

The Impact of Legislative Development on the Constitutionality of the Rules of Attribution in Private International Law (A Comparative Study)

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Abstract--- *The rules of laws conflict are still the usual technical means for solving the problem of international conflict of laws, that its mission is pointing the specialized law of the legal relationship tainted by a foreign element, but the development of life, especially after the radical transformations that occurred in Iraq in 2003. And openness in all aspects, especially economic, financial and commercial transactions, these rules have become invalid for application to disputes with an international dimension for two reasons: The first It has not changed in spite of the important developments that have taken place internationally since the second half of the last century and because it has not been devoted to the constitutional and economic principles that came out of the 2005 Iraqi constitution. The second: Because Iraq needs investment projects that can contribute to the reconstruction of its infrastructure and the reconstruction of the country. The judges need rules that would assist and guide the judge in choosing the law to be applied in the disputes before the court, and in light of this development it is obligatory for the Iraqi legislator to review the rules of attribution in response to new developments.*

Keywords--- *A Comparative Study, Impact of Legislative, Constitutionality of the Rules.*

I. INTRODUCTION

The development legislation that the world is witnessing in the field of private international life is a result of the political, economic and social conditions that societies are going through. It has a major impact on the development of relations between countries and individuals, which has resulted in the development of the content of the ideas assigned in the rules of conflict of laws. It needs a specific and precise attribution controls and which the Iraqi supporting rules lack in comparison to the rules of support of other countries. The fact that the rules of Iraqi attribution are long formulated in a literary style, difficult to understand by the parties of the legal relationship in several laws, such as Iraqi Civil Law No. 40. Contrary to the modern method used in drafting the legal rule, which is characterized by simplicity and ease of understanding by the parties to the legal relationship, which makes the rules of attribution known in Iraqi private international law. That leads to the application of domestic or foreign legal rules to legal relationships that include a foreign component. It is unable to confront this development, especially in the field of electronic commerce, because they are rules that were only developed for a material world, in addition to that the constitutional principles was not devoted in Iraqi for the year 2005. Thus, it made the rules of conflict of laws not applicable in the field of international relations. This is because it contradicts the basic principles that the 2005 constitution stipulated, such as the principle of equality between men and women, and the need to find a

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balance between them in rights and duties. With this development witnessed by the world, the Iraqi law system remained without Codifying, as is the case in the comparative law, such as Tunisian private international law and other laws.

II. RESEARCH PROBLEM

The research problem lies in, that Iraq has undergone political, economic, and social transformations that changed from its previous reality as a simple country to a complex state, which has an impact on the rules of conflict of Iraqi legal laws long ago. it scattered in several laws such as the Iraqi Civil Law No. 40 of 1951 and the Personal Status of Foreigners Law No. (78)) For the year 1931 and the Iraqi Law for the Execution of Foreign Provisions No. 28 of 1930 and thus these rules can be effective for finding solutions to disputes of private international law, and are they agreeable with the new political and constitutional system.

III. RESEARCH PLAN

In order to take note of the topic of the research, we will divide it into two topics. We deal in the first topic the rules of attribution in legal legislations, and in the second topic the problems raised by the constitutionality of the rules of attribution.

IV. RESEARCH METHODOLOGY

The study of this research depends on the comparative analytical approach through analyzing the internal legal texts of other countries and making a comparison between these texts and Iraqi law and the extent of their application with international agreements in the field of the impact of legislative developments on the constitutionality of the rules of attribution under private international law.

The first topic

Attribution rules under legal legislation

The followed procedure in various comparative legislations is to follow an artistic method for resolving the contention or conflict between laws regarding international relations. This method is known as the approach of attribution rules or rules of conflict of laws, its task is to solve the problem of "conflict of laws" by choosing a specific law - national or Foreign - to apply to the dispute in question. In order to take a detailed note of this in the topic, we will divide it into two requirements. In the first demand, we will indicate the traditional approach to the rules of attribution and in the second demand the extent of the appropriateness of the traditional conflict method to settle private international disputes.

