may be excluded.**

In studying this subject, both the descriptive method will be employed to gather relevant information and the analytical method to interpret and analyze the gathered data.

SECTION ONE: THE ROLE OF WILL IN DETERMINING THE APPLICABLE LAW FOR TECHNOLOGY TRANSFER CONTRACTS

Technology transfer contracts, being among the most crucial forms of international trade that significantly contribute to sustainable development and are influenced by the free will of the contracting parties, raise questions about the parties' choice of applicable law. This will be addressed in Section One, alongside an examination of the legislative stance on the freedom of parties in technology transfer contracts to select the applicable law for related disputes, which will be discussed in Section Two.

I. The parties' choice of applicable law

In studying the issue of determining the applicable law for contracts involving technology transfer specifically, and international financial contracts more generally, legal scholarship has provided two primary theories to interpret this matter: the subjective theory and the objective theory. Both recognize the right of the parties to choose an applicable law for their disputes.

The subjective theory goes so far as to grant the parties of an international contract the ability to incorporate a specific law as a provision within their contract, not only for dispute resolution but also to allow them to adopt certain legal rules from that law while excluding other rules that may not align with their interests[4]. Additionally, this theory enables contracting parties to choose multiple laws for resolving their contractual disputes[5]

It is worth noting here that, if the state whose law was chosen enacts amendments during an ongoing dispute related to a contractual issue in a technology transfer contract, such amendments do not apply to the international contract or, by extension, to the technology transfer contract[6].

Based on this discussion, it is evident that the subjective theory grants contracting parties, particularly in technology transfer contracts, complete freedom to designate the law of a specific country to address issues that may arise during the execution of these contracts. This freedom even extends to allowing multiple laws to be chosen while excluding legal provisions from the chosen law that do not serve their financial interests. However, this matter may often lead to a conflict of laws and a lack of agreement on this matter, which tips the scales in favor of one party over the other contracting party. This prompted legal scholars to introduce an alternative theory known as the objective theory.

The objective theory emerged in response to the subjective theory, arguing that the freedom of the contracting parties to select an applicable law is limited. While they may choose a law to govern disputes in international contracts, and specifically technology transfer contracts, this freedom is constrained to selecting the applicable law only and does not extend to selectively

[4] Ghorof Moussa, and Salah al-Din Aqar al-Dimagh, The Role of Will in Determining the Applicable Law to Technology Transfer Contracts, journal of Al-Mufakkir, vol. 17, issue 1, 2022, p 237.
[5] Zouawi Louria, and Lamtaei Nour al-Din, The Applicable Law in Arbitration of Technology Transfer Contracts, The Academic Journal of Legal Research, vol. 12, issue 2, 2021, p 307.
[6] Belmihoub Abd al-Nasir, The Freedom of Contracting Parties to Choose the Law Governing International Contracts, web site https://www.tribunaldz.com, last visited May 17, 2023, at 21:34.

incorporating provisions from that law into their agreement[7]. Therefore, the parties to a technology transfer contract cannot cherry-pick provisions from the applicable law and exclude others that may not align with their financial interests[8].

It is evident that the objective theory was formulated to restrict the autonomy of parties in selecting the governing law for their international contracts, particularly those related to the transfer of technology between nations. This approach prevents the technology owner from overextending their legal right to select only those legal provisions that serve the interests of the service or goods owner—specifically, the technology owner—at the expense of the other party, the technology recipient. Consequently, proponents of the objective theory advocate for a standard of choosing the applicable law based on how well the chosen law aligns with the contract's subject matter.

II. LEGAL POSITION ON THE FREEDOM OF TECHNOLOGY TRANSFER CONTRACT PARTIES IN CHOOSING THE APPLICABLE LAW

Following the perspectives of legal scholars on the issue of choosing the applicable law for technology transfer contracts, it is essential to review the legal stance various legislations have adopted on this matter. The Hague Principles from the 2015 conference, stated in Article 2, clarify that a contract is subject to the law chosen by its parties. Furthermore, the article's second clause confirms that parties may choose to apply an entire legal system to the entire contract or just parts of it. Contracting parties may also select multiple laws, applying each to different parts of the contract between them[9].

