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# LEGAL ADAPTATION OF CONTRACT TRANSFER (COMPARATIVE STUDY BETWEEN FRENCH AND ENGLISH LAWS)

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## Abstract

This study deals with contract transfer as an independent and modern legal system and a subjective legal principle, which has been imposed today on the legal arena by social and economic developments. Therefore the controversy remains about its legality, which led to the emergence of two trends in the legal field, one of which considers the transfer of the contract as an ownership transfer and a debt transfer at the same time, and this is known as the bilateral theory. Another trend considers the contract as a single systemic unit whose components (debt and ownership) cannot be separated in the contract case. This is known as the unilateral theory.

**Keywords:** transfer, disclaimer, Licensing Ownerships, contractual position, Traditional Theory, Modern Theory.

## 1. Introduction

The emergence of the objective concept of the obligation has led to the possibility of the transfer of the obligation separate from its parties. As a result, the personal element that formed an obstacle to the transfer of the obligation between persons has become a barrier to the transfer of the obligation between persons, mitigating its severity, thus allowing the possibility of the transfer of the obligation ownership or debt from the person committed by the systems of the transfer of ownership and the transfer of debt.

Recently, the modern laws have adopted the systems of transferring the ownership and debt, but these two systems are still unable to keep pace with the requirements of the modern era, financial and economic fluctuations, as well as social and cultural changes, and the reason is that the system of ownership transfer governs the transfer of a certain ownership by itself as well as with regard to the system of debt transfer, and then what is not suitable to regulate the transfer of the contract as a single unit, with its ownerships and obligations, and what it contains of licensing ownerships (voluntary ownerships), it was a result of the tremendous development in the modern era and the accompanying emergence of the importance of the transferred values, it was necessary to respond to these developments, and find a legal system that responds to these conditions and enables the transfer of the contract as a single unit, so the contract case emerged as a means of transferring the contractual bond with its ownerships and obligations.

The contract transfer, according to a preliminary definition, is an act whereby one of the parties to the contract, called the assignor, transfers his/her contractual position in a contract which has not yet been carried out, to one of the third parties called (the transferee), against the other contractor called (the drawee).

The emergence of this novel system has provoked a wide controversy in jurisprudence and law regarding the determination of its legality. To address this problem, we will put forward the two theories adopted by jurisprudence in determining the legality of the contract transfer, adopting the comparative approach compared to French and English law in two directions. We devote the first direction to the bilateral theory and the second to the unilateral theory as follows.

## 2. The First Direction: bilateral ( Traditional ) Theory

Traditional jurisprudence considers the contract transfer as nothing more than a debt and ownership at the same time. Therefore the rules of each of them must be applied to it on the transfer of the contract binding on both parties. This analysis prevails in countries that have organized the transfer of ownership and debt at the core of their civil law and general rules, including Iraqi legislation and Egyptian and Algerian legislation (Yebbah, 2020).

The proponents of this theory believe that since there are no special rules governing contract transfer, it is necessary to resort to the general rules governing the transfer of the obligation in its positive (ownership) and negative (debt) parts, and since the transfer of the contract leads to the transfer of the ownership and debt together, it is necessary to resort to the provisions of the transfer of ownership and debt, as they are general provisions governing the transfer of ownerships and obligations, and therefore it requires the division of the contract into ownerships and obligations, so the transfer of the ownership governs the transfer of the ownership from the drawee to the transferee, while the transfer of debt is ruled among them, taking into consideration that the transfer of ownerships and obligations is made in the transfer of the contract at the same time, the scholar Abdul Razak Al-Sanhouri( 1963) dealt with the transfer of the contract in dealing with the transference of the lease in relation to the disclaimer, saying "at the beginning the lessee in this case makes a contract between him and the transferee of the assignor a relation of lease and the assignor in relation to his obligations, as for his obligations to the lessor, relation is the disclaimer of the rent is assignor and the drawee in relation to the properties and the relation between assignor and the drawee related to obligation".

We elicit from this that the transference of rent is both a debt transference and an ownership transference (Al-Mulla Hawish, 1992). Whereas the transfer of obligations is subjected to the provisions of the transference of debt, as those obligations are transferred under an agreement between the drawee and the debtor, it is not considered effective against the creditor except at the moment of its approval. It is valid if the transfer is concluded between the drawee and the debtor. However, the latter does not have the right to refer to the original debtor unless he acknowledges it (See Article (363) of the Iraqi Civil Code).