The first requirement

The traditional approach to attribution rules

The attribution rules are considered the ideal way for the national legislator to choose the most congested laws that are appropriate to the rule of the international special relationship and the most satisfactory to justice. Thus, the purpose of the existence of these rules is to select the law that achieves an appropriate and consistent solution with

the requirements of logic, justice and fairness. According to these rules, the applicable law is reached in two stages: the stage of determining a conflict or relationship to link it to one of the ideas assigned and called this stage "initial adaptation". After the court ends this stage of conditioning, and matter becomes clear, it moves to the second stage: the stage of linking the assigned idea with a predicate officer to ensure determining the nationality of the appropriate law governing the dispute presented to it, and that every application of the national conflict rule may result in the application of foreign law or the judge and inherent law That the court applies its national law, the exception is to apply foreign law. This is what happens through the rules of attribution that the national legislator assigns in favor of foreign law, i.e. attributing the dispute to the law of a particular country in particular and expresses this stage in the English concept with the term of choice of law from a conflicting group. Each law has an interest in being applied. Accordingly, the base of support is composed of two main components: the idea assigned and the chain of reference.

The assigned idea is considered the first element in the structure of the base of attribution and it is the set of legal cases that the base of reference refers to defining the law pertaining to it and each group is a legal idea. The Iraqi legislator, like the Tunisian and Egyptian legislators, combined legal centers related to the acquisition of ownership, possession and the determination of rights in a single predicate idea, the idea of the center of funds. It states that "(possession, ownership, and other kind rights are regulated by the law where the money is located and that corresponds to Article (18) of the Egyptian Civil Law No. (131) for the year (1948) from Article (24) of the amended Iraqi Civil Law, which states that "(Issues relating to ownership, possession, and other in-kind rights, and in particular ways of transferring these rights by contract and inheritance" And the will, and others, shall be subject to the law of the site in relation to the property, etc)).

However, a single legal issue may receive more than one predicate idea and thus more than a base of attribution. Marriage in its formal and substantive conditions, for example, is distributed between two supporting ideas and thus between legal as stated in Chapter (45 and 46) of the Tunisian Journal of Private International Law and Article (19) the first and third paragraphs of Iraqi Civil Law No. (40) of 1951 amending it stipulates that((1 - In the objective conditions of the validity of marriage, due to the law of both spouses, it is considered true for marriage between two foreigners or between a foreigner and an Iraqi if it is contracted according to the form prescribed in the law of the country in which it took place, or if the forms prescribed by law are taken into account Each of the spouses... etc)).

The same is true in other contracts such as the work contract and in other relationships such as inheritance and will. In implementation of this, if a dispute related to a question tainted with a foreign element is brought before the court, the judge must give a description of the issue to determine its nature, in preparation for its inclusion in one of the appropriate supporting ideas for it. After that, he can reveal the applicable law by the attribution officer that defines the legislator in each country for each attribution idea. The attribution officer is the tool that the legislator relies on in the structure of the attribution base to determine the applicable law and is chosen through the constituent elements of the legal relationship. He is either one of its parts, such as nationality, citizenship, domicile and common management of both of them or its place, such as the location of the money and the place of execution, or from its cause, such as the place of signing the contract or the occurrence of a harmful or beneficial act.

