

The Conflict of Laws Rules on Contractual Obligations in the Federal state: A Comparative Study with U.S. Second Restatement

<https://doi.org/10.17656/jlps.10316>

Dr.Younis Salahuddin Ali

Assistant Professor of the Private Law/ College of Law and International and Diplomatic Relations / Cihan University-Erbil

Abstract

This research is concerned with studying the scope of the application of the conflict of laws rules on the contractual obligations in the interstate conflict of laws in the federal state. The article adopts the U.S. law as a paradigm, in conformity with the U.S. second restatement of the conflict of laws, compared with the situation of the current conflict of laws rules in the Iraqi civil law No. (40) of 1951. The U.S. second restatement can solve the interstate conflict of laws on the contractual obligations, by both the article 187 and 188. It encompasses the solution of the interstate conflict of laws in the case of the choice of law. And in the case of the determination of the applicable state law in the absence of the choice of law by the contracting parties. The problem of the research lies in the shortage and insufficiency of the situation of the conflict of laws rules in the Iraqi civil law No. (40) of 1951, concerning the inter-territorial (inter-regional) conflict of laws. This study has adopted to the analytical comparative methodology of the legal research, and the main finding of this study is that the first paragraph of the article (25) is not concerned with solving the inter-territorial conflict of laws in the federal state. The researcher suggests some relevant recommendations to the Iraqi legislator, the most important of which is to suggest a legal regulation for solving the inter-regional conflict of laws in the federal Iraq.

Keywords: Chosen Law, Second Restatement, The Conflict of Laws Rules, Interstate Conflict of Laws, Connecting Factors.

قواعد تنازع القوانين الخاصة بالالتزامات التعاقدية في الدولة الفيدرالية/ دراسة مقارنة بالمدونة الأمريكية الثانية
ديونس صلاح الدين علي

أستاذ القانون الخاص المساعد / كلية القانون والعلاقات الدولية والدبلوماسية / جامعة جيهان-أربيل

younis777_y@yahoo.com

الخلاصة

يُعنى هذا البحث بدراسة نطاق تطبيق قواعد تنازع القوانين على الالتزامات التعاقدية، في تنازع القوانين في الدولة الفيدرالية. وقد تبنت الدراسة القانون الأمريكي إنموذجاً، وذلك وفقاً للمدونة الأمريكية الثانية لتنازع القوانين، مقارنة بقواعد تنازع القوانين الحالية في القانون المدني العراقي رقم (٤٠) لسنة ١٩٥١. وجدير بالذكر أن بإمكان هذه المدونة حل التنازع بين قوانين الولايات بخصوص الالتزامات التعاقدية عن طريق المادتين (١٨٧) و (١٨٨). وهي تتضمن حلاً للتنازع بين قوانين الولايات في حالة إختيار القانون الواجب التطبيق، وفي حالة تحديد قانون الولاية الواجب التطبيق في حالة غياب إختيار الأطراف المتعاقدة لذلك القانون. وتكمن مشكلة البحث في النقص والقصور الذي إعتري أو شاب موقف قواعد تنازع القوانين (قواعد الإسناد) في القانون المدني العراقي رقم (٤٠) لسنة ١٩٥١، بخصوص تنازع القوانين بين الأقاليم. وقد تبنت الدراسة منهج البحث العلمي القانوني التحليلي المقارن. أما أهم نتيجة توصلت إليها الدراسة فهي عدم ملائمة الفقرة الأولى من المادة (٢٥) لحل تنازع القوانين بين الأقاليم

في الدولة الفيدرالية. وإقترح الباحث بعض التوصيات ذات الصلة للمشروع العراقي ومن أبرزها إقترح تنظيم قانوني لحل تنازع القوانين بين الأقاليم في العراق الفيدرالي .

الكلمات المفتاحية: القانون المختار، المدونة الثانية، قواعد تنازع القوانين، تنازع القوانين بين الولايات، ضوابط الإسناد.

رئیساکانی تیکچوونی یاسا له بابەتی پابەند بە گریبەستیهکان له حکومهتی فیدەرال: توێژینهوهیهکی هاوێچ
لهگه‌ڵ گۆقاری دوومه‌ی ئهمریکی بۆ تیکچووه‌ی کان یاسا
دیونس سه‌لاحه‌دین عه‌لی
پروفسۆری یاریده‌ده‌ری یاسای تایبەت / کۆلێژی یاسا و په‌یوه‌ندییه‌ نیوده‌وله‌تیه‌کان و دیپلۆماسی /
زانکۆی جیهان-هه‌ولێر

