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The Objective Rules Approach as A Mechanism for Determining the Law Applicable to The Transfer of Technology Transfer Contracts

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Abstract: This research paper examines the substantive rules governing technology transfer contracts, particularly in light of countries' increasing interest in foreign investment through international contracts with foreign investors. The question arises: which law applies in the event of a dispute? The first section attempts to study this topic by defining substantive rules and identifying their sources While we devoted the second section to the issue of the ability of substantive rules to actually resolve the dispute, with an actual evaluation of these rules and an attempt to reach the rules applied in the case of the dispute.

Keywords: Contracts, transfer, Technology.

INTRODUCTION

One of the most prominent features of the global economy is the eagerness of all countries to attract foreign private investment. This is due to the crucial role such investment plays in achieving economic and social development for these countries, as it represents the primary channel for the flow of capital, scientific, technical, and technological expertise to developing nations. To achieve this, these countries strive to conclude numerous international agreements with foreign investors, and among the most important of these agreements today are technology transfer agreements.

Because technology transfer contracts are international agreements in which the state is a party along with the technology supplier, it is conceivable that these contracts will give rise to legal issues leading to disputes between the parties at any stage of the contract. Therefore, it is necessary to determine the competent court and the applicable law to ensure the necessary protection of the parties' rights. Regardless of the mechanism used by the parties to the technology investment contract to resolve their dispute, resolving the dispute requires identifying the law applicable to the specific case. The difficulty facing arbitrators and judges lies in determining this

law due to the presence of a foreign party in the technology transfer contract. Since conflict of laws rules are the traditional approach that establishes jurisdiction in such cases, and as a result of the shortcomings that have emerged when applying this approach to technology transfer contracts, a trend has arisen seeking to limit the applicability of this law to technology investment contracts, especially if the chosen law is the national law of the receiving state. This trend suggests that the alternative lies in applying the substantive rules approach as a substitute for governing all matters in the field of international investment transactions, including determining the law applicable to technology transfer contracts. Based on what we present the following problem: To what extent are substantive rules, as a method of private international law, capable of determining the applicable law for technology transfer contracts? To answer this problem, we propose the following plan:

Section 1: The Nature of Substantive Rules as a Method of Private International Law

- Requirement 1: The Concept of the Substantive Rules Method within the Framework of Technology Transfer Contracts
- Requirement 2: Sources of Substantive Rules within the Framework of Technology Transfer Contracts

Section 2: Substantive Rules as a Mechanism for Determining the Applicable Law for Technology Transfer Contracts

- Requirement 1: The Issue of the Capacity of Substantive Rules to Govern Disputes Arising from Technology Transfer Contracts
- Requirement 2: Evaluating the Application of the Substantive Rules Method in Governing Technology Transfer Contracts

Section One: The Nature of Substantive Rules as a Methodology of Private International Law

Recent years have witnessed a decline in the prominent position of the conflict of laws method within private international law. This has led to the emergence of other methods that are actively seeking to establish themselves for regulating private international relations, such as the methodology of substantive rules.

To understand the role of these rules in resolving disputes arising from international technology transfer contracts, it is necessary to first address the concept of the substantive rules method within private international law (Section One), and then examine the sources from which these rules derive their foundation (Section Two).

Section One: The Concept of the Substantive Rules Methodology within Private International Law

Undoubtedly, the substantive rules method constitutes a distinct legal system within the realm of private international relations. This necessitates understanding its concept, which we will explore by defining it (Section One) and then examining the characteristics that distinguish it from other methods operating within private international law (Section Two).

Section One: Definition of Substantive Rules

Substantive rules in private international law can be viewed as a set of international legal rules and commercial customs and practices that businesspeople and traders have traditionally applied and resorted to. Consequently, their application to disputes arising from these relationships is more equitable than any other solution, including the solution offered by applying the rules of conflict of laws.ⁱ

Technology transfer contracts are defined as: "An agreement whereby the technology supplier undertakes to transfer technical information to the technology importer for use in the manufacture or development of a particular good, or in the operation of machines or devices, or in the provision of services. The sale, purchase, or rental of goods is not considered a technology transfer."ⁱⁱ

Due to the unique and complex nature of technology transfer contracts, as well as the rapid evolution of their subject matter, a set of rules and conventions has emerged among the stakeholders involved in this field.ⁱⁱⁱ From this perspective, and in light of the criticisms leveled against the self-application of contracts or the application of general principles of law, some legal scholars defending the interests of Western trade and multinational corporations have argued that the substantive rules approach can be applied to contracts concluded by the state with foreign investors and used to resolve any disputes arising from them, considering it the appropriate law, especially in cases where the parties fail to explicitly choose this law.^{iv}