This article suggests that international lawmakers, in adopting the principle of choosing the applicable law for international contracts, including technology transfer contracts, provide parties the flexibility to select a law in its entirety and apply it to the contract, or to apply specific legal provisions selectively. Additionally, the article allows parties to choose multiple legal provisions from different countries, applicable to either parts of the contract or the contract as a whole[10].

Similarly, the arbitration rules of the International Chamber of Commerce, in Article 13, align with this approach, granting parties the freedom to choose a law to be applied by the arbitration court in case of a dispute[11].

The French legislator, through Article 1496, Clause 1, of the French Code of Civil Procedure, allows for the application of the legal provisions chosen by the commercial parties. In the absence

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[7] Chirki Nasrin, and Saeed Bouali, Algerian Private International Law, Dar Balqis, Algeria, 2013, p 83.

[8] Zouawi Louria, and Lamtaei Nour al-Din, previous reference, p. p. 307, 308.

[9] " 1- A contract is governed by the law chosen by the parties.

2- the parties may choose:

a/ the law applicable to the whole contract or to only part of it; and

b/ Different laws for different parts of the contract." United Nations Commission on International Trade Law, Principles for Choosing the Law Applicable to International Commercial Contracts, U.N. Doc. A/CN.9/830, 48th Session, Vienna, 2015, https://assets.hcch.net/docs/4679993d-5c7b-48d0-21095ff5c32f.

[10] Al-Anzi Ziad Khalif, Principle of Freedom of Parties to Choose the Law Governing International Trade Contracts According to the Principles of the Hague Conference (2015), University of Sharjah Journal of Shari'ah and Law, vol. 13, issue 2, 2016, p 381.

[11] Kreid Maryam, The Legal System of the Industrial License Contract, Master's Thesis, Faculty of Law, Constantine University -1, Algeria, 2012-2013, p 177.

of an explicit choice, the international arbitrator may select the applicable law based on its suitability to the nature of the contract[12].

This clause reflects that the French legislator has adopted the subjective theory's perspective, which permits parties in international contracts to select certain legal provisions from the applicable law while disregarding others, thereby granting the parties extensive freedom in this selection. Additionally, the arbitrator is granted this right in the event of a dispute over a particular issue, especially if the contract lacks explicit provisions by the contracting parties[13].

The position of egyptian and algerian legislators on applicable law in technology transfer contracts:

The Egyptian legislator, in Article 19 of the Civil Code, states: "The law of the state in which the common domicile of the contracting parties is located shall apply to contractual obligations if they share a common domicile. If they have different domiciles, the law of the state where the contract was made shall apply, unless the contracting parties agree otherwise or it appears from the circumstances that another law is intended to be applied "[14].

Turning to Algerian legislation, Article 18, Clause 1, provides: "The law chosen by the contracting parties shall apply to contractual obligations if it has a genuine connection with the contracting parties or with the contract"[15].

From this article, it can be inferred that the Algerian legislator has adopted the subjective theory, which grants parties the right to choose a specific law to govern their international contractual disputes. However, in order to rely on this choice, a fundamental criterion must be met: there must be a genuine link between this law and either the parties or the contract[16]. For example, French law may be chosen because both parties have their residence in France or because France is the country where the contract is executed.

Additionally, the Algerian legislator, in Article 1050 of the Code of Civil and Administrative Procedure, states: "The arbitration court shall resolve the dispute based on the rules of law chosen by the parties. In the absence of this choice, it shall resolve according to the law and customs it deems appropriate"[17].

The implication of the above text is that the arbitration body tasked with resolving disputes related to international contracts primarily applies the law of will agreed upon by the contracting parties. However, if no specific law is agreed upon or if it has been omitted by the parties, the

[12] Article 1496 of the French Civil Code: " The arbitrator shall decide the dispute in accordance with the rules of law that the parties have chosen; failing such a choice, in accordance with those that he considers appropriate. He shall take into account in all cases commercial practices. ''

[13] Kreid Maryam, reference above, p 188.