پوخته

ئهم توێژینه‌وه‌یه‌ په‌یوه‌ندیده‌ به‌ توێژینه‌وه‌ی سه‌ر ده‌وامی به‌کارهێنانی رئیساکانی تاقیکردنه‌وه‌ی یاسا له‌سه‌ر پابەند بە گریبەستیه‌کان له‌ تاقیکردنه‌وه‌ی یاسا له‌نیوان دۆله‌ته‌کان له‌ نه‌ته‌وه‌ی فیدەرالی. ئهم بابەته‌ یاسای ئهمریکی وه‌ک نموونه‌یه‌ک وه‌رگرتوه‌، له‌گه‌ڵ گۆقاری دوومه‌ی ئهمریکی بۆ تیکچوونی یاسا، به‌ هاوێچکردنه‌وه‌ی ئهو یاساکانه‌ی که‌ ئیستا له‌ یاسای شارستانی عێراقی ژماره‌ (٤٠) ی سالی ١٩٥١ بوونی هه‌یه‌. پێویسته‌ ب‌لێندری‌ت که‌ گۆقاری دوومه‌ی ئهمریکی ده‌توانی‌ت کێشه‌ی تیکچوونی یاسای نیوان و‌لاته‌ فیدەراله‌کان چاره‌سه‌ر بکات بۆ به‌نده‌ په‌یماننامه‌کان، له‌ رووی ماده‌ (١٨٧) و (١٨٨). ئهمه‌ چاره‌سه‌ری تاقیکردنه‌وه‌ی یاسای نیوده‌وله‌تی ده‌گرت، له‌ حاله‌تی هه‌لبژاردنی یاسا. هه‌روه‌ها، له‌ حاله‌تی دیاریکردنی یاسای به‌کاربه‌ر ب‌ی هه‌لبژاردنی یاسا له‌لایه‌ن په‌یمانکاره‌کانه‌وه‌. کێشه‌یه‌کی توێژینه‌وه‌یه‌ که‌ له‌ نه‌بوونی ته‌واوی و نه‌کۆکیه‌تی باری یاساکانی تاقیکردنه‌وه‌ له‌ یاسای شارستانی عێراق ژماره‌ (٤٠) ی سالی ١٩٥١ دایه‌، به‌ توێبه‌ری تاقیکردنه‌وه‌ی یاسای هه‌ریمه‌که‌ (ناوچه‌کان). ئهم توێژینه‌وه‌یه‌ ریگه‌یه‌کی بۆ راپرسی و به‌راوردی یاسایی به‌کارهێناوه‌. ئهم توێژینه‌وه‌یه‌ به‌ ئه‌نجامدا ده‌گاته‌ ئه‌وه‌ی که‌ فقه‌ی یه‌که‌می بابەت (٢٥) په‌یوه‌ندیده‌ به‌ چاره‌سه‌ری تاقیکردنه‌وه‌ی یاسای هه‌ریمه‌کانی نه‌ته‌وه‌ی فیدەرالی نییه‌. توێژه‌ره‌که‌ هاندیکی په‌یوه‌ندیده‌ به‌ په‌رله‌مانی عێراق پێشنیار ده‌کات، گرنگ‌ترین پێشنیاره‌که‌ش ئه‌وه‌یه‌ که‌ ر‌یکخه‌ستی یاساییه‌کی تایبەت بۆ چاره‌سه‌ری تاقیکردنه‌وه‌ی یاسا له‌ نیوان هه‌ریمه‌کان له‌ عێراقی فیدەرالی پێشنیار بکات.

کلێله‌ وشه‌کان: یاسای هه‌لبژێردراو ، گۆقاری دوومه‌ی، یاساکانی تیکچوونی یاسا، تیکچوونی یاسا له‌ نیوان و‌لاته‌ فیدەراله‌کان، بینهری یاسایی.

Introduction

First: The Introductory Preface to the Topic: The U.S. Restatement (second) of the conflict of laws regulated the interstate conflict of laws rules, and assigned both the sections (187) and (188) to determine the applicable law of a certain state to solve the conflict of laws concerning the contractual obligations. The section (187) of the U.S. Restatement (second) of the conflict of laws made a distinction between two situations, in which the law of the state chosen by the parties to govern their contractual rights and duties can be applied. The first handles the special issue which the parties could have determined by an explicit agreement on the local law of the state chosen. The second deals with the special issue which the parties could not have determined by an explicit agreement on the local law of the state chosen. The section (188) is concerned with determining the applicable local law of the state having the most significant relationship to the transaction and the parties with respect to that issue, in the absence of the effective choice by the

parties. Whereas the current Iraqi conflict of laws rule in the first paragraph of the article (25) of the Iraqi civil law is applicable on the contractual obligations arising from the international contract, and is not concerned with solving the inter-territorial (inter-regional or inter-state) conflict of laws in the federal state. Nor is the second paragraph of the article (31) sufficient for solving this type of conflict of laws.

