



Transfer of Commitment Throw Assigning of the Contract in Comparative Legislation: A Comparative Study

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Abstract:

The Saudi Civil Transactions Law is considered the first Arab civil law to adopt the principle of “waiver of the contract” as one of the forms of transfer of commitment in its general theory. Many researchers believe that this form has great importance in light of the development of economic reality and the development of the idea of commitment from the personal theory to the objective (material) theory. This research comes to study the position of contemporary legislation on this principle, and to clarify the position of Islamic legislation on it, through a number of elements, which are:

- 1- Definition of waiver of contract and the historical development of its idea and applications.
- 2- The idea of waiver of contract in contemporary civil legislation.
- 3- The position of Islamic legislation on waiver of contract

The research reached a number of results, the most important of which are: that the Saudi regulator has adopted the latest in contemporary technologies that preceded this topic, and that this trend does not contradict Islamic legislation, and success is from God.

Keywords: waiver of the contract, contract assignment, contract theory, comparative legislation.

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1. Introduction:

In comparative laws, the commitment is transferred in one of two forms of transfer: transfer of right and transfer of debt. With the development of the requirements of the modern era, its technologies and transformations, it was necessary to develop legal tools to transfer commitments. Thus, “waiver of the contract” emerged as a means of transferring the contractual bond, preserving the existence and identity of the contract. Some contemporary laws have begun to adopt it, and comparative judiciary has adopted it more widely, in a legal response to the development of the idea of commitment within the framework of the personal doctrine, which sees the relationship between the creditor and the debtor as the essential element in the commitment, in contrast to the expansion of the work of the material (objective) doctrine, which considers the subject of the commitment more important than its persons, and therefore the commitment can remain despite the change of its parties (Al-Sanhuri, Al-Wasit fi Sharh Al-Qanun Al-Madani, 1/86).

In light of the above, this research comes to analyse and monitor the position of contemporary legislation and Islamic legislation towards it, and it is called "Transfer of commitment through assigning of the contract in comparative legislation. A comparative study.

Importance of the research: The importance of the research appears in view of the fact that the contract is the most important source of commitments and most of them in practical reality, and the development of the legal system of the contract in contemporary systems in response to economic developments and the requirements of dealing.

Research problem and questions: The position of comparative legislations on the issue of transferring the commitment by waiving the contract varied, hence this research came to describe their position on it, and compare it with the position of Islamic legislation, and answer a number of questions, the most important of which are:

1- What is the concept of waiving the contract?

2- What is the position of contemporary legislations on the idea of transferring the commitment by waiving the contract?

3- What is the position of Islamic legislation on waiving the contract?

Research Methodology: The descriptive analytical comparative method, as the position of laws on this idea will be studied and the opinions of commentators on it will be surveyed, as well as the position of Islamic legislation on it.

Research Divisions: The research includes an introduction, a preface, three demands, a conclusion, and a list of references, according to the following division:

Introduction: It includes the importance of the research, its problem and questions, the research methodology, and its divisions.

Introduction and Definition.

First: The historical development of the idea of transferring the commitment by waiving the contract and its applications.

Second: The idea of waiving the contract in contemporary civil legislation.

Third: The position of Islamic jurisprudence on waiving the contract

Conclusion and References

Definition of waiver of contract:

The idea of assigning a contract arose in contemporary legal jurisprudence, and therefore several definitions of its idea were provided, including:

- An act by which one of the contracting parties in a specific contract transfers that contract, with the rights and commitments it creates, to a person who is not related to that contract (Mustafa Malik, Assignment of the Contract: A Comparative Study, p. 9).

- A means for one of the contracting parties to exit the contractual relationship without its expiration, as another person replaces him according to a special organization. (Yasmine Abbas, Hassan Makki, Legal Effects of Assignment of the Contract, p. 13)

The researcher can formulate the following definition: A contract that allows one of the contracting parties (the assignor) to transfer his status as a party to the contract (his contractual position) to another (the assignee) with the consent of the other contracting party (the assignee).