Among the characteristics and features of the attribution rules are the rules of an indirect solution in the sense that they do not solve conflict but rather guide to the applicable law, as well as that they are national rules. Another feature is that it is double sided. In the other words, they may sometimes refer to national law or to the application of a competent foreign law, but in all cases they are neutral in the sense that they refer to the most relevant laws regardless of its content, i.e. the material result achieved following this exclusion of other laws or guidance. It refers to one law, so if the national legislator believes that justice is achieved by applying the national law, then it is obligatory to apply, and this matter is true of civil responsibility and real estate actions, but justice may be achieved in other disputes by applying the law of another country referred to as the rule of attribution. It is an abstract and neutral base among a group of centers and relationships that include an international dimension. It is decided before the conflict and when the judge applies it is not considered a violation of sovereignty. Through this characteristic of the rules of attribution, the competent law is determined in all cases, whether the law is national or foreign law, and then the national judge can decide on disputes of a foreign element and apply the appropriate law for these disputes. Thus, the traditional approach for choosing the idea of attribution comes from the reality in which society lives and therefore the idea of attribution is a national idea with national descriptions. The legislator is obligated to preserve the entity and foundations of society and it is the first element in the base of attribution. The attribution officer is a national component and the law assigned to him sometimes a national law or foreign law, with the consequence that the technical construction of the legal base in most of the cases has a national character that does not fit with the nature and philosophy of the rules of private international law.

The second requirement

The effectiveness of the traditional approach to attribution rules in private international disputes

The approach law conflict does not provide a direct solution to that conflict, but rather defines or refers to the applicable law, and the conflict is not solved so it is an indirect approach. Its rules are defined as those rules that the national legislator sets in each country its mission or function is to assign a legal relationship with a Foreigner element to the most appropriate laws to it. Its assignment ends with the beginning of law assignment. This is what the Iraqi legislator adopted in Article (31/1) of the Iraqi Civil Law No. (40) of 1951 amending, which states that ((if it is determined that a foreign law is applicable It applies from its substantive provisions without those related to private international law)). It is also called the rules of conflict of laws because it resolves the conflict between two or more laws. The last term was used by the Washington Convention of 1965 to settle investment disputes between the state and the citizens of other countries in Article (42) thereof. The approach of rules of conflict is based on the spatial focus of the subject matter of the dispute and considering the place to which it relates to the most reliable bonds. The choice of the law of that place to govern the relationship or link subject to the dispute. These rules are developing as a result of the progress of social life, which necessarily results in an evolution in the content of the ideas supported. The absence of specific and precise attribution controls for these ideas, and therefore the rules stipulated in Articles (11-33) of the Iraqi Civil Law No. 40 of 1951 amended are no longer Compatible with this attribution ideas on the one hand, On the other hand, the development that affected the idea of entrusting the entry of the electronic contract into the practical realm, which was recently organized by the French legislator in amending (2016). The French Civil Code for the year 1804 amended in Article (1125) which states that "the electronic means

can be used to indicate the conditions of the contract or Information about money or services and materials" (1127,1126,). As the general provisions of the electronic contract showed, and thus it becomes clear the inability of the Iraqi traditional attribution rules approach to confront this development because the principle of territoriality cannot be applied in the hypothetical domain, as the planetary village has in fact canceled all predications that depend on the geographical controls of a particular region for unknown location. Moreover, the information cannot be associated or identified with a specific region, because it is transmitted automatically from the moment of downloading to all countries connected to the Internet. The justifications on which the position is based, do not continue under the Internet system, due to the fact that this system has achieved areas for communication, exchange of information and data across borders in a smooth flow. it entered all countries without prior permission and without barriers, and thus the legal relations (contractual and non-contractual) arising from Electronic transactions exceeded the territorial spatial limits of one country to include the entire world.

It is clear from above mentioned, the inadequacy of the attribution controls known in private international law, which lead to the application of internal legal rules to operations that are cross-border in nature, they are regulations that developed only for the sake of a physical world, while transactions via the Internet lead to a virtual world of numbers And logical entities. So it became necessary to search for an alternative that would replace the traditional rules of conflict and organize problems that might arise in this area. As stipulated in Article (9) of the Vienna Agreement for the International Sale of Goods for the year 1980, it stated (The two parts shall adhere to the norms that they agreed upon and the customs upon which the dealings were established between them).² Unless there is an agreement to the contrary, it is assumed that the two parts have implicitly agreed to their contract or Its formation as a custom they knew about or should have known about it when it was widely known and regularly taken into account in international trade between the parties in the similar contracts in effect in the same branch of trade). The norms of electronic commerce can be used or so-called objective substantive electronic rules applied to electronic commerce contracts.