As for the transfer of ownership is made without the need for the debtor's consent, but it is not valid to the latter unless he has accepted it or by declaring it. As for its validity against properties of the others, it requires a firm date of acceptance (See Article (363) of the Iraqi Civil Code).

Thus, it can be said that the role of the drawee in transferring the ownerships and obligations of the assignor to the drawee under the transfer contract is limited to the drawee's accession to that contract by accepting it after obtaining it or by announcing it to him because this intervention is the main determinant in the transference of the contract, which gives it effectiveness and validity (Al-Saadi & Al-Saiedi, 2022).

Accordingly, the application of the provisions of the transference of ownership and debt to the system of transfer of contract faces many difficulties, in particular, those related to the effectiveness of the transfer of debt or transfer of ownership, as the transfer of debt contained in the transference of rent, is considered a special kind of transfer (Abdelbaqi, 1952). the scholar Al-Sanhouri (1963), in his talk about the rent, expressed the truth of the transfer of the contract by saying, "This contract itself is the one that altered to the disclaimer and all the ownerships, obligations, pillars and conditions it contains, and without any modification in it, and the drawee replaces the lessee in all of this, and becomes the lessee instead of the original lessee in the lease contract" (Al-Sanhouri, 1963).

This theory has been subjected to many criticisms because considering the transference of the contract as a debt transfer and an ownership transfer at the same time, which leads to the division of the contract, which is contrary to the law that rejects everything that leads to the division of the contractual position. Since the transference is on the contract as one unit, the transfer rules cannot respond to its privacy since the contract transfer is an overlapping and complex process. In contrast, the provisions of both transfers (ownership and debt) are designed to govern the transfer of ownership and obligations separately (Hawish, 1992).

Moreover, the division of the contract into ownerships and obligations entails the impossibility of transferring voluntary ownerships or so-called licensing ownerships, such as the ownership of possible avoidance of the

contract, because the latter is linked to the contract and not to the obligation of an ownership and a debt (Saad, 2004).

Given the previous criticisms of the bilateral theory, Lapp ( ) tried to present it in a new way, as he believed that the transfer of the contract does not focus on the transfer of the contract itself but rather on the transfer of relations arising from the contract. Based on what was mentioned, the subject of the contract transfer is the transfer of ownership and obligations resulting from the contract to third parties. However, he did not analyse the process as a debt transfer or a transfer of ownership at the same time but rather as a disclaimer of ownerships known as licensing or voluntary ownerships (Afsa, 2011).

The analysis provided by Mr. (Lapp) came short when considering that the French legislator has not regulated the debt transfer. Although this jurist strongly refuses to adopt the systems of subrogation in the fulfilment and conditioning for the benefit of others as a substitute for the contract transfer. He considered that the obligation has a financial value, which means the possibility of transferring it from one person to another unless the personality of the debtor is considered, and this is under an agreement between the assignor and the drawee, which has its effects on them. However, it is not effective in the face of the creditor without his acceptance, as the agreement concluded between the assignor and the drawee is the one that guarantees the transfer of debts like ownerships. The drawee can only pay his non-enforcement against him (Ghestin, n.d).

Moreover, the advantages of the transference of the contract in comparison with the requirement for the interest of third parties and the subrogation in payment are significant, as the obligation of the beneficiary arises under the agreement concluded between him and the assignor, and his obligation is the same as the obligation of the assignor and with the same characteristics, unlike the two systems of stipulation for the interest of third parties and the subrogation in payment (Ghestin, n.d)

Among the supporters of Division Theory, the French jurist (LARROUMET) considered that the transfer of the contract compulsory to both parties is only a transfer of ownership to which a debt transfer is added, where it is considered that the fertile field of the contract transfer is the contract binding on both parties, it is a coexistence of mutual ownerships and obligations, which would give the contract transfer its special status, if compared with the transfer of the ownership, this is on the assumption that the other contractor who transferred its positive or negative contractual position under the contract did not implement its obligations on its part. In all cases, we will have a simple ownership transfer. The proponents of this theory see that the transfer of ownership is transferring the positive side. In contrast, the transfer of the negative side encounters many obstacles due to the abnormality of debt transfer as a legal system targeting another debtor (Yebbah, 2020). The Division Theory poses an important problem related to the consent of the drawee.

