Jilin Daxue Xuebao (Gongxueban)/Journal of Jilin University (Engineering and Technology Edition)
ISSN：1671-5497
E-Publication：Online Open Access
Vol: 41 Issue: 05-2022
DOI 10.17605/OSF.IO/6RJFG

THE ELECTRONIC OBJECTIVE APPROACH IN RESOLVING THE ISSUE OF CONFLICT OF LAWS IN CROWDFUNDING

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Abstract

Crowdfunding, is considered one of the most important processes that contribute to providing innovative financial services. From large numbers of individuals to support innovation through project financing, and this type of financing is based on the use of (electronic platforms) to directly link the project owner (the founder) and the financier (the audience of supporters). Crowdfunding is divided into two fundamentally different models, the first: the financing model in return (the investment model), and the other, the most common: the model of financing without consideration (the non-investment model). The electronic substantive rules approach is based on the idea of creating some basic (objective) rules that include direct solutions to electronic international relations disputes, so they are applied directly without looking for the applicable law to which the rules of attribution lead. The electronic substantive rules were defined in terms of the mechanism of their conclusion, as: "a set of legal rules that provide an objective or material solution to the issue in question directly. The electronic substantive law consists of a set of non-national legal rules, which require resolving the conflict by providing direct solutions, regardless of the relevant law in accordance with the traditional approach, because it was laid as a basis to respond to the nature of international private relations, related to electronic transactions. The research is an attempt to determine the extent to which the electronic objective approach can provide the best solution to disputes in international private relations.

Keywords: Conflict of laws, crowdfunding, model contract, electronic contracting.

Introduction:

The term financing in general is an expression of the process related to providing the project with the funds necessary to achieve its goals, and with the emergence of the digital technology era, which led to the emergence of applications that help Internet users to obtain money through digital platforms, and it was only a short period until a more complex and confusing concept of laws appeared through The world is the concept of (Crowdfunding) as a process of collecting monetary contributions from a large number of people, based on digital technology that has brought about a kind of change in the framework of the capital market.

Famous projects that were financed by the traditional method of financing (the construction of the Statue of Liberty on Liberty Island in New York in 1885 through small donations from the American people, as well as the translation of Homer's Iliad from

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Greek into English 1713, the process of financing Mozart and Beethoven for concerts and the publication of new musical manuscripts through subscriptions advanced by interested members of the public.

The first successful online crowdfunding campaign occurred in 1997 when British rock band Marillion raised money from their account fans while roaming the United States by raising $60,000 from their fans online. An online crowdfunding platform from Boston, USA, ArtistShare, which looked like a website where musicians could get donations from their fans to produce digital recordings, has evolved into a fundraising platform for film/video and photography projects as well as music(David M. 2015, p1).

A more recent example of crowdfunding is the election campaign of US President Barack Obama that took place in 2008, in which he raised three-quarters of a billion dollars. It should be noted that about half of the total donation amount was raised through contributions of less than $200. American ((PALM, , 2016, p. 270)).

In this period, the crowdfunding activity began to seek its way to appear as an alternative method outside the borders of the United States of America to reach Europe and then to the rest of the world. After crowdfunding emerged as a major source of funding, US President Barack Obama signed in April 2012 the Crowdfunding Act, also known as the Jobs Act, the Online Capital Raising with Fraud Deterrence Act or the Unethical Non-Disclosure Act.

The novelty of crowdfunding has brought us to new problems related to the topics of private international law, especially in the scope of defining the law applicable to cases that arise from transactions related to crowdfunding in the relationship of the platform manager with the public and the relationship of the founder with the platform manager, as well as determining the competent court for crowdfunding issues. The most important point here is to determine the appropriate approach to resolving the problems of those conflicts.

Research question;

The research question is determined about what is the most appropriate approach to resolving disputes that occur from the application of the idea of crowdfunding ... in a more clear word ... can the electronic objective approach be the most appropriate approach to resolving those disputes?

I. The definition of the electronic objective approach

The electronic objective rules approach is based on the idea of creating some basic (objective) rules that include direct solutions to electronic international relations disputes, so they are applied directly without looking for the applicable law that leads to the rules of attribution.

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The electronic objective rules were approach defined in terms of the mechanism of their setting, as: “a set of legal rules that provide an objective or material solution to the issue in question directly, and does not refer to others (Ahmed Cairo, 2000, p. 61)

In another definition, it is: "The substantive law component that gives direct solutions to electronic disputes from the reality of the virtual world (Ismat, 2015. p. 478)

It is understood from the foregoing that the electronic substantive law consists of a set of non-national legal rules, which require resolving the conflict by providing direct solutions, regardless of the relevant law according to the traditional approach, because it was laid as a basis to respond to the nature of international private relations, related to electronic transactions.