Second: The importance of the research: The importance of this research lies in trying to borrow some important conflict of laws rules from the U.S. Restatement (second) of the conflict of laws, in order to suggest a legal regulation for the inter-territorial (inter-regional) conflict of laws in the federal Iraq.

Third: The problem of the research: The problem of the research focuses on the shortage and insufficiency of the situation of the conflict of laws rules in the Iraqi civil law No. (40) of 1951, concerning the inter-territorial (inter-regional) conflict of laws. The problematization is also embodied by two questions: the first is: what is the extent to which the Iraqi law can benefit or make use of the U.S. interstate conflict of laws rules provided by the second restatement , as the best interstate conflict of laws rules world-wide. The second is how can the shortage and insufficiency vitiating the current Iraqi conflict of laws rules be dealt with, concerning their being incapable of solving the internal conflict of laws among regions and territories, because the current rules are tasked with solving the conflict of laws on the international level. Including the second paragraph of the article (25), which determines the applicable law on the international contract, and the contractual obligations from which they arise. Furthermore, the second paragraph of the article (31) is insufficient of for two reasons: the first reason it is assigned to solve the internal conflict of laws in a country having several legal systems in front of the Iraqi judge. The second reason: it refers to the internal law of a country having several legal systems. Considering that the laws of the federal Iraq do not contain internal conflict of laws rules, tasked with solving the inter-regional conflict of laws.

Fourth: The methodology of the research: This research has followed up the analytical comparative methodology of the legal research, by studying the explicit choice of the law of the state by the parties, and the applicable law having the most significant relationship to the transactions and the parties, in the absence of the effective choice of law provision according to the U.S. Restatement (second) of the conflict of laws. And comparing them with current situation of the Iraqi conflict of laws rules.

Fifth: The plan of the research: in conformity with the above-mentioned methodology, this research has been divided into two sections as follows:

First Section: The explicit choice of the law of the state by the parties.

Second Section: The applicable law having the most significant relationship to the transactions and the parties, in the absence of the effective choice of law provision.

1. The explicit choice of the law of the state by the parties

To begin with, the parties to contract or the contracting parties can agree or make a choice to select or choose expressly the law of a certain state⁽¹⁾, by inserting an explicit choice-of-law provision in their contract. But the section (187) of the U.S. Restatement (second) of the conflict of laws made a distinction between two situations, in which the law of the state chosen by the parties to govern their contractual rights and duties can be applied⁽²⁾. The first handles the special issue which the parties could have determined by an explicit agreement on the local law of the state chosen⁽³⁾. The second deals with the special issue which the parties could not have determined by an explicit agreement on the local law of the state chosen. Therefore, we should make an in-depth analysis of these two situations in the following two topics as follows:

1.1. The law of the state chosen if the particular issue of the conflict is the one which the parties could have resolved by an explicit choice-of-law provision

It has been previously mentioned that the contracting parties can agree to choose the local law of an interested state to govern their rights and duties⁽⁴⁾, if the particular issue is one which the parties could have determined by introducing or listing an explicit choice-of-law provision in their contract⁽⁵⁾. According to the first paragraph of the section (187) of the U.S. Restatement (second) of the conflict of laws entitled the (law of the state chosen by the parties), which states that (the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue). Analyzing the text of this paragraph can lead to the idea that the parties necessarily have the capability and power to determine the terms of their contractual arrangement. This text can be applied if the particular issue of the conflict is the one which the contracting parties could have resolved by an explicit choice-of-law provision to choose the local law of a particular state⁽⁶⁾. As soon as the parties agree to choose the law of a designated state in conformity with this paragraph, the forum (court) this contractual provision, in order to respect the common intent or the mutual intention of the parties. In other words, the court will apply the law of the state chosen, even if this law is the law of other state than the one in which both the parties are domiciled, or the one to which the subject-matter of the contract has no relation. But the issue of the conflict is the one which the contracting

(1) John O'Brien, Conflict of Laws, Second Edition, Cavendish Publishing Limited, London, 1999, P.33.

(2) Peter North and J.J Fawcett, Cheshire and North's Private International Law, Thirteenth Edition, Butterworths London 1999. p.28.

(3) E. Scoles, party autonomy and choice-of-law: the restatement (second) of conflict of laws, Hofstra Law Review, Volume 4, Issue 4, 1976, P.605.

(4) Paul E. McGreal, Conflict of Laws, SMU Law Review, Annual Survey of Texas Law, Volume 47, Issue 4, 1994 .P.873.

(5) Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, Conflict of Laws, Fifth Edition, West Academic Publishing, 2010 .P.1551.

