Science of Law, 2025, No. 3, pp. 256-262
DOI: 10.55284/tk86rz79

The Role of Will in Determining the Law Applicable to Smart Contracts

Hassan Khudair Abbas[1]*, Azhar Mahmoud Lahmod[2]

[1,2]Department of Private Law, College of Law, Tikrit University, Salahuddin, Iraq; hassanfcb19981028@gmail.com

Keywords:
Explicit will,
Implicit will,
Law of will,
Legal nature,
Smart contracts.

Abstract. This study aims to demonstrate the role of explicit and implicit will in determining the law applicable to smart contracts. Traditional attribution criteria have become incapable of determining the law of digital contracts. This requires a more effective legal system that is compatible with the nature of this type of digital dispute, ensuring legal security and protecting the legal positions of the parties to the contract. This study was conducted using an analytical approach, analyzing relevant legal texts in national and international laws, in addition to a comparative legal approach to study comparative laws in the Anglo-American and Latin American systems, to demonstrate the role of these systems in establishing rules for smart contract operations through digital platforms. The study revealed that the explicit will is the best traditional solution available in legal systems for determining the law applicable to smart contracts. While implicit intention has diminished the importance of the unified elements of a smart contract across all contracts, rendering it incapable of establishing a method for determining contract law. The virtual and decentralized nature of these contracts has led many legislators to refrain from addressing them, given the difficulty of creating a legal system in light of the infrastructure that requires development to accommodate contractual processes in this type of contract. Legal development in the field of smart contracts and artificial intelligence is necessary through the study of technical aspects by specialists to develop a substantive law that addresses the legal issues that arise when implementing smart contracts similar to electronic contracts. This law also addresses the issue of determining the law applicable to the international nature of this type of contract, or through developing attribution criteria that align with the nature of virtual disputes.

1. INTRODUCTION

Determining the law applicable to smart contracts is crucial, as determining the law governing the contract is considered half the solution, through which contracting parties can draw a roadmap to resolve disputes arising from the implementation of the smart contract. There are several ways to determine the law applicable to smart contracts, including the law of will, through which the parties agree on a certain law which is inferred through the explicit or implicit will. If the law is determined, the judge resorts to the chosen law without referring to other attribution criteria to determine the applicable law.

The will is one of the most important criteria for determining the competent law to be applied to contractual disputes with a foreign element in private international law. All national conventions and laws have adopted this principle, obliging the national judge to seek the contracting parties' will to determine the law applicable to an international contract with a private international relationship. The legislator has entrusted individuals with the task of choosing the law and regulating their contracts in a way that guarantees the interests of both parties, as the parties have the right to subject their obligations arising from international contracts to the legal system they deem appropriate for their contract. Furthermore, the contracting parties have the freedom to construct their contract internally; the law allows them to choose the applicable law. This is called the authority of the will.

These contracts reflect advanced techniques and technology, whose emergence has raised many questions concerning the applicability of the attribution criteria to disputes arising from their implementation. This type of contract is in the experimental phase, with no physical factors determining its location as it relies on a virtual medium. Many individuals employ it in their work in various fields, including e-commerce, inventory tracking, real estate, entertainment, and other aspects of life, in a way that allows it to resolve many problems without any effort from the contracting parties.

1.1. Research Significance

The significance of the research lies in explaining the legal nature of smart contracts, which has become a subject of disagreement due to the difference between jurisprudential opinions and legal researchers. Furthermore, it is necessary to address the role of will in smart contracts with the possibility of relying on it in determining the contract law, especially in case where the law governing the contract is not determined through explicit will.

1.2. Research Objectives

This study aims at:

1. Defining the smart contract with clarifying the position of jurisprudence and legislation on it.
2. Explaining its legal nature and whether it can be considered as a smart contract or not.
3. Explaining the role of will in determining the law applicable to smart contracts.
4. Explaining the role of the explicit will in choosing the applicable law governing the contract.
5. Explaining the role of the implicit will in smart contracts and the extent to which it can be relied upon in determining the contract law.

*Corresponding author.

1.3. Research Problem

The main research problem lies in determining the legal basis upon which the smart contracts operate, as well as defining the extent to which the smart contracts can be considered contracts in the legal sense subject to contract theory. In addition, it is necessary to explain the role of will in resolving the problem of the law applicable to the smart contract, and whether the judge can rely on the implicit will to determine the contract law in light of an unstable virtual environment.