The second topic

The problems raised by the constitutionality of the attribution rules

The aim of the attribution rules approach in the various legislations of states is to search for the law that best suited to rule the legal relationship that includes a foreign element. it is originally determined in the perspective of schools of jurisprudence for conflict of laws. this goal must be effective in communicating with other legal systems and requires to be the goal of attribution rules Iraqi to preserve various special interests with the international dimension in response to the political, economic and social transformations that the Iraqi society has experienced that change and change have occurred. During this period from 1950 until now, society has moved from the stage of a dictatorial regime based on individual rule to the stage of a democratic state based on the principle of equality, and on the one hand Others from an agricultural community that takes agriculture as the primary source of legal relations to an industrial community that takes modern technology as an important basis in establishing trade relations with natural and moral persons belonging to different nationalities.

The first requirement

The political, economic and social debates of the constitutionality of the attribution rules

The law is a social necessity for human life and it cannot be dispensed in any way. Rather, the societies that live without law are societies that do not know the ladder of development, and the characteristic of development is governed by factors outside the will of the legislator. Whereas, the manufacturing and formulation of the rules of attribution are a reflection of the state's philosophy, as if the latter affects the political, economic and social aspect, even if the former plays a less or less specific role in relation to other aspects, given that the text in private international law is subject to being influenced by the political factor less than the other. Likewise, these rules are a means and a tool for expressing the material and moral needs of the dealers within the framework of this branch of the law. Therefore, the legislator must combine these elements that are the political, economic and social aspect within the state, and this combination will contribute significantly to creating legal rules that seek justice. It is clear and in line with the rules and standards of private international law. And the rules of conflict of both types are conflict of laws or conflict of jurisdiction, but they were designed according to the provisions of the Civil Law of 1951 when the Iraqi state was a simple country and the situation is not so now. The form of the Iraqi state changed after 9/4/2003 from a central unified state to a federal state, and as a result, that is why, in 2004, the Governing Council of Iraq issued the Transitional Administrative Law, of which the fourth article states that "the system of government in Iraq is a federal, republican, and federal Pluralist democracy".

In the permanent federal constitution of Iraq for the year 2005, he stated in its first article, "The Republic of Iraq is an independent and sovereign state, the system of government in which it is a parliamentary, federal, and democratic" Countries are divided according to the provisions of international law into simple and complex states, and in simple states there is one authority, which exercises the aspects of sovereignty through its three legislative, executive and judicial bodies. As for the composite state, and Iraq is one of them, which includes states and territories, there are federal legislative and judicial bodies that simplify their powers over the entire region of the country, and there are local legislative, executive, and judicial bodies that exercise their jurisdiction within the borders of the state or region.

This reality may result in a regional diversity in the wonderful called in international law on regional diversity and raises a problem called attribution to the law of a country in which laws transgress and jurisprudence indicates the need to consult the attribution rules in this law in order to reach the applicable law among the multiple laws.

This problem has demonstrated the ineffectiveness of the rules of attribution in finding solutions to disputes of private international law, as well as the failure of the text to keep up with reality and from keeping up with the attribution rules with the political and constitutional system, and therefore the legislator must intervene in order to develop practical solutions to this problem. Likewise, the Iraqi legislator must intervene to develop solutions to protect the Iraqi economy, which was guaranteed by the Iraqi constitution of 2005 in Article 25 thereof in the field of economic rights, which states: Likewise, the Iraqi legislator must intervene to develop solutions to protect the Iraqi economy, which was guaranteed by the Iraqi constitution of 2005 in Article 25 thereof in the field of economic rights, which states: (The state guarantees the reform of the Iraqi economy according to its modern economic