(6) Paul E. McGreal, op Cit .P.873.

parties could have resolved by an explicit choice-of-law provision⁽¹⁾. But the forum will not give effect to the choice-of-law provision, if the consent of one of the contracting parties is obtained by a vice of consent vitiating the will of that party, such as duress, misrepresentation, undue influence or mistake. But what about the choice-of-law provision included or contained in the "adhesion contract" drafted unilaterally by the dominant party, and imposed on the weaker party, who has no real chance to discuss or bargain about its terms and stipulations? The U.S. courts will not usually apply the choice-of-law provision, if it inflicts substantial damage or injustice to the adherent. As far as the contractual capacity is concerned, the contracting parties can choose two laws of different states to govern their contractual capacity. Particularly when the parties are domiciled in different states, and each of them has the capacity to enter into the contract under the local law of his domicile⁽²⁾. In this case they should subject to the rule of the third paragraph of the section (187) which states that (in the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law). According to this rule the capacity of each party shall be determined by the local law of his domicile.

1.2. The law of the state chosen if the particular issue of the conflict is the one which the parties could not have resolved by an explicit choice-of-law provision and its exceptions

The parties to a contract can also agree to choose the local law of an interested state to govern their rights and duties, even if the particular issue is one which the parties could not have determined by incorporating an explicit choice-of-law provision in their contract. In conformity with the second paragraph of the section (187) of the U.S. Restatement (second) of the conflict of laws, which states that (the law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either: (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties). In this case the local law of the state chosen by the contracting parties will be applied, even if the particular issue is one which the parties could not have resolved or determined by the explicit choice-of-law provision⁽³⁾. When this paragraph is analyzed, it is clearly shown that the rule included in this paragraph will be applied, when two or more states have an interest in the determination or resolution of the particular issue. But the rule does not apply when all contracts are located in a single state⁽⁴⁾. Strictly speaking, the rule of this

(1) **Peter North and J.J Fawcett**, op Cit. p.28.

(2) E. Scoles, op Cit , P.606.

(3) Paul E. McGreal op Cit .P.874.

(4) **Peter North and J.J Fawcett**, op Cit. p.28.

section can apply when the contracting parties seek to have the chosen law determine issues, which they could have determined or resolved by explicit agreement directed to that issue⁽¹⁾. The most important particular issue to be governed by this paragraph, and the parties could not have resolved by an explicit provision in their agreement, is exemplified by the validity of the contract. Therefore, in multi-state transactions the parties may choose the applicable law to govern the validity of their contract, and the rights and obligations created thereby. An example of this question, (A) concluded a contract with (B) in the state of Chicago. The law governing the validity of the contract, chosen according to the explicit choice-of-law provision is the local law of the state of Texas, which considers the contract valid and enforceable. As opposite to the local law of the state of Chicago, according to which the contract is unenforceable for the lack of consideration. In an action brought by (B) against (A), the contract will not be held invalid for the lack of consideration. It is to be noted that the rule included in the second paragraph of the article (187) is restricted or limited by two exceptions which preclude the application of the law of the state chosen by the parties:

- A- The local law of the state chosen by the parties has no substantial relationship to the parties or the transactions and there is no other reasonable basis for the parties' choice: the chosen state or the law of the state chosen can have a substantial relationship to the parties or the transactions⁽²⁾, and the parties will be held to have had a reasonable basis for their choice, if the place of the performance of the contract is situated in the chosen state, one or both parties are domiciled in that state, one or both parties have his principal place of business in that state, or the place of contracting is situated in the chosen state, provided that the place of contracting should not be wholly fortuitous and bears no real relation either to the contract or to the parties. If the local law of the state chosen by the parties will not be based on these connecting factors, it does not have any substantial relationship to the parties or the transactions⁽³⁾. If the parties intend deliberately to choose a foreign law in the spirit of adventure, this choice will be made in contrary to the requirement of reasonable basis for parties' choice, stipulated in the first exception to the second paragraph of the section (187).
- B- The local law of the state chosen by the parties would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination or resolution of the particular issue: the terminology of the "fundamental policy of a state" refers to the core or essential public policy⁽⁴⁾. The

(1) E. Scoles, op Cit , P.610.

(2) Paul E. McGreal op Cit .P.873.

(3) E. Scoles, op Cit , P.611.

(4) Jeffrey L. Rensberger , Choice of Law and Time, Part II: Choice of Law Clauses and Changing Law Changing Law, Georgia State University Law Review, Volume 39, Issue 2, 2023 .P.446.

file:///C:/Users/AD4/Desktop/Choice%20of%20Law%20and%20Time%20Part%20II_%20Choice%20of%20Law%20Clauses%20and%20Changi.pdf

state's fundamental policy indicates the principles or rules that reflect substantial economic and social interests, such as fairness, morality or protection of certain weaker groups (e.g., consumers or employees). As well as the principles and rules Prohibiting the enforcement of unconscionable contracts, reinforcing anti-discrimination laws. Therefore, the application of the chosen law will be refused by the forum for achieving a prime goal or objective of the protection of a fundamental policy of the state which, under the rule of the section (188), would be the state of the otherwise applicable law. Provided that this state has a materially greater interest than the state of the chosen law in the determination or resolution of the particular issue.