Substantive rules are generally defined as: "Those rules that govern private international relations presented to the judge, to which his substantive national law is applied directly, without going through the conflict of laws rule."^v It has also been defined as: "a set of principles, systems, and rules derived from all sources that continuously feed and continue to feed the legal framework and the workings of the international trade community," which then appear as the constituent rules of international commercial law.^{vi} Substantive rules are an approach based on the idea of creating certain fundamental, substantive rules that provide direct solutions to private international disputes. These rules are applied directly by the judge or arbitrator without needing to search for rules of

reference in their domestic law or to determine the applicable law. This approach responds to evolving economic and commercial relations, and substantive rules serve as a refuge and recourse for the judge of the contract.^{vii} It is worth noting that the more states conclude international agreements on conflict of laws issues, the more this leads to an expansion of substantive laws at the expense of choice-of-law rules.^{viii}

From the foregoing, it can be said that substantive or objective rules are distinguished from other approaches operating within the scope of private international law. This represents the positive aspect of these rules and their ability to resolve this type of dispute. Consequently, they are distinguished from other rules by several characteristics, which can be summarized as follows:

Section Two: Characteristics of Substantive Rules

Substantive rules possess certain characteristics that distinguish them from other approaches operating within the scope of private international law, giving them a special nature. Among these characteristics are:

First: Direct Rules

Substantive rules are described as direct rules because they provide direct solutions to the dispute at hand without relying on a specific law. This eliminates the mediation that could arise between the judge and the applicable law. Therefore, they are easy to apply and known in advance, thus protecting individuals' expectations before they enter into contracts. Respecting these expectations is considered one of the most important objectives of contemporary private international law.^{ix} Since the judge or arbitrator applies these rules directly to disputes, this feature of substantive rules distinguishes them from conflict-of-law rules.^x

Second: Class and Specific Rules

Substantive rules are characterized as class and specific. They are class because they address a specific category of individuals, namely those involved in international trade. They are specific because they provide solutions for a particular type of transaction or problem arising from international trade, such as the contracts under discussion.^{xi}

Third: Rules of Spontaneous Origin

Substantive rules are considered spontaneous because they are the product of customs, traditions, and practices that have become prevalent among members of a society over time. Their spontaneous nature stems from the fact that most of these rules originate within a self-governing community, bypassing the formal procedures of codified laws. Furthermore, they are not subject to official regulation; their application is automatic and they are not bound by any specific

authority.^{xii}

Fourth: Rules with International or Universal Content Substantive rules possess a universal content because they are inherently present in national or international legal systems as rules or principles with international applicability, specifically designed to govern and adapt to these international relations. The international content of these rules indicates that they govern private relations of an international nature, even if some of their elements are national, as long as the nature of these relations remains international, and even beyond that, even if one of the parties is a state or a public legal entity.^{xiii}

Fifth: Rules that are easy to apply.

This characteristic emerges when those involved in international trade are familiar with how these rules operate, making their application easier. At the same time, this preserves their legitimate expectations and provides them with the desired legal security from their contracts. Substantive rules can create a secure, reliable, and predictable legal environment. These two objectives are among the important characteristics that constitute the legal framework for international trade relations.^{xiv}

The second requirement: Sources of substantive rules within the framework of technology transfer contracts. The sources of substantive rules vary, ranging from national, in cases where local legislators establish specific legal regulations for international relations, or where a country's judiciary creates substantive rules directly applicable to contracts, to international, in cases where they are established by an international legislator through international agreements or treaties concluded between states. These agreements or treaties contain substantive rules applicable to international technology investment contracts brought before a judge in one of the signatory states of the treaty or agreement.^{xv} To elaborate further, we will examine each source separately as follows:

Section One: Substantive Rules of National Origin

Proponents of the substantive approach acknowledge the potential role of national legislation as a source of substantive rules. To highlight these sources that have contributed to the formation of substantive rules, we will divide them into substantive rules of legislative origin and substantive rules of judicial origin.

First: Substantive Rules of Legislative Origin

Some national legislations have established substantive rules within their domestic laws that can be directly applied to international trade contracts, even though they originated from domestic legislation. Some legal scholars have argued that a judge can directly apply these substantive rules to the dispute before him without resorting to conflict-of-

laws rules.^{xvi}.