[14] Law No. 131 of 1948, Civil Code of Egypt (1948), as amended by Law No. 131 of 2021, issued on October 13, 2021.

[15] Order No. 75-58 of September 26, 1975, amending and supplementing the Civil Code by subsequent laws, especially Law No. 05-10 of June 20, 2005, and Law No. 07-05 of May 13, 2007.

[16] Abu Zeid Mohamed Hazem Hussein, Technology Transfer Contracts within the Framework of Private International Law: An Analytical Study in Egyptian Law Compared to French Law, Spirit of Laws, vol. 35, Special Issue, 2023, at 2142.

[17] Law No. 08-09, Law on Civil and Administrative Procedures, dated February 25, 2008, amended and supplemented by Law No. 22-13 of July 12, 2022, Official Journal, no. 48 of 2022.

arbitrator must resolve the dispute based on the rules of law and customs appropriate to the matter at hand[18].

SECTION TWO: THE ROLE OF THE JUDGE IN DETERMINING THE APPLICABLE LAW IN TECHNOLOGY TRANSFER CONTRACTS: CASES OF EXCLUSION OF THE LAW OF WILL

After highlighting the importance of the will in determining the applicable law to technology transfer contracts, a question arises about the cases where the law chosen by the parties' will is excluded by the judge dealing with the dispute. Accordingly, it is essential to address the case of multiple law choices and their inadequacy in resolving the dispute, which will be discussed in the first section, in addition to addressing the case of contract invalidity, which will be addressed in the second section.

I. THE CASE OF MULTIPLE LAW CHOICES AND THEIR INADEQUACY IN RESOLVING THE DISPUTE

The case of multiple law choices refers to the situation where several different laws or legal provisions from multiple laws are chosen for application to parts of the international contract. This situation embodies the complete freedom of the contracting parties to select the applicable law as adopted in the subjective theory.

However, the prevailing opinion among legal scholars has rejected the application of more than one law to technology transfer contracts, based on the idea that the contract is merely a single legal entity governed by one law as a whole, and that multiple choices may lead to conflicts between legal provisions[19].

In this regard, the explanatory memorandum of the Egyptian Civil Code, in its commentary on Article 19, rejected the idea of multiple choices of law[20] . However, the French legislator allowed the selection of several laws to be applied to international contracts, including technology transfer contracts[21].

Technology transfer contracts are long-term contracts, and the provisions of the chosen law may not adequately address the issues covered by the contract. Furthermore, the parties to these contracts may postpone their choice of law during the negotiation phase until all details of the future contract are available, which may lead to a deficiency in the contract that the judging arbitrator must complete based on the information at their disposal.

Additionally, the contracting parties may choose a law that is deficient and does not address the issues encompassed by the technology transfer contract or that has provisions that are not suitable, thereby failing to cover all aspects of the contract, making it unsuitable for application to the dispute before the judge. In this case, this deficiency is addressed or the parties' chosen law is excluded[22].

II. THE CASE OF CONTRACT INVALIDITY

It may occur that the parties to a technology transfer contract choose the law of a specific state to apply to it, which may result in the contract as a whole being void or in the invalidity of one of its constituent elements. The prevailing opinion in law suggests excluding the chosen law that the parties explicitly expressed in the terms of the technology transfer contract or at a later time. This is because the principles of the Hague Conference have opened the door for their explicit choice of the applicable law to the contract at a later date following the conclusion of

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[18] Sanegouga Saïh, Commentary on the Law on Civil and Administrative Procedures: Text, Explanation, Commentary, and Application, vol. 2, Dar al-Huda, Algeria, 2011, p 1227.

[19] Kreid Maryam, previous reference, p 182.

[20] Article 26 of the Explanatory Memorandum for the Proposal of the Egyptian Civil Code According to Islamic Law.