II. Characteristics of electronic substantive law:

1-They are rules of a definite and even qualitative agreement; as it addresses the range of dealers in the electronic field, and has its virtual space in which it holds its sessions and issues its rulings through closed circuits of communications, and documents are usually exchanged via e-mail, it is an automatic law arising from the electronic community.

2- It finds its source in international agreements, model contracts ... and others, and it did not come through an official way or according to a specific formality, and its application does not require the intervention of the public authority.

The expansion of electronic transactions necessitated an accompanying activity, exemplified by the trend of legal thought towards the idea of unifying electronic legal rules; In order to eliminate cases of conflict of laws and create an atmosphere of tranquility for international electronic transactions; Proposing different means and methods to transform a number of legal and practical ideas into international and regional agreements, or rules, norms and contractual models issued by international organizations (Georges A.L1961, pp 507-521)

III. Evaluating the electronic objective rules approach in resolving the problematic conflict of laws in crowdfunding;

The content of the conflict rule - according to the perspective of traditional jurisprudence (Sami, 1994, p. 513) hardly deviates from the concept of applying the internal law of a particular state that enjoys this description in accordance with the provisions of private international law, which has the consequence of restricting the freedom of choice for the parties to the contractual relationship with the internal law of the state concerned with the application of the law of the contract, which This means that the scope of the attribution rule hardly departs from the concept of a narrow interpretation of the term law to be limited to referring to the legislative text only. However, the adoption of the

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traditional concept, which requires the interpretation of the term law in the sense of legislation, constitutes an obstacle to the application of objective rules; because the latter is based on agreement, customary, or rules of a legal nature that emanate from the general principles of international law. Here, the question can be raised about the extent to which they can be applied directly in solving the problem of conflict of laws without going through the disputed approach (national laws), and does this lead to prejudice to the rules of necessary application (public order)?

In order to answer the question, two points must be clarified. The first relates to the relationship of the electronic objective approach to the determinants of conflict, while we deal in the second point about the extent of the possibility of this approach in resolving conflict issues in crowdfunding.

First / The electronic objective approach and the determinants of conflict

In addition to the rules of the traditional approach, private international law included other rules called rules of necessary application. Some jurisprudence in the field of private international law provided some definitions for them ("National legislation differed in naming rules with necessary application. Some call them police and security laws, such as the French Civil Code, and others with peremptory laws, such as Swiss law. The most common naming of rules with necessary application is the most common, but despite its many names, it agrees in its content and expression to the application of legal concepts. It is compatible with the requirements of the international interest, as on the basis of which national concepts are regressed before international ideas and solutions").

It has been defined as those rules that accompany the intervention of the state and work to protect its social, economic and political interests, and are applied in an imperative capacity, regardless of the applicable law (Khaled .Alexandria, 2017, p. 143)

In another definition, they are: “The rules that may accompany the state’s intervention, and aim to achieve and protect the vital and necessary, economic and social interests of the group, and whose failure to respect them results in wasting what the legislative policy seeks, and are applicable to all links that enter into its field of application, whatever their nature.” national or of an international character" (Ahmed, p. 257).

Thus, it becomes clear that the idea of rules of direct application in the scope of private international relations, which is an embodiment of the idea of public order in its traditional sense (It is worth noting that the majority of Arab legislation, including the Iraqi one, stipulates the necessity of excluding the application of foreign law if its provisions are in violation of public order and public morals in the state of the dispute judge without specifying precisely the meaning of public order and the rules that fall under it, whether those related to (electronic) transactions or (Traditional) both.), due to

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its connection to the essence of the general economic and social order of the state, leads to the exclusion of national law that is applicable according to the rule of conflict or according to the choice of the parties .

It is in this way that it converges with the methodology of the objective rules, in terms of their direct application without going through the rules of attribution, and perhaps this common aspect between the two approaches, requires us to clarify the difference between them to address the problem of conflict of laws, which is concentrated both in the way each of them addresses the problem of conflict, or from Where is the extent of his respect for the foreign element in the relationship at hand, or in the goal that each of them seeks , According to the following :

A / the availability of the foreign element in the legal relationship:

The methodology of the substantive rules is based on a focal point, its applicability to relations of an international nature, including electronic contractual links (Jean-Michel, op.cit , p68), while in the methodology of rules necessary to apply, this selection process disappears, and from this perspective, these rules have a wider scope as they apply to internal and international relations without discrimination between them.