Second: Substantive Rules of Judicial Origin

At the beginning of the last century, the judiciary attempted to establish substantive rules aimed at regulating international trade matters. Initially, it concealed itself behind other ideas in private international law, particularly behind the traditional application of the conflict of laws method, in order to give these rules a positive character within the framework of general principles. Once its solutions acquired a general and abstract character as a result of the stability of their application, the judiciary hastened to declare the independence of these solutions and the rules they contained as rules of substantive private international law.^{xvii}

The second branch: Substantive rules of international origin

International acts have established a diverse set of substantive rules for international trade. The most important of these rules can be summarized as follows:

First: International sources of treaty origin

International agreements are considered among the most important sources of substantive rules in private international relations. They contain direct regulations for related contracts and may unify the domestic laws of the signatory states. The resulting rules then become part of these states' national legislation. Consequently, these rules, in addition to being applicable to international relations, are also applicable to domestic relations.^{xviii}

Perhaps one of the most important agreements relevant to our study is the agreement that deals with investment contracts, or similar contracts, and among the most important of these is the Washington Convention on the Settlement of Disputes Arising from Investment Contracts between States and Foreign Persons of 1965. Many bilateral and regional agreements have also been established that are concerned with encouraging and guaranteeing investment, as most of these investment agreements have aimed to define the scope and content of both the rights and obligations of the parties to these investment contracts.^{xix}

Second: International Sources of Spontaneous Origin
Within the realm of international trade, numerous rules have emerged as a result of practical experience in economic activity across various sectors of international business. These rules have become so consistent and universally applicable that their continued relevance to this type of activity justifies their consistent application. These sources or rules include international trade customs and practices, and standard contracts applicable in international trade. All of these are important in settling international

trade disputes, including disputes related to technology transfer contracts.^{xx}

These rules are characterized by their spontaneous emergence without state intervention. Undoubtedly, subjecting international trade disputes to these rules fulfills the aspirations of those involved in international trade to subject their contracts to legal rules that suit the unique and specific nature of these disputes, and achieves for them the desired legal security in their commercial relations.^{xxi}. Furthermore, the evolution of international private relations and the inability of many national legal systems to keep pace with this evolution has increased the need for new rules that are more suitable for international contracts, such as technology transfer contracts, which fall under complex contracts and are difficult to classify as traditional contracts.^{xxii}

Having clarified the meaning of substantive rules and their sources as one of the approaches that operate within the scope of private international relations, and having concluded that there are real rules that can play a fundamental role in governing disputes over technology investment contracts, we will examine the suitability of applying these rules as a mechanism for determining the applicable law to technology investment contracts.

Section Two: Substantive Rules as a Mechanism for Resolving Technology Transfer Contract Disputes

Substantive rules play a fundamental role in resolving disputes arising from technology transfer contracts. However, examining this role reveals the issues that have been raised regarding their application by judges and arbitrators, as well as doubts about their status as a legal system. Therefore, we will begin by examining the capacity of substantive rules of international trade to resolve technology transfer contract disputes (Section One), and then evaluate the role of these substantive rules in resolving such disputes (Section Two.)

Section One: The Capacity of Substantive Rules to Resolve Technology Transfer Contract Disputes

Examining the capacity of the substantive rules approach to resolve technology transfer contract disputes requires, first, addressing how substantive rules are applied to technology transfer contract disputes, and then examining the jurisprudential debate surrounding the legal nature of the substantive rules approach.

First: How to Apply Substantive Rules to Technology Transfer Contracts

Undoubtedly, applying substantive rules to international contracts in general, and technology transfer contracts in particular, is simply an expression of the legitimate needs of contractual relationships related to international trade transactions. Since

substantive rules are considered independent and belong to a specific environment, they constitute a foreign legal system for the national judge hearing the dispute. While they are considered an independent law governing the contractual relationship, the situation differs before arbitration, as the arbitrator does not belong to a specific national law^{xxiii}. This raises the question of how these rules are applied before both the courts and arbitration.

-1Direct application of substantive rules by the judge: Undoubtedly, the application of substantive rules to international contracts in general, and technology transfer contracts in particular, is simply an expression of the legitimate needs of the contractual relationships involved^{xxiv}. The direct application of substantive rules before national courts occurs when these rules are of domestic origin or enshrined in an international treaty to which the judge's state is a party. In such cases, they are applied directly, without the need to resort to the choice-of-law rule, which is used to apply the substantive rule of a foreign law relevant to the contractual relationship before the national judge. The judge only relies on international commercial custom as a precautionary measure when there are deficiencies in certain national legislative provisions^{xxv}. Therefore, the application of these rules does not require the choice of the contracting parties, as they are self-executing and become mandatory as soon as the subject matter relates to a contract of an international nature. The use of these rules is not dependent on any conflict-of-laws rule.^{xxvi}