1.3. The situation of the current Iraqi conflict of laws rules towards the voluntary choice of the applicable on the contractual obligations

One of the well-established principles in the field of the civil law in general, and the private international law in particular, is the principle of the autonomy of will, which can apply on the international contracts vitiated with a foreign element⁽¹⁾. This principle is closely related to another principle known as the (pacta sunt servanda). Both of these principles originated in the civil law, but extended their application later to the field of the private international law. Therefore the Iraqi legislator adopted them in reformulating the conflict of laws rules in the Iraqi civil law No. (40) of 1951. Under the title of the "chosen law". Under the first paragraph of the article (25) of the Iraqi civil law, which states that (The contractual obligations shall be governed by the law of the state wherein lies the domicile of the contracting parties if they have a common domicile; where they have different domiciles the law of the state within which the contract was concluded will be applied unless the contracting parties have agreed (otherwise) or where it would be revealed from the circumstances that another law was intended to be applied). It has been clearly indicated that the Iraqi legislator subordinated the international contract to the law chosen by the contracting parties⁽²⁾. This choice of law should made clearly by the parties' autonomy of the will, or it would be revealed from the circumstances that another law was intended to be applied. In this case the court should deduce or infer the law chosen by the implied will of the parties from the circumstances which surrounds the contract⁽³⁾. An example of this case the insertion of the choice-of-jurisdiction clause in the international contract. In order to include the contractual disputes of conflicts within the jurisdiction of a certain state.

(1) Ahmed Abdulkarim Salameh, The science of the conflict of laws rules and the choice between legislations as an origin and curriculum, Mansourah Egypt, 1996 .P.1097.

(2) Awni Mohammad Al-Fakhri, The Will of choice in the international commercial and financial contracts A comparative study, Zein Juridique Publishing, 2012 .P.94.

(3) Hasan Al-Haddawi and Ghalib Al-Dawoudi, The private international law, The conflict of laws, international jurisdiction and enforcement of foreign judgments, Baghdad, 1988, P.873.

This means that the parties' will has impliedly chosen the law of that state⁽¹⁾. It is to be noted also here that these circumstances surrounding the contract is considered as judicial presumptions, upon which the court can rely to detect the implied will of the parties. It can be detected sometimes from the language of the contract⁽²⁾. Finally we should refer to the insufficiency of first paragraph of the article (25) of the Iraqi civil law in solving the inter-territorial (inter-regional or inter-state) conflict of laws in the federal state. It is to be noted that the shortage or insufficiency vitiating the current Iraqi conflict of laws rules is embodied by their being incapable of solving the internal conflict of laws among regions and territories, because the current rules are involved in solving the conflict of laws on the international level. Including the first paragraph of the article (25) which determines the applicable law on the international contract, and the contractual obligations from which they arise.

2. The applicable law having the most significant relationship to the transactions and the parties, in the absence of the effective choice-of-law provision

In this section we shall discuss the applicable law of the state having the most significant relationship to the transactions and the parties, in the absence of the effective choice of law provision, and the role played by the principle of the protection of justified expectations of the parties the most significant relationship⁽³⁾. and compare it with the situation of the current Iraqi choice of laws rules in the following topics as follows:

2.1. The protection of the of justified expectations of the parties by determining the most significant relationship to the transaction and the parties in the absence of the effective choice of law provision

The first paragraph of the section (188) of the U.S. Restatement (second) of the conflict of laws entitled the (law governing in absence of effective choice by the parties) states that (the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in section (6)). At first sight, it has been indicated that the rule of this paragraph refers clearly to the principles and factors listed in the section (6) of the second restatement⁽⁴⁾, in conformity with which the rights and duties of the contracting parties concerning a particular issue⁽⁵⁾, are to be determined or governed by the local law of the state having the most significant

(1) Hisham Ali Sadiq, The applicable law on the international trade contracts, Alexandria Egypt, 2001, P.28.

(2) Abbas Al-Abboudi, The conflict of laws, international jurisdiction and enforcement of foreign judgments, Al Sanhoury Publishing Baghdad, 2015, P.184.

(3) William M. Richman and William L. Reynolds, Prologomenon to an Empirical Restatement of Conflicts, Indiana Law Journal, Volume 75, Issue 2, Article 3, 2000.P.421. <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2115&context=ilj>

(4) Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, op Cit .P.1560.