B: In terms of the goal that these rules seek to achieve:

The discrepancy between the electronic and direct objective approaches in the extent of the importance of the foreign element in the legal relationship leads to a discrepancy in the conduct of the judge in the dispute, based on the goal that these curricula seek to protect (The difference between the two approaches is reflected in the protective aspect, as it has a protective function; This is due to the fact that it prevents the emergence of conflict between laws to know the rule of law or its unification, and it also helps the parties in the negotiation stage of concluding contracts, which greatly reduces the chances of conflict arising in the future, and there is no doubt that the preventive function is the first of the functions of the law in general. public. For more details, see: Dr. Hisham Khaled, International Contracts and Their Submission to Objective Rules, Dr. I, Dar Al-Fikr Al-Jamii, Alexandria, 2001, p. 10 and beyond) Where the rules of direct application aim to protect the internal community; Because it is related to the public order, which is one of the state’s priorities in protection, by achieving the maximum level of protection necessary for the national organization in its political, social and economic aspects, with evidence that the legislator, while defining these rules, does not differentiate between an issue of an international nature and an internal or national one, other than Objective rules that aim to protect international relations that exist for their protection.

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C: According to the source:

It is agreed that the substantive rules are unofficial, multi-source rules with an organizational and automatic establishment stemming from a self-organized community, not regulated by an official body and not affected by passing through the formal procedures necessary for enacting positive laws, other than the necessary application rules that are characterized by being national source; Represented by national legislation (Balash Linda, Subjecting the international contract to substantive rules, PhD thesis submitted to the Faculty of Law and Political Science / MouloudMammeri University, Algeria, 2017, p. 364).

D: In terms of priority in application:

The rules with necessary application are distinguished from the substantive rules, in that the first has priority and precedence in application, which requires the national judge to first examine the extent to which they can be applied to the contractual relationship.

E: In terms of methodology in application:

The objective approach is not just a set of unified rules aimed at defining the law that must be applied in the event of a conflict between different national laws regarding certain legal relations. Eliminates conflict of laws through direct adjudication of the dispute without resorting to other legal rules(Talib, Amman, 2010, p. 56) , as well as providing an objective solution, without going through any other mediation; Unlike the rules of necessary application, their application depends on the existence of a connection between the dispute and the law of the judge.

Second / The electronic objective approach as a modern way to solve the problem of conflict of laws in crowdfunding:

If we proceed to enumerate objective sources, to examine the extent to which they can be directly applied to the crowdfunding contract, the answer will be as follows: With regard to international agreements, whatever the extent of the dispute about the extent to which they can be considered as a source of objective rules or not, the matter that There is no room for doubt that no one denies these international agreements their active and prominent role in setting these rules for contractual ties of an international electronic character, but the issue is related to the mechanism of their direct application. In this way, there will be no direct application of the substantive rules contained in international agreements on electronic contracts; Unless the dispute is submitted to the judiciary of a member state, then it is considered part of its legal system, which obviates the need to resort to the dispute approach as a basis for its application, so that referring to the latter in this particular assumption is a denial of its objectives that seek to unify

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the substantive provisions that apply to contracts. As for the assumptions in which the conditions for implementing the international agreement are not met, given the failure of the criterion it requires to focus the contractual bond in one of the member states, the judge does not have a way to apply it directly unless it is found within its internal legislation, as is the case in the legislation of England, which It adopts the provisions of the Brussels Treaty in its internal legislation, which allows the application of its provisions to contracts of internal transport, similar to its direct application to contracts of international transport (Mahmoud, Alexandria, 2004,p 309).

It is understood from this that, unless the state is a member of the treaty or agreement, the substantive rules lose the status of their direct application, and there is nothing left for them but application through the conflictual approach, and there is no doubt that leaving the contractual ties of an international nature to the authority of the internal laws that refer to the competence of the conflict rules in the judge's state Despite the existence of objective rules that respond in nature and objectives to the considerations of international contracts, it would spread anxiety in international dealings and threaten the legal and economic positions of the contracting parties, which requires the application of these rules directly without the need for a conflict approach as long as they form part of the judge's law. The same applies to the customs, the judge can no longer apply them directly to the contract, not even through the conflict approach, except by choosing the will for them, but even in the assumption in which the contracting parties choose these customs, this choice is no more than a material choice These norms are relegated to the status of contractual conditions; As it entails that the contract remains subject to the jus cogens rules in the internal law whose jurisdiction the rules of attribution in the judge's country indicate, when the contracting parties remain silent on the conflicting choice of contract law (Alaa Al-Din, 2004, p. 198).