-2The Arbitrator's Direct Application of Substantive Rules

The arbitrator can directly apply substantive rules to the contract in dispute without resorting to conflict of laws procedures. This is based on the fact that substantive rules have acquired the status of legal rules, which empowers the arbitrator to utilize their inherent binding force. The arbitrator can then directly apply these rules to the contract in dispute without requiring the contracting parties to express their desire for their application. The purpose of these rules is to facilitate the provision of objective and direct solutions appropriate to the inherent nature of disputes arising from investment contracts.^{xxvii}

The arbitrator enjoys broad freedom in resolving disputes according to the substantive rules of international trade, which are genuine legal rules of great importance in regulating international commerce. Moreover, these rules impose themselves on the international arbitrator, as their application differs from that before a national judge. The arbitrator is considered free from being bound by the choice-of-law rules of any particular state, applying the substantive rules applicable to the dispute directly, given that these rules provide direct solutions to the

issue at hand and are more appropriate than others. The arbitrator here does not have a specific law of jurisdiction in the sense commonly understood in private international law. Rather, the system to which he belongs consists of a set of international customs and traditions and general principles of law; therefore, he is obligated to apply them directly to the dispute before him for resolution.^{xxviii}

From the foregoing, we can conclude that the application of substantive rules within technology transfer contracts differs from conflict-of-laws rules in that the former directly address disputes arising from investment, development, and international trade contracts. In contrast, conflict-of-laws rules do not offer a direct solution to such disputes; their function is limited to guiding the applicable law. However, the applicability of substantive rules to technology transfer contract disputes still faces another challenge: the extent to which these rules constitute a legal system within international relations.

Secondly: The Legal Nature of Substantive Rules in Technology Transfer Contracts

In fact, examining the legal status of substantive rules is a crucial issue in private international relations. This importance stems from the degree to which these rules constitute binding legal rules for both judges and arbitrators. On this specific issue, legal scholars have differed regarding the extent to which substantive rules possess the status of a legal system, and whether these rules constitute an independent legal system of their own. One school of thought within Islamic jurisprudence denies that these rules constitute a legal system, while another maintains that they do, in themselves, form a legal system. The conclusion we will reach in this regard will directly affect their ability to resolve disputes arising from technology transfer contracts, as follows:

-1The First School: Denying the Legal System Status of Substantive Rules

Some have denied that the substantive rules of international trade constitute a legal system. According to them, these rules are merely material rules falling under the general umbrella of commercial law, and therefore do not constitute a legal system in their own right. Furthermore, they lack any distinctive features that differentiate them from the material rules of international trade.

Proponents of this school of thought have based their viewpoint on several arguments, including the following:

- These rules are not mandatory, as most of them are supplementary and therefore lack the element of obligation.^{xxix}
- The lack of substantive rules to impose penalties; any legal system cannot stand unless its rules are accompanied by a penalty

that ensures their respect and survival.^{xxx}.

The absence of objective rules for society to regulate it, and the fact that the purpose of the legal system is twofold: firstly, organically, which is represented in the actual organization of the community, and secondly, organizationally, which is represented by the legal rules that govern this organization.^{xxxi}.

- The objective rules lack generality and abstraction, meaning that their discourse is not directed at a specific person or event, but rather the determining factor is the generality of the characteristic and the fulfillment of the conditions, as the rule applies to every event that meets the required conditions.^{xxxii}.

Having identified the arguments presented in legal scholarship that deny the legal status of the substantive rules of e-commerce, we will now address the second approach, which affirms that these substantive rules possess a legal status.

-2The Second Approach: Recognizing the Legal Status of Substantive Rules

This approach takes the opposite stance to the first, considering these rules of international trade to possess an independent legal system by their very nature. It emphasizes the existence of a virtual community as a sufficiently cohesive unit, sharing a common ideology and bound by close relationships and transactions, thus constituting a genuine international community. Its members are responsible for establishing the rules of conduct that govern their transactions, and consequently, the rules they issue possess force and effectiveness.^{xxxiii}.

The substantive rules of international commercial law are considered genuine legal rules, deriving their fundamental character and value from several factors, which we summarize below:^{xxxiv}.

- The existence of a cohesive community of participants in international trade.
- The existence of bodies that ensure respect for substantive rules, such as arbitration tribunals. (* The existence of specific, self-imposed sanctions for substantive rules.

It can be said that the essence of this trend is that the substantive rules of international contracts, including technology investment contracts, constitute a legal system in every sense of the word, provided that the necessary elements for its establishment are present. These elements are behavioral rules respected by those addressed by them and applied by the judge or arbitrator, and mechanisms that guarantee the effectiveness of this legal system.