First: The Historical Development of the Idea of Transferring the Commitment Through Waiver of The Contract and Its Applications:

The waiver of the contract as a form of transfer of commitment is a relatively modern term that emerged in the realm of legal jurisprudence, and most contemporary codifications have not addressed it.

The Saudi Civil Transactions System is considered the first Arab civil law to adopt it, while calls by legal scholars to include it in the texts of civil legislation in a number of countries continue to be repeated through research and studies (Nabil Ibrahim Saad, p. 179, Afafsa Mufida, p. 116, Yasmine Abbas, and Hassan Makki, p. 35).

Although judicial rulings have taken their way in adopting it in response to the necessities of reality and its developments. This concept originated under the name "contract assignment" in German, then Italian and Portuguese legal jurisprudence (Mustafa Malik, p. 11), then appeared as legislative materials regulating its provisions as a form of the transfer of commitment in the texts of Italian, Portuguese and then recently French civil law (Mohamed Al-Saeed, Contract Assignment: A Comparative Study, p. 925, Yasmine Abbas, and Hassan Makki, p. 34), and called it the waiver of the contract (in its amendments to Article (1216) by Order No. 2016-131 dated February 10, 2016).

The lack of codification of the provisions of contract assignment in Arab laws does not mean that there is no need for it or working with it, as some of those laws - such as the Egyptian and Algerian - have tended to codify some of its applications with regard to some contracts, and not as a general theory for all contracts, such as codifying the assignment of a lease contract or an agency contract and others. (Al-Sanhouri, 6/660, Mansouri Al-Mabrouk, Zawaqi Mustafa, p. 376)

It is worth noting that the Saudi system had previously adopted it - before the issuance of the Civil Transactions Law - in several areas, including:

- Administrative contracts: The Saudi regulator has included the provisions for waiving them in Chapter Four: Chapter Five of the Government Tenders and Procurement System (issued by Royal Decree No. M/128 dated 12/11/1440 AH), especially Articles: (70), (71/3).

- Waiver of the employment contract: It is stipulated in Article (18) of the Saudi Labor System (issued by Royal Decree No. M/51 dated 23/8/1426 AH and its amendments)

- Waiver of shares and stocks in commercial companies, the provisions of which are included in the Companies System (issued by Royal Decree No. 678 dated 29/11/1443 AH) in a number of articles, including: (Articles 44, 45, 56, 154), and others.

Second: The Idea of Waiving the Contract in Contemporary Civil Legislation:

After explaining the nature of waiving the contract and the historical development of its idea, we will address the idea of waiving the contract in contemporary civil legislation, where the view of legal jurisprudence regarding waiving the contract varied; is it considered an application of the transfer of rights and the transfer of debt or is it considered an independent system from them? Two trends have emerged in the matter:

The first trend: Some jurisprudence sees that the waiver of the contract is nothing more than a transfer of a right and a transfer of a debt at the same time, and therefore it is sufficient with the rules regulating it to organize a new waiver of (the contract), and this theory is the prevailing one in German and Egyptian jurisprudence and most contemporary codifications, and is based on dividing the contract into rights and commitments ; the provisions of the transfer of a right are applied with regard to the rights in the contract, while the provisions of the transfer of a debt are applied with regard to the commitments in it, and it is called the theory of dividing the contract or dismantling. (Al-Sanhouri, 6/663) This trend was criticized on the grounds that the waiver of the contract is viewed as an integrated whole without dividing the contractual process, which makes the rules of the transfer unable to keep pace with the process of waiving the contract (Nabil Ibrahim Saad, p. 74) This theory also sees the conclusion of the waiver despite the dissatisfaction of the the waiver, although the the waiver is not released from the original contract except with the consent of the the waiver, otherwise he remains a guarantor of the implementation of the contract