In contrast to the international arbitration judiciary, as it was applied directly without the need to implement the conflict rule approach, because it did not originally form part of its legal system, and because the arbitrator's authority to create and establish substantive law is broader than the judge; Because the first is not responsible for respecting and applying the legal texts issued by the legislator of a particular country, in contrast to the second.

On the other hand, granting the arbitrator the possibility of excluding the contentious approach gives them the ability to exclude national laws that they estimate are lacking or inappropriate, and it also allows them to apply texts derived from different laws, which ultimately leads to the creation of objective rules in private international law common to all countries (Dr.. Ahmed Abdel Hamid Ashush, Conflict of Laws Curricula Dispute (A Comparative Study), Dr. T, University Youth Foundation, Alexandria, 1989. P35). Arbitration judiciary also helps to achieve this result, which is the agreement of the

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contracting parties in most cases to authorize the arbitral tribunal the authority not to abide by the letter of the applicable legal rules and to have the authority to search for a just and equitable solution that suits the dispute. It finds its basis in national laws, international treaties, and customs... (Dr... Nader Mohamed Ibrahim, Center for Transnational Rules in Front of International Economic Arbitration, Part 1, Dr. I, Dar Al-Fikr Al-Arabi, Alexandria, 2002, pg. 59). Examples of national laws that came to provide the arbitrator with the authority to choose the law appropriate to the contract from the substantive rules without being bound by a specific approach, was stipulated in Paragraph C of Article 36 of the Jordanian Arbitration Law (Jordanian Arbitration Law No. 16 of 2018), which stated the following: “In all cases, the arbitral tribunal must take into account when deciding In the subject matter of the dispute, the terms of the contract subject of the dispute shall take into account the commercial usages in the same transaction, the customs followed, and what is done in the dealings between the two parties .

Paragraph d of the same article mentioned above stipulates that: “The arbitral tribunal, if the two parties to the arbitration expressly agree to authorize it to conciliate, may decide on the subject of the dispute according to the rules of justice and equity without being bound by the provisions of the law. As for the Iraqi law, it was stated in Article (6) of the Iraqi draft law on arbitration that: “First: The two parties to the arbitration are free to determine the law that the arbitrators must apply to the subject of the dispute. Second: If the two parties to the arbitration agree to subject the legal relationship between them to the provisions of a model contract. Or an international agreement or any other contract, the provisions of this contract, including the special provisions it includes, must be enforced.

Among the international agreements that emphasized granting the arbitrator the authority to directly apply the substantive rules, is the 1961 Geneva Convention in the matter of international commercial arbitration. In addition to this, the international commercial arbitration regulations, most notably what was referred to in Article 13 of the International Chamber of Commerce Arbitration Regulations in Paris issued in 1975, which obligated the arbitrator to observe in all cases the provisions of the contract and the customs of international trade.

We also find that the Model Rules of Arbitration developed by the United Nations Commission on International Trade Law in 1985, stipulated in the first paragraph of Article 28 of it: on the dispute."

and the Oman Convention on International Commercial Arbitration, which stipulates that the arbitrator must take into account in all cases the provisions of the contract and the customs of international trade in relation to the dispute(Article 21 of the Oman Convention on International Commercial Arbitration of 1994 stipulates that: “1. The

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Tribunal shall settle the dispute in accordance with the contract concluded between the two parties, and the provisions of the law agreed upon by the two parties, expressly or implicitly, if any, otherwise in accordance with the provisions of the law most relevant to the subject matter of the dispute, provided that Observe the rules of stable international trade usages). But does the meaning of the foregoing mean that cases are not envisaged in which international electronic norms and customs are directly applied before the internal judiciary, without the disputation approach?

The answer to the above question can be the possibility of this, if it is stipulated by the legislator in its internal law, as is the case in some internal laws whose texts have been referred to the prevailing customs and norms, which may conform to international customs and norms, as if the contract was subject to French law The latter refers the choice of contract law under Article 1135 of the French Civil Code to the customs of international trade, and then these customs are not applied as the competent law under the rules of conflict, but based on the referral of internal texts in the law of the state to which these rules referred to its jurisdiction (This is what was stipulated in Article 31/1 of the Iraqi Civil Code, which stated the following: (If it is decided that a foreign law is to be applied, its objective provisions are applied, not those related to private international law)),but the Iraqi legislator No assignment theory.