The bilateral theory considers the consent of the drawee as a prerequisite for the formation of the contract transference to impose the release of the assignor and then its removal from the existing contractual bond. The issue of the debtor's consent here presents us with a legal problem, which is whether the consent of the debtor (the drawee) is a condition for the existence of the contract transference itself or the purpose of the release of the assignor and its removal from the existing contractual bond? This problem presents us with two concepts or two directions for the contract transfer

**First** - The debtor's consent is a prerequisite for the formation of the contract transfer, and then in case of disagreement, we will not have the transfer of a contract. Therefore it is required for the assignor and the drawee to wait for the consent of the debtor (the assignor). Therefore if the debtor does not agree, the drawee will be obligated to execute against the debtor. We will be here before the promise of implementation and not the contract transfer.

**Second** – It is considered that the debtor consents to free the assignor and remove him from the contractual relationship if the assignor withdraws from the contractual bond. The relationship is limited between the drawee and the transferee. With the latter's consent, the assignor escapes from the contractual bond. However, if the debtor does not accept the transference, in this case, the contract's transference does not occur, as its main objective has not been achieved, and the parties' clear Will has been taken into account. In their absence, the judges are subjected to search and interpretation. Accordingly, French jurisprudence considers the debtor's consent a prerequisite for establishing the contract transference, whether the debtor expressed his consent explicitly or implicitly. Hence, French jurisprudence considers that if the transfer fulfilled in the

absence of the debtor's consent is not the contract but the debt, the bilateral theory does not achieve the status of the contract if the absence of the debtor's consent (the drawee)( Yebbah, 2020).

### **3. The Second Direction: The Unilateral Theory**

In view of the criticisms of the bilateral theory, the French jurisprudence has adopted the unilateral theory presented by Professor (Aynes), whom he believed that the transfer of the contract is not a transfer of ownership and debt at the same time but rather a transfer to the contractual position or the contractual bond arising from the original contractual relationship, the transfer of the contract is a transfer to the entire contractual position, as the content of the contract represented by the place and the reason has not changed. Therefore there is no deviation from the binding force of the contract; the contract, in his view, is only money. Therefore it is possible to move freely and without any obstacles. The contract transference does not aim to liberate the assignor; the reason for the contract is the most important element that has not changed despite the change of its parties under the transfer, and in this regard distinguishes between the amendment on the substantive side and that amendment on the personal side.

As long as the transfer of the contract affects the personal side, as the reason for the contract has not changed under the transfer, it can be said that the contract transfer system guarantees the continuity of the contract despite the change of its parties and in a more precise sense, if the reason for the contract changes, we cannot have of the contract transfer, where the transfer becomes then it's not possible, in which case we'll have a new contract (Aynes, 1984).

This jurist tried to give a new interpretation to Article 1122 of the French Civil Code, according to which the assignor's contract with the drawee against him constitutes at the same time a contract with his successor (the drawee) as well, as long as the drawee against him is linked with the drawee.

This analysis provided by Professor Aynes is based on a legal presumption of Will. This analysis leads to removing the obstacles posed by the principle of contract relativity, but it does not lead to the release of the assignor. This makes him confirm that if the contract transfer is accepted, its subject matter is the contract's continuity and not the debt's recovery. The issue of the assignor's release becomes a secondary issue. Examples are many of them, such as Article 121, Law 1 of September 1948, which stipulates that the exchange of the dwelling is a guarantor for the lessor for a period of 5 years concerning the obligations of the person with whom it is exchanged. Article 121 of the French Insurance Law also gives the seller the ownership of recourse against the buyer for all the premiums paid to the insured before the sale of the insured thing is announced.

Accordingly, Aynes (1984) believed that the transfer of the contract is not linked to the consent of the drawee unless there is a legal provision or this is contrary to a condition that the parties agreed to include in the contract, or the contract is based on personal consideration, in which case the drawee merely gives consent.

Lachize is also a supporter of the unilateral theory. He believes that the consent of the drawee is a condition for the formation of the contract transfer, where he is a party to a tripartite relationship and not the conclusion of a new contract. The contract itself remains continuous under the transfer, as he believes that the transfer of the contract in the absence of the consent of the drawee is only a project without effect (Afsa, 2011).