The second trend: Another theory tends to say that the waiver of the contract is an independent system that differs from similar systems because it transfers the contractual bond by the will of the parties (therefore it differs from the system of delegation and stipulation for the benefit of others and

renewal of the commitment. (Muhammad Al-Saeed, p. 945)), and it results in the contractor leaving the contracting centre and the new contractor bearing the rights and commitments arising from it, because the subject of the waiver: is the entire contract and its effects, and this is what the majority of French legal jurisprudence is based on and the Italian, Portuguese and French codification has recently adopted, and it is based on the tendency of the contractors' will to waive the contract as a whole without division and the waiver of the contractual bond or the capacity of the contractor, and it is called the theory of the unity of the contract (Mansouri Al-Mabrouk, Zawaqi Mustafa, p. 385), and the Saudi civil transactions system took this direction, and called it "waiver of the contract", while some legal jurisprudence and comparative judiciary call it (contract transfer). (Sulayman Marqus, Al-Wafi in Explaining the Civil Law 6/671, Dr. Yasmine Abbas, Dr. Hassan Makki, p. 13, and this name was also given by the French Civil Code in its amendments to Article (1216) By Order No. 2016-131 dated February 10, 2016

This trend has been criticized for viewing commitment as an objective idea devoid of personal connection, and it also ignores the idea of the binding force of the contract. It is clear that this criticism is misplaced because this theory did not neglect the personal consideration of the contracting parties, nor did it ignore the binding force of the contract, as it stipulated the consent of the the waiver (Nabil Ibrahim Saad, p. 79), which is a complete expression of his will and a guarantee of his personal consideration and the binding of the contract.

Third: The position of Islamic jurisprudence on waiving the contract

Islamic jurisprudence has known the transfer of commitment by transfer of debt and transfer of right since the era of the first legislation in the era of the Chosen One, may God bless him and grant him peace, and it preceded ancient and contemporary laws that were not guided to it until many centuries later. (Al-Zarqa and others, p. 35) As for "waiver of the contract" as a form of transfer of commitment, I did not find a jurisprudential detail for it according to the contemporary systematic conception, and accordingly, examining the position of Islamic jurisprudence in this position is not without one of two cases based on its jurisprudential classification and whether it is considered an independent contract? Or the implementation of a contractual condition within the original contract? And the explanation of that:

First: That "waiver of the contract" be a condition of the contract. The basic principle regarding the conditions of the contract is permissibility and validity according to the majority of jurists (Ibn Taymiyyah, Majmoo' al-Fatawa, 29/346, Ibn al-Qayyim, I'lam al-Muwaqqi'in, 1/259). Conditions are divided into two types (one of the most comprehensive studies that dealt with this topic is the book The Theory of Condition in Islamic Jurisprudence by Professor Dr. Hassan al-Shadhili, Dar Kunuz Ishbiliya, Riyadh, first edition, 1430 AH): valid conditions, including conditions that are required by the contract (such as the condition of delivery or the absence of defect) or are in its interest or the interest of one of its parties (such as the condition of mortgage or guarantor), as well as conditions included in a text or consensus such as the condition of option. This type of condition has its effects.

The invalid conditions, including the conditions that contradict the requirements of the contract, or lead to something forbidden, or are prohibited by the Lawgiver, such as the condition preventing disposal and the conditions that are a means to something forbidden, these conditions do not have their effects, even though the schools of thought differed regarding the extent of the contract's corruption by the condition or the invalidity of the condition and the continuation of the contract, and the like, which is detailed in its places. Accordingly, the condition of waiving the contract in each contract is considered according to it and its validity or invalidity is determined, and the basic ruling on the condition of waiving the contract is: permissibility. In the hadith, "Muslims are bound by their conditions, except for a condition that forbids something permissible or permits something forbidden." (Narrated by Al-Tirmidhi, Book of Rulings, Chapter on What Was Mentioned from the Messenger of Allah (blessings and peace of Allah be upon him) Regarding Reconciliation, Hadith No. (1352), and he said it is a good and authentic hadith. It was narrated by Abu Dawud, Book of Judgments, Chapter on Reconciliation, Hadith No. (3594), and Al-Albani authenticated it in their footnotes.)