(5) Paul E. McGreal, op Cit .P.873.

relationship to the transaction and the parties with respect to that issue⁽¹⁾. The phrase (most significant relationship) can be interpreted as the local law of the state with which the rights and duties of the contracting parties concerning a particular issue are most closely connected⁽²⁾. It is worth-noting that the principles or factors identifying the most significant relationship between the local law of a certain state⁽³⁾, and the transaction and the parties with respect to a particular issue are provided for in the second paragraph of section (6) which states that (When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied). The most important of these principles or factors is the protection of justified expectations of the parties, in the absence of effective choice by the parties. It is to be emphasized here that the protection of justified expectations of the parties is considerably more important in contracts than in torts. If the justified expectations of the parties is protected by the local law of a certain state, this will support in turn other such important values as the certainty, predictability and uniformity of result⁽⁴⁾. Unless these values are realized, the justified expectations of the parties will be disappointed⁽⁵⁾. Therefore, there is a close relation between the protection of justified expectations of the parties as a main factors listed in the second paragraph of section (6) afore-mentioned, and the absence of effective choice by the parties⁽⁶⁾. Even in the field of the law of contract itself, the importance of the protection of the justified expectations of the parties varies from a particular issue to another, or from issue to issue. It will be considerably more important in issues related to the validity of the contract, such as contractual capacity and formalities. But the factor of the protection of the justified expectations of the parties will be less important in the issues related to the nature of their contractual obligations and the time of performance of the obligation. Because these issues are to be governed by default rules or gap-filling rules rather than mandatory or imperative rules. This means that the justified expectations of the parties will not be disappointed by the application of the gap-filling rules of one state rather than those of another state. But matters run contrary to this situation if the mandatory or imperative rules are to protect the

(1) Jeffrey L. Rensberger , op Cit .P.443.

(2) Abba Mayss, Principles of conflict of laws, Third Edition, Cavendish Publishing Limited, 1999 .P.115.

(3) **Peter North and J.J Fawcett**, op Cit. p.29.

(4) Paul E. McGreal, Conflict of Laws, SMU Law Review, Annual Survey of Texas Law, Volume 47, Issue 4, 1994 .P.867.

(5) E. Scoles, op Cit , P.612.

(6) William M. Richman and William L. Reynolds, op Cit .P.423.

justified expectations of the parties. Therefore, the protection of justified expectations of the parties is not likely to play an important role in the choice of law process. Consequently the formation of choice-of-law provisions is closely related to other principles or factors listed in section (6) other than the protection of justified expectations of the parties.

2.2. The connecting factors which determine the applicable law of a certain state in the absence of the effective choice of law provision

Applying the principle of the protection of justified expectation of the parties, listed in section (6) of the U.S. restatement second of the conflict of laws, to determine the applicable law having the most significant relationship to the transactions and the parties, in the absence of the effective choice of law provision⁽¹⁾. The second paragraph of the section (188) has identified nine connecting factors to determine the applicable law of a certain state in the absence of an effective choice of law by the parties, and states that (in the absence of an effective choice of law by the parties, the contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue). This paragraph indicates that the principle of the protection of justified expectation of the parties mentioned in section (6), plays a considerable role in determining the applicable local law of a certain state, which has had the most significant relationship to the transactions and the parties⁽²⁾, with respect to the particular issue, in the absence of the effective choice of law provision. This determination is usually made by nine connecting factors: 1-The factor of the place of contracting. 2-The factor of the negotiation of the contract. 3-The factor of the place of performance. 4-The factor of the location of the subject-matter of the contract. 5-The factor of the domicile of the parties, 6- The residence of the parties, 7-The nationality of the parties, 8-The place of incorporation and 9-The place of business of the parties. This second paragraph clarifies that the local law of the state where one or more of these factors are situated, is considered as the applicable law having the most significant relationship to the transactions and the parties, and protecting the justified expectations of the parties⁽³⁾. The place of contracting represents the place where the offer and acceptance occur, to give the contract its binding effect. Whereas the place of negotiation of the contract makes a distinction between simple and significant contracts. Because it refers to the place where the contracting parties negotiate and agree on the terms of their significant contract preceded by a stage of negotiation. This means

(1) **Peter North and J.J Fawcett**, op Cit. p.29.

(2) Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, op Cit .P.1566.

(3) William M. Richman and William L. Reynolds, op Cit .P.423.

that if the contract is a significant one preceded by a stage of negotiation, the applicable law will be the local law of the state of negotiating the contractual terms. The place or situs of the subject-matter of the contract handles with such physical things as movable like chattels, or immovable like land. This connecting factor clearly protects justified expectations of the parties. The factors of domicile, residence, nationality, place of incorporation and place of business of the parties provide permanent or lasting relationship between the factors and the parties⁽¹⁾.