1.4. Research Methodology

The novelty of this type of contract requires studying it using two approaches, namely the analytical and comparative approaches. The analytical approach analyzes the relevant legal texts in the Anglo-American and Latin systems and searches for the legal systems that best regulate this type of contract. As for the second approach, it studies the difference between the legislation that established the legal basis for this type of contract through automated transactions and the legislation that raised concerns about the lack of infrastructure to keep pace with the technological development of this type of modern contract. This helps develop the legal means for the legislator to legislate a law for addressing the problems of digital contracts.

1.5. Research Outline

This study deals with the role of the will in determining the law applicable to smart contracts. It consists of two sections; the first section includes the definition of smart contracts and their legal nature, while the second section discusses the role of the will in determining the law applicable to smart contracts, including the explicit and implicit wills.

2. THE CONCEPT OF SMART CONTRACTS

The great development witnessed by the world has led to the development of contract law, becoming one of the most advanced fields to cope with modern techniques and technology. Contract law is constantly evolving in response to the changes created by new technologies in the world. This has given each society its own way of contracting, in a way that limits the physical element in smart contracts. Therefore, it becomes possible to conclude agreements and contracts without human intervention through electronic agents, a method that some consider a major development in contracting procedures. Smart contracts are still relatively new, thanks to the American jurist Nick Szabo, who invented them. The operation of these electronic contracts relies on a technological basis, undergoing continuous development. This requires studying it through reviewing its definitions and legal nature.

2.1. Definition of Smart Contracts

Smart contracts are among the modern terms that have been introduced to the field of contract law, keeping pace with the developments that accompanied the growth of technology in the fields of communications and artificial intelligence. This technology has enabled the auto-implementation of contract terms without human intervention. Accordingly, this term requires studying it at the jurisprudential and legal levels, as follows:

2.2. Definition of Smart Contracts in Jurisprudence

The smart contract was first coined by the American legal cryptographer Nick Szabo, who defines it as the protocol of computed transactions that implements the contracting parties' conditions (Szabo, 2006). Szabo also defines it as a set of covenants specified in digital form, containing protocols through which the parties implement their obligations (Szabo, 1995). While other jurists define it as the contract that is implemented through digital programs on a blockchain platform, fulfilling and complying with the conditions of the concluded agreement (Lauslahti et al., 2017). This definition is incomplete, as it does not clarify the terms of the contract that make it binding on the contracting parties and the smart programs through which the contract is implemented. Others define it as a computer protocol that aims to facilitate, establish, implement negotiation or conclude the contract digitally, resulting in the completion of transactions without intermediary intervention between the contracting parties (Quhf & Al-Amiri, 2019). In this definition, the jurisprudence explains the purpose of the smart contract, but it does not clarify the mechanism through which the contract is created, despite referring to the absence of an intermediary between the contracting parties.

Jurists and researchers differ in defining smart contracts, setting arguments and justifications to define them. Some of them define a smart contract as a digital contract based on blockchain technology that governs the obligations of contracting parties under the contract (Dawood, 2021). This definition refers to the nature whereby smart contracts are created through referring to blockchain technology and considering it the basis for creating smart contracts. However, it does not refer to the second means used for accessing the blockchain technology, that is, smart programs, as the definition is marred by ambiguity and incompleteness due to the lack of this reference.

As a result of the development in this type of contract and the interest of jurisprudence in it, it is defined as an electronic contract that is concluded through blockchain technology using encrypted and illegible algorithms that represent the terms and conditions of the contract or the transaction that takes place between two or more people (Al-Dosqi, 2020). This definition contains all aspects of the smart contract compared to the other definition. In this definition, the jurisprudence explains the nature of the smart contract and the smart programs through which blockchain technology is accessed, which carries out the creation and completion of the contractual process digitally.

Based on the above, it is possible to define a smart contract as the convergence of wills between the parties involved in this type of contract to establish, amend, transfer or cancel the contractual obligations using the smart programs available on digital platforms, relying on the conditions and instructions that all parties to the contract are bound by without any human intervention, or of any kind, between the parties to the contract and it cannot be modified after acquiring the form and binding force.