[21] See Article 1496 of the French Civil Code.

[22] Zouawi Louria, and Lamtaei Nour al-Din, previous reference , p 311.

the contract, in accordance with Article 2, paragraph 3 of the Hague Principles, which states that they may choose or amend the applicable law at any time, provided it does not affect the validity of the contract or the rights of third parties[23]. When the parties express their choice of a law that leads to invalidity, the arbitrator or the judge dealing with the dispute must exclude this choice and determine another law to resolve the dispute before them[24].

The question raised in this regard is: What are the cases that lead to the invalidity of a technology transfer contract or one of its essential elements?

These cases can be summarized in two scenarios: The first is the selection of a specific law while neglecting to review it, meaning that the parties to the contract are unaware of the legal provisions they have chosen to apply to the contract. In this case, this choice is excluded. The second scenario involves the selection of a specific state law without committing to it, meaning that the judge or arbitrator is not obliged to apply the chosen law according to the legal provisions that were established at the time of selecting the law, particularly if the chosen law undergoes subsequent legal amendments that lead to the invalidity of the contract or part of it. In this situation, the parties' intent does not aim to obligate the arbitrator to apply it in its form at the time of selection, and therefore the judge excludes this option that leads to the invalidity of the technology transfer contract or part of it, based on the principle of the parties' natural right to rely on the validity of the contracts they conclude[25]. An alternative view is that the parties' choice of law must be followed, even if it invalidates the contract, as long as it benefits one party. There is no contract if it deprives one of the contracting parties of the protection established by the application of the provisions of the chosen law, and if the chosen law is excluded, it leaves the contract without any governing law[26].

CONCLUSION:

At the end of this research paper, it can be said that technology transfer contracts are among the most important types of international contracts aimed at transferring technology from one country to another. The will of the parties to the contract plays a fundamental role in choosing the applicable law, where legislations differ in adopting the theory of will interpretation in the choice. Some have adopted the personal theory that unleashes individuals' will in selecting the law applicable to the dispute brought before the arbitrator or judge, such as the French legislator. Others have restricted this freedom, namely the supporters of the objective theory, who have imposed certain conditions for the application of the law chosen by the parties to the contract, primarily the existence of a genuine link between the chosen law and the contract or its parties, as exemplified by the approach taken by the Algerian and Egyptian legislators.

Moreover, the judge or arbitrator presented with the dispute may exclude the will law from its application to the dispute related to technology transfer contracts in cases where multiple laws are chosen for application on the contract as a whole, which is a single legal entity. This also includes cases where the law is not suitable for adjudication, such as when its provisions do not encompass the details of the contract, as well as the case of excluding the will law when it conflicts with the invalidity of the contract, such as when the contract or part of it is threatened with nullity upon the application of the will law, prompting the judge or arbitrator to exclude this choice and determine another law to resolve the dispute involving technology transfer contracts.

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[23] Al-Anzi Ziad Khalif, previous reference, p 383.

[24] Kreid Maryam, previous reference, p 182.

[25] *Zouawi Louria, and Lamtaei Nour al-Din, previous reference, p 310.*

[26] *Kreid Maryam, previous reference, p 182*

Based on the above, a set of recommendations has been formulated, summarized in the following points:

1. **It is a flaw in the legislations that adopted the personal theory in its absolute form to define basic criteria in choosing the applicable law, especially in the case where multiple provisions are applied to various parts of the contract, particularly in cases of conflicting laws between them, which could be restricted by the unity of purpose and the common principles adopted in those laws.**
2. **In cases of excluding the will law, the majority of legislations did not define the law that will take the place of the will law in the application to technology transfer contracts. Therefore, this idea should be developed to primarily serve the weaker party.**
3. **Establishing legislations and bodies specifically for resolving disputes related to technology transfer contracts due to the sensitivity and complexity of this field.**
4. **Conducting specialized training courses for those tasked with resolving international disputes involving technology transfer contracts, particularly in determining the applicable law and ensuring the proper application of the will law in its correct form.**

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