As for the role of the will as a source of objective rules, does it give its parties the possibility of direct application without going through the conflictual approach?

If we restrict the application of the substantive rules through an officer attributing the will, we will be faced with complementary rules, the application of which depends on the will of the contracting parties, and with this rule, it is usually the agreement that devolves the status of contractual conditions, and therefore it is not applicable unless the parties adhere to it explicitly or implicitly, It is incorrect to say that substantive rules are complementary rules whose application depends on the will of the parties. Because this contradicts its automatic nature of command, which requires its direct application, and to prevent the parties from agreeing on what is contrary to it.

Accordingly, it becomes clear that the application of substantive rules in private international law does not take place in the first place; except through the conflict approach, as long as there is no explicit text to apply it. Since the crowdfunding contract falls within the scope of Article (3) of the Iraqi Arbitration Draft Law, which states that: “Arbitration shall be subject to the provisions of this law if the dispute is over a legal relationship of a contractual economic nature, whether that relationship is (civil, commercial, administrative, credit, industrial, agricultural, service) or any other relationship that the two parties agree to be of an economic nature.

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It seems natural that its objective provisions that arose to regulate international private relations apply directly to the disputes that arise before the arbitrators without the need to resort to the rules of attribution, which means that the will has the ability to choose the objective rules, and the obligation to apply them directly without going through the contentious approach; In the event of resorting to arbitration, we have already clarified the effective role of each of them in directly applying the substantive rules.

Otherwise, it is not possible to say that the objective rules can be applied directly, whether by the parties or the judge, as long as there is no explicit text that gives them the right to resort to their direct application, except by passing through the conflictual approach, and this is supported by the jurisprudence (Veronique Legrand, Loi applicable au Contract de Commerce Electronique, op cit, p8), which means that in light of the current situational facts, It is not conceivable that the electronic topical rules will receive their direct application, except before the arbitration courts, given that the substantive rules derived from them have been specially developed for their organization, in a manner that requires their application directly without the need to implement the conflict approach.

We can comment on the foregoing by saying that the previous opinion is correct regarding the rules governing traditional issues, given that the Iraqi legislator has singled out a text to regulate the rules of attribution of the traditional contractual relationship based on the idea of settlement, but the matter is different in the electronic contract; Because the legislator did not address the issue with a text of its own attribution in the Electronic Transactions and Electronic Signature Law, keeping pace with the development of modern means of contracting, which subjected it to the provisions of Article 25 of the Iraqi Civil Code, and since the latter is codified to solve the problem of conflict of laws in traditional contracts based on the idea of localizing the contractual relationship, Therefore, transgressing the national laws for their inadequacy to rule the problems of the electronic contract is sufficient to justify this transgression and the application of the objective rules, and therefore the judge is not restricted by not resorting to other than the traditional conflict approach in the assumptions in which he does not find an objective rule that provides a direct solution to the issue at hand, thus avoiding the rules Objectivity The complexity of the contested approach and what may lead to it in breach of the parties' expectations, especially when they remain silent about the choice of contract law .

Although there have been a large number of references to general principles (Dejan, Sarkis of Internet Law, 1997 Martins Nakhff, pp41-53) in various fields of international law, the methodology for defining these principles is still unclear, and criticism has been directed at them stating that international courts and tribunals apply “general principles” that are not generally recognized. It has also been noted in national laws around the

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world that limiting general principles of law to those generally recognized in all parts of the world can raise difficulties when a court or tribunal deals with a question on which a widely accepted principle cannot be identified (Report of the United Nations International Law Commission, Sixty-ninth Session, 2017, p. 10.).

Conclusion

The necessity of adopting the substantive approach in private international law, without neglecting the role of the contentious approach in some resources, given that electronic substantive law is still in its infancy, marred by deficiencies and shortcomings with regard to many issues that arise in the scope of international relations, and therefore we cannot say By abandoning the contentious approach, at least for the time being, and keeping the two approaches together, and this confirms that the coexistence of the two approaches in the field of electronic contracts is a fact that is difficult to deny at the present time.

In addition, the technological development in the modern era has led to the emergence of a significant number of international contracts, in particular (the crowdfunding contract); Show the shortcomings of the national and international legal systems to confront the problems arising from that contract, and to complete the legislative deficiency in the law requires assigning the contract to international common rules to cover this shortcoming or shortcoming in the national law.