2.3. The situation of the current Iraqi conflict of laws rules towards the determination of the applicable law on the contractual obligations in the absence of the choice of law

The Iraqi legislator has adopted a compound conflict of laws rule in drafting the first paragraph of the article (25) of the Iraqi civil law, to determine the applicable law on the contractual obligations arising from the international contract. This conflict of laws rule is made up of for four connecting factors: the factor or criterion of the explicit or express will, the factor or criterion of the implied or implicit will, the factor or criterion of the common domicile of the parties and the factor or criterion of the place of contracting. therefore, conflict of laws rule it can be said that this conflict of laws rule consists of two principal factors or criteria, that is to say, the explicit and implied will factors, as well as two reserve connecting factors: the connecting factor of the common domicile of the parties and the factor of the place in which the contract is concluded⁽²⁾. In the absence of both the explicit and implied parties' will, the court shall apply the remaining rigid and reserve connecting factors of the common domicile and the place of contracting. but both of these factors are criticized. Because the common domicile factor runs contrary to the nationality factor or criterion adopted by the Iraqi law. And the place of contracting can be considered sometimes as a fortuitous factor. This means the insufficiency and deficiency of the rigid connecting factors to determine the applicable law in the absence of both the explicit and implied parties' will⁽³⁾. As we have said earlier the first paragraph of the article (25) of the Iraqi civil law is insufficient in solving the inter-territorial (inter-regional or inter-state) conflict of laws in the federal state. But the following question should also be answered: is the second paragraph of the article (31) of the Iraqi civil law suitable or sufficient for solving the problem of the inter-territorial (inter-regional) conflict of laws in the federal Iraq?. It states that (Where this foreign law is one of a state having several legal systems the law of such state will determine which of these systems must be applied). The typical answer is that the second paragraph of the article (31) is also insufficient for solving the problem of the inter-territorial (inter-regional) conflict of laws in the federal Iraq. This insufficiency of the second paragraph of the article (31) can be attributed or ascribed to two reasons: the first it is assigned to solve the internal conflict of laws in a

(1) **Peter North and J.J Fawcett**, op Cit. p.30.

(2) Abbas Al-Abboudi, op Cit, P.184.

(3) Abbas Al-Abboudi, op Cit, P.186.

country having several legal systems in front of the Iraqi judge. The second it refers to the internal law of a country having several legal systems. Considering that the laws of the federal Iraq do not contain internal conflict of laws rules, concerned with solving the inter-regional conflict of laws.

3. Conclusions

The conclusion is made up of both the findings and recommendations and as follows:

First: Findings: The study has reached the following findings:

- 1- The U.S. Restatement (second) of the conflict of laws regulated the interstate conflict of laws rules, and assigned both the sections (187) and (188) to determine the applicable law of a certain state to solve the conflict of laws concerning the contractual obligations.
- 2- The section (187) of the U.S. Restatement (second) of the conflict of laws made a distinction between two situations, in which the law of the state chosen by the parties to govern their contractual rights and duties can be applied. The first handles the special issue which the parties could have determined by an explicit agreement on the local law of the state chosen. The second deals with the special issue which the parties could not have determined by an explicit agreement on the local law of the state chosen.
- 3- It is to be noted that the rule included in the second paragraph of the article (187) is restricted or limited by two exceptions which preclude the application of the law of the state chosen by the parties: (A) if the local law of the state chosen by the parties has no substantial relationship to the parties or the transactions and there is no other reasonable basis for the parties' choice. (B) if the local law of the state chosen by the parties would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination or resolution of the particular issue.
- 4- The section (188) is concerned with determining the applicable local law of the state having the most significant relationship to the transaction and the parties with respect to that issue, in the absence of the effective choice by the parties.
- 5- The second paragraph of the section (188) has identified nine connecting factors to determine the applicable law of a certain state in the absence of an effective choice of law by the parties: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, (f) residence, (g) nationality, (h) place of incorporation and (i) place of business of the parties.
- 6- The study has reached to an important finding that the current Iraqi conflict of laws rule in the first paragraph of the article (25) of the Iraqi civil law is applicable on the contractual obligations arising from the international contract, and is not concerned with solving the inter-territorial (inter-regional or inter-state) conflict of laws in the federal state.

- 7- The study has also reached to another important finding that the second paragraph of the article (31) is also insufficient for solving the problem of the inter-territorial (inter-regional) conflict of laws in the federal Iraq.
- 8- This insufficiency of the second paragraph of the article (31) can be attributed or ascribed to two reasons: the first it is assigned to solve the internal conflict of laws in a country having several legal systems in front of the Iraqi judge. The second it refers to the internal law of a country having several legal systems. Considering that the laws of the federal Iraq do not contain internal conflict of laws rules, concerned with solving the inter-regional conflict of laws.