As for the Iraqi legislation, it adopts the unilateral theory, despite not declaring it, and it fails to regulate the contract transfer system independently through which the specificity of this new legal system. Article 777 of the Iraqi Civil Code stipulates a provision that (In the event of a disclaimer of rent, the drawee replaces the lessee in all ownerships and obligations arising from the contract)

It is apparent from the text of the Article 777 that the Iraqi legislator has implicitly defined the transference of the contract and revealed its special nature under its provision that the drawee shall replace the drawee concerning the ownerships and obligations arising from the lease. The Iraqi legislator's position also confirms the adoption of the unilateral theory (Ugaili, 2021). The text of Article 778 where stipulated the express or implicit consent of the assignor to the assignor's clearance, as it stipulates that (the first tenant is discharged

towards the lessor, whether by the obligations imposed by the lease in respect of the second rent or by his guarantee to the drawee in the case of transference of the lease

1. If the lessor accepts the second lease or by waiving the lease without making any reservation regarding his ownership before the first tenant.
2. If the lessor collects the rent directly from the second lessee or the drawee without making any reservation regarding his ownerships before the first lessee (as it is clear from this text that it requires the debtor's explicit or implicit consent to the assignor's discharge, and this statement is consistent with the Unilateral theory ( Al-Mulla Hawish, 1992).
3. English jurisprudence has emphasized the Unilateral theory by saying (it is necessary to wonder about the nature of the contract transfer? Is it a transfer contract or a trust?)
4. Whereas the English jurisprudence considered that the transference of the contract is a transfer contract of ownership<sup>1</sup> like other contracts of transfer of ownership ( Michael ), whereas Lord Hoffmann's in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* (can be considered property ownership if the property is given the broad meaning) (*Investors Compensation Scheme*, 1997).

Since ownership includes tangible and intangible things, the ownerships and obligations arising from the contract are intangible; it can fall within the framework of the owner since English law allowed the transfer of the intangible property through the document that proves it, as well as the ownership of tangible things transferred by the delivery of possession (Greg, 2006 ) which is confirmed by Lord Justice Scrutton's statement (that the courts of equity treated debts as property) (Ellis, 1920).

Accordingly, English law<sup>2</sup> adopts the unilateral theory, as it considers the contract transfer of a contract that transfers the property. This is because the ownership institution is a general service influencing transfers (Greg, 2006).

If one of the most prominent obstacles to the bilateral theory was the impossibility of liberating the assignor without the drawee's consent, it was the same for the unilateral theory.

From the legal nature of the contract transfer, we considered that the unilateral theory is the best means on which the concept of the contract transfer can be based. Although it presents legal formalities, they are minimal and can be overcome if compared with the bilateral theory. They lead to the transfer of the contract as a whole, which leads to the preservation of the contract through its continuation despite the change of one of its parties. The adoption of the unilateral theory as a legal basis for the study of the contract transfer obviates the search for what compensates for the debt transfer, on the negative side of the obligation as in the bilateral theory, because the contract is completely transferred.

After we completed our research on the contract's legal nature, we reached several conclusions and some proposals that we can put in the hands of the Iraqi legislator.

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<sup>1</sup>- Whereas English law stipulated the establishment of this contract, the intention of its parties to create legal relations between them see , (Al-Rubaie, 2017)

<sup>2</sup>- Where the English law regulates the transfer of the contract in the property law of 1925 amended in Article 136 , Mona Naeem Jazaz Al-Shi 'i, The content of the contract is considered a comparative study with the French and English laws, PhD thesis, Faculty of Law – University of Baghdad, 2019 , p. 151 .

#### 4. Conclusions

1. The traditional theory is that a transfer contract is a debt and ownership. This analysis is widespread in countries that have regulated the transfer of debt and ownership to a general rule.
2. The English jurisprudence considered that the transference of the contract is a contract of transfer, which was confirmed by the case law of the English courts.
3. As for the Iraqi legislation, it adopts the unilateral theory, although he did not declare that. This is clear to us from the appearance of Article 777 of the Iraqi Civil Code.
4. Modern theory has interpreted the legal nature of the contract transference as a transfer of the entire contractual bond and the ownerships and obligations it contains.

#### 5. Suggestion

In light of the absence of a general theory governing the transfer of the contract in Iraqi legislation, where the Iraqi legislator has been content to regulate it in some contracts but not others, we call upon the Iraqi legislator to intervene to develop a general theory of the transfer of the contract and regulate it independently of both the debt and the ownership, as it must take into account the development of the idea of commitment, as it is no longer only a personal bond, but has become a transferable element of the financial liability, and therefore we propose the following text (a contract binding on both parties may be transferred, unless it is based on personal consideration, or there is an explicit prohibitive provision or condition of the contract ).

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