In fact, while the majority of legal scholars support the aforementioned arguments, another segment of the legal community has adopted a more moderate

stance, acknowledging the substantive rules of international trade as an imperfect legal system, still, in their words, like an embryo in the process of growth and formation.

The second requirement: Evaluating the role of these substantive rules in determining the applicable law for technology transfer contracts. We have previously discussed the substantive rules of international trade in terms of their nature and sources. Despite the existence of all these sources and elements, which appear on the surface to be sufficient to govern disputes arising from technology transfer contracts, reality raises doubts about the existence of these rules and their suitability for resolving disputes. Which are causing a stir.^{xxxv} Despite all these arguments stemming from the views of those who support the effectiveness and sufficiency of substantive rules to collectively form the rules of substantive law, exaggerating this judgment is incorrect because these rules have not yet matured.^{xxxvi}.

Furthermore, granting arbitrators free rein in applying substantive rules when the parties are silent on the choice of law of the contract, and without specific controls under the pretext of the existence of an arbitration clause, is not without risks. This leads to the arbitrator's excessive disregard for established and stable legal and substantive controls, which may expose the dispute to the arbitrator's personal whims.^{xxxvii}.

The danger of this approach also lies in technology transfer contracts concluded by the state or one of its institutions, given the close connection of these contracts to its sovereignty and judicial and executive immunity. This is reflected in the legal solutions adopted to settle international contractual disputes, particularly the obstruction of the enforcement of arbitration awards within the territory of the contracting state, whose law has been deliberately disregarded despite its close relevance to the dispute at hand.^{xxxviii}.

Indeed, the existence of substantive commercial rules is a reality evidenced by dealings within cross-border commercial circles. Furthermore, the acceptance of these rules as legally binding, and the resulting international practices regarding the application of the direct approach to international relations concerning technology transfer—especially given the shortcomings of some national legal systems—is justified. However, the danger of these rules lies in the bias of their drafters towards the interests of large corporations that own the technology. This necessitates finding a balance when resolving disputes arising from these contracts.^{xxxix}.

Therefore, we believe that resorting to the rules of private international law is essential for resolving

disputes related to technology transfer contracts, along with the necessity of international cooperation in this area. The balance between public and private interests must be considered. Granting international contracts a degree of freedom by allowing parties to create self-regulation governing their contractual relations is permissible, provided that this does not lead to the contract being exempt from the rule of law.^{xi}

In light of the foregoing, it is clear that international technology transfer contracts require the integration of all legal approaches that illuminate their application in contractual relations, especially during crises. This necessitates a special effort from those involved in this trade—given their dominant and constant role—as the concept of coexistence and cooperation between the two approaches presents international cooperation as an alternative aimed at achieving legal security and the common interest of the contracting parties. This, in turn, allows for economic and legal transformations that propel international relations toward progress and prosperity.^{xii}

CONCLUSION:

In conclusion, this study suggests that substantive rules are the most suitable approach for regulating technology transfer contracts and the disputes arising from them, including determining the applicable law. However, this approach is still in its early stages and is not yet fully developed. The need for domestic laws, with their solutions offered through the conflict of laws approach and other private international law methodologies, remains a reality. This is necessary to address the shortcomings of substantive rules in determining the applicable law. Therefore, while the substantive rules approach is suitable for determining the applicable law in technology transfer contracts, this determination can only be made after first addressing the primary approach: national conflict of laws rules, i.e., the rules of the nation-state receiving the technology. Nevertheless, we have reached the following conclusions:

- The study has established the concept of substantive rules as one of the methods of international law that contributes to resolving disputes arising within the framework of international contractual relations.
- Substantive rules are a set of legal rules with international implications that contribute to resolving disputes arising from technology transfer contracts.
- The substantive rules approach represents a legal system still in development, making it incomplete and unable to encompass all disputes arising from technology transfer contracts.
- The substantive rules approach has

gained significant prominence among private international law approaches, particularly in light of the crisis surrounding the conflict of laws approach.

- Based on the foregoing findings, we can offer the following recommendations:
- Encouraging the application of substantive rules by both national judges and international arbitrators, as a means of overcoming differences in national legislation, thus contributing to the regulation of disputes arising in the field of technology investment contracts.
- Intensifying international and regional efforts to unify the substantive rules governing disputes arising from technology transfer contracts.
- We urge national legislators to keep pace with developments in technology transfer contracts and their dispute resolution mechanisms, as these mechanisms contribute to attracting foreign investors.
- We urge national legislators to accede to international conventions that address issues related to technology investment contracts

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