Second: That the "waiver of the contract" occurs after the conclusion and commencement of the contract, and it was not stipulated in the original contract. The waiver here is a contract and the original principle

in it is permissibility, based on the general rules in the provisions of the contract upon which its provisions are based, the most important of which here are:

1- Jurists have counted the types of disposals of rights, properties and transactions:

- Transfer of rights: whether the right is an object, a debt or a benefit, and it is a disposal that requires acceptance, and it may be for a consideration such as a sale, lease and transfer, and it may be without a consideration such as a gift, usufruct and endowment.

- Waiver: which is the release from what is in debts, and it is a disposal that does not require acceptance, and it may also be for a consideration such as clearing what is in the two liabilities when the debts are equal, and it may be without a consideration such as the release from what is in the liabilities of objects and rights (Imam Al-Hafiz Al-Ala'i Al-Shafi'i, *Tahdhib Al-Furuq wa Al-Qawa'id Al-Sunniyah fi Al-Asrar Al-Fiqhiyyah*, p. 215, *Al-Majmu' Al-Madhhab*, 1/220, 224) The system considered the waiver of the contract as a transfer and described it as such, so the waiver of the contract is a transfer of it, then it takes the provisions of the original contract whether it was a sale, lease, settlement, or other, so its provisions apply to it. (Abdul Karim Al-Ismail, *Waiver of Financial Rights: Its Forms, Rulings, and Judicial Applications*, p. 121) This results in the release of the transferor's liability unless the two contracting parties agree otherwise, so the transfer and release are combined in it.

2- The authority of the contractual will (i.e. the freedom of the contracting parties) in creating contracts and conditions, which is a trend in Islamic jurisprudence to expand its scope, and the Hanbali school is considered the broadest school in extending the authority of the will over contracts and conditions, with a difference in some branches and details, and its content is the freedom of the contracting party to create contracts of all kinds and stipulate conditions unless there is a legal text or a general rule prohibiting them (Al-Zarqa, *General Jurisprudential Introduction* 1/462, 479, p. 497).

The basis of contracts is the consent of the contracting parties, and their result is what they have imposed on themselves by contracting (Ibn Taymiyyah, 3/239), so if the contract is completed, "the contracting party cannot escape from the provisions of the contract after its conclusion unless the other party waives his right to adhere to them and they agree to dissolve his contract and get rid of his commitments ." (Muhammad Abu Zahra, *Ownership and the Theory of Contract in Islamic Law*, p. 227) And it was stated in *Tahdhib Al-Furuq*, "And what is a right of human beings, ownership is not transferred except with their consent, and it is not valid to release it except by their dropping it." (Imam Al-Hafiz Al-Ala'i Al-Shafi'i, 1/120) The system considered the consent of the original contracting party a condition for the waiver of the contract to be valid, as mentioned above.

3- Permissibility of transactions and the legitimacy of contracts that are conducted on the basis of the interest of the public interest, which is taking every matter in which there is an interest that the mind accepts, and no specific principle of the Sharia witnesses its cancellation or consideration. As long as the contract does not include what the Sharia has prohibited or causes harm to the parties to the transaction or to others and was with the consent of the contracting parties, it is valid and produces its effects. (Abu Zahra, p. 242).

It is clear from these rules that the principle in transferring the commitment by waiving the contract is permissibility, and waiving the contract is not valid except by agreement of the parties and is binding on them.

2. Conclusions:

1- Assignment of a contract is "a contract that allows one of the contracting parties (the assignor) to transfer his status as a party to the contract (his contractual position) to another (the assignee) with the consent of the other contracting party (the assignee)."

2- The development of the codification movement in the Saudi system, as the Civil Transactions System is considered the first Arab civil law that adopted the principle of "assignment of the contract" as one of the forms of transfer of the commitment.

3- Islamic legislation allows the assignment of the contract "as a form of transfer of the commitment."

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