foundations, in a manner that ensures full investment of its resources, diversification of its sources, and encouragement and development of the private sector) As a result of the economic openness and growing economic relations with the countries of the world, thanks to the widespread use of the Internet and globalization, and Iraq's entry into the field of electronic dealing, in addition to that and because of the migration of Iraqis to Abroad: Nearly five million Iraqis outside Iraq, as a result of this fact, the increase in mixed legal relations, marriage, divorce, inheritance, etc. It is noted that the political, social and economic transformations that the Iraqi state is going through confirm the invalidity of the Iraqi rules of support mentioned in Articles (11-33) of the Iraqi Civil Law No. 40 of 1951 to apply to disputes of an international dimension.

The second requirement

Constitutional transitions of the attribution rules

As we already knew that the Iraqi legal attribution rules for a long time are still the usual way of organizing the international life of individuals as an approach that gives the choice of solutions in the presented laws related to the legal relationship with a foreign element, except that the development that took place at the present time and the emergence of the state in the modern concept alerted the states from them Iraq pointed out the necessity to lay down the organization of these relations through appropriate legal rules that are compatible with the constitutional provisions that the Iraqi constitution for the year 2005. Where the effective Iraqi constitution affirmed the principle of equality between men and women and the need to find a balance between them in the rights and duties in Article 14 of it, which states (Iraqis are equal before the law without distinction as to sex, race, nationality, origin, color, religion, sect, belief, or Opinion or economic or social situation).

This principle embodied in the Iraqi constitution for the year 2005 shows us that the drafting of the attribution rules came in a different way because the Iraqi legislator in the Civil Law No. 40 of 1951 preferred the husband's nationality law over the wife's nationality law in the attribution rules for personal status matters by giving jurisdiction to the law. The husband on the effects of the marriage contract under Article 19, the second paragraph of it, and the issue of divorce in Article 19, the third paragraph, which states that "the law of the husband applies at the time of divorce or at the time of filing a lawsuit. The preference of the husband's nationality law over the wife's nationality law because the Iraqi legislator did not dedicate the principle of equality between men and women, which is one of the principles enshrined in the Iraqi constitution. thus, giving jurisdiction to the base of attribution of personal status to the husband's nationality law at the time of divorce or filing a lawsuit causing harm to the wife from this. It leads us to a very important issue, these texts are no longer have a constitutional value because the formulation of the rules of attribution still enshrines the principle of equality between men and women.

V. CONCLUSION

First: The results

1- The aim of the attribution rules is to verify the existence of protection for the justified and reasonable expectations of the parties to the conflict, to predict the results of litigation and to achieve justice in every decision. To pay the attention to the consistency of solutions, harmony and harmony among the national judiciary and the

relevant legal systems. This methodology serves the interests of both parties to the conflict as well as the state and the international community, Because it fills inefficiencies in inductive reasoning.

2- The attribution rules should be simple in terms of formulation and substantive content and easy to understand by litigants in order to avoid unpredictability by litigants and promote justice. Therefore in much legislation, the national legislator uses the multiple or alternative attribution base in order to create sufficient flexibility in the legal bond between conflict and the applicable law that applies to a specific legal category.

3-The technical construction of the base of support in most of the cases has a national characteristic that does not fit with the nature and philosophy of the rules of private international law.

4-The political, economic, and social transformations that Iraq went through indicated the inability of the attribution rules to confront development and its inability to apply to private international disputes.

VI. RECOMMENDATIONS

1-The Iraqi legislator should start codifying the rules of private international law instead of leaving them in several laws, rules of conflict of laws, and rules of conflict of international jurisdiction. Acknowledgment of the implementation of foreign provisions, similar to the Tunisian private international law, as well as taking advantage of solutions adopted by European regulations such as the Regulation on Contractual Relations of 2008, the Regulation on Personal Status, and the Regulation on Non-Contractual Liability for 2007, as well as the Hague Agreement of 2005.

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