Second: Recommendations: After displaying these findings, the researcher suggests the following recommendations:

- 1- The researcher recommends that the Iraqi federal legislator follow suit the first paragraph of the section (187) of the U.S. second restatement of the conflict of laws and apply the local law of the region chosen by the parties to govern their contractual rights and duties, if the particular issue is the one which the parties could have resolved by an explicit agreement on the local law of the region chosen. Therefore the researcher suggests that the Iraqi federal legislator adopt the following text: (the local law of the region chosen by the parties can govern their contractual rights and duties, if the particular issue is the one which the parties could have resolved by an explicit agreement on the local law of the region chosen by the choice-of-law provision).
- 2- The researcher recommends that the Iraqi federal law-maker follow suit the second paragraph of the section (187) of the U.S. second restatement of the conflict of laws and apply the local law of the region chosen by the parties to govern their contractual rights and duties, even if the particular issue is the one which the parties could not have resolved by an explicit agreement on the local law of the region chosen, unless the law of the chosen region has no substantial relationship to the parties or the transaction, or would be contrary to a fundamental policy of a region which has a greater interest than the chosen region in the determination of the particular issue. Therefore the researcher suggests that the Iraqi federal legislator adopt the following text: (the local law of the region chosen by the parties can govern their contractual rights and duties, even if the particular issue is the one which the parties could not have resolved by an explicit agreement on the local law of the region chosen by the choice-of-law provision, unless the law of the chosen region has no substantial relationship to the parties or the transaction, or would be contrary to a fundamental policy of a region which has a greater interest than the chosen region in the determination of the particular issue).
- 3- The researcher also recommends that the Iraqi federal law-maker follow suit the second paragraph of the section (188) of the U.S. second restatement of the conflict of laws, and determine various connecting factors, to apply the local law of the region having the most significant relationship to the transaction and the parties, in

the absence of the choice of law by the parties, instead of being restricted to the current rigid factors of criteria of the Iraqi civil law, represented by the law of the common domicile of the parties, and the law of the place of contracting. Therefore the researcher suggests that the Iraqi federal legislator adopt the following text: (in the absence of the choice of law by the parties, the applicable law should be the local law of the region having the most significant relationship to the transaction and the parties, which is determined by having recourse to the following factors or criteria: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, (f) residence, (g) nationality, (h) place of incorporation and (i) place of business of the parties).

References

First: The Legal Books

- 1- Abbas Al-Abboudi, The conflict of laws, international jurisdiction and enforcement of foreign judgments, Al Sanhoury Publishing Baghdad, 2015.
- 2- Abla Mayss, Principles of conflict of laws, Third Edition, Cavendish Publishing Limited, 1999.
- 3- Ahmed Abdulkarim Salameh, The science of the conflict of laws rules and the choice between legislations as an origin and curriculum, Mansourah Egypt, 1996.
- 4- Awni Mohammad Al-Fakhri, The Will of choice in the international commercial and financial contracts A comparative study, Zein Juridique Publishing, 2012.
- 5- Hasan Al-Haddawi and Ghalib Al-Dawoudi, The private international law, The conflict of laws, international jurisdiction and enforcement of foreign judgments, Second Part, Baghdad, 1988.
- 6- Hisham Ali Sadiq, The applicable law on the international trade contracts, Alexandria Egypt, 2001.
- 7- Jeffrey L. Rensberger , Choice of Law and Time, Part II: Choice of Law Clauses and Changing Law Changing Law, Georgia State University Law Review, Volume 39, Issue 2, 2023.
- 8- John O'Brien, Conflict of Laws, Second Edition, Cavendish Publishing Limited, London, 1999.
- 9- Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, Conflict of Laws, Fifth Edition, West Academic Publishing, 2010.
- 10- Peter North and J.J Fawcett, Cheshire and North's Private International Law, Thirteenth Edition, Butter worths London 1999.

Second: The Laws

- 1- The Iraqi civil law No 40 of 1951.
- 2- The U.S. Restatement (second) of the conflict of laws.

Third: The Legal Journals & Research

- 1- E. Scoles, party autonomy and choice-of-law: the restatement (second) of conflict of laws, Hofstra Law Review, Volume 4, Issue 4, 1976.

- 2- Paul E. McGreal, Conflict of Laws, SMU Law Review, Annual Survey of Texas Law, Volume 47, Issue 4, 1994.
- 3- William M. Richman and William L. Reynolds, Prologomenon to an Empirical Restatement of Conflicts, Indiana Law Journal, Volume 75, Issue 2, Article 3, 2000.