2.2.1. Definition of Smart Contracts in Legislation

The U.S. law is among the first legislations that referred to smart contracts in the laws of some U.S. states, including the

Arizona Law No. (2417) of 2017, where Article (5/E/2) of Section (44/7061) defines a smart contract as an event-driven program with a state that runs on a distributed, decentralized, shared, and replicable ledger that can handle and direct the transfer of assets in this ledger (United States, State of Arizona's Electronic Transactions, 2017). The Tennessee State Law defines smart contracts in the Electronic Transactions Law No. (47) of 2019 in Part Two, Chapter Ten, as "a computer program used in the automation of transactions and executed on a distributed, decentralized, shared, and replicable ledger (United States, State of Tennessee's Electronic Transactions, 2019).

The Maltese legislator defines the smart contract in Article (2/1) of the Digital Innovation Authority Law No. 31 of 2018 as a form of innovative technology consisting of a computer protocol or an agreement concluded in whole or in part electronically, which is automatically executable and enforceable utilizing the computer code, although some parts require human intervention (Maltese Virtual Financial Assets, 2018). The Italian legislator defines a smart contract in Law No. (12) of 2019 in Article 8/F3/2 as a computer program operating on technologies based on a distributed ledger in which the execution occurs automatically in two or more parts based on the effects renewed by them (Legge Italiana n، 2019). While the European, English and French legislators do not define smart contracts, they have enacted legislation on digital contracts. This is possibly attributed to the novelty of this type of contract.

Concerning the Arab legislator, none of the legislators has defined smart contracts. The Arab legislator has addressed electronic transactions, electronic contracts, and automated electronic transactions (Arab Guiding Law, 2019). The Emirati legislator defines automated electronic transactions in the Dubai Transactions and Electronic Commerce Law No. (2) of 2002 in Article (2) as transactions concluded and executed in whole or in part by electronic means and records, in which such acts or records are not subject to any follow-up or review by a natural person, as in the ordinary context of the creation and execution of contracts and transactions (The UAE Electronic Transactions Law, Article One). In the Electronic Transactions Law No. (20) of 2014, the Kuwaiti legislator defines electronic transactions as any transaction or agreement concluded and executed in whole or in part by electronic means and correspondence (The Kuwaiti Electronic Transactions Law, Article One, 2014). The Bahraini legislator also addresses the electronic agent in the Electronic Transactions and Communications Law No. 54 of 2018 (The Bahraini Electronic Communications and Transactions Law, Article One, 2018). As for the Iraqi legislator, he defines the electronic contract of the Electronic Signature and Electronic Transactions Law in Article (1/11) as the connection between an offer issued by one of the contracting parties and the acceptance of the other in a manner that establishes its effect on the contract, which is carried out by electronic means (The Electronic Signature and Electronic Transactions Law, Article 1, 2012).

After reviewing the definitions that dealt with smart contracts in terms of concept or content, although the Arab legislations did not address the same definition, these legislations have features that accept this type of electronic contracts by stating an automated intermediary or transaction. As researchers in this regard, we recommend the Iraqi legislator to reconsider the Electronic Signature and Electronic Transactions Law or to enact a new law regulating such types of contracts in order to keep pace with technological changes and their repercussions on legal actions and contracts in the digital environment and artificial intelligence.

2.3. The Legal Nature of Smart Contracts

Determining the notion from which the contract stems, its implementation and defining its terms by the contracting parties is related to the legislative policy of the society and the accompanying development in the legal concepts in the particular country. Explaining the legal nature of smart contracts, although it is accompanied by many complexities, motivates the researchers to study it, based on the disagreement in jurisprudence between supporters and opponents on determining the legal nature to consider it as one of the types of legal contracts. Therefore, the following subsection explains this case in more details.

2.3.1. Smart Contracts are a Mechanism for the Execution of the Original Contract

A part of the jurisprudence did not consider smart contracts as legal contracts, but referred to them as a program or a means used for implementing the pre-orders prepared by the parties to the smart contract, the purpose of which is to simplify the creation and implementation of contracts (Savelyev, 2018). In addition, the smart contracts did not address the organization of contracts in certain rules, leading to the opponents' objection to considering them as legal contracts. They described them as directed programs that work on the automatic implementation of the contract terms after they are converted into encrypted digital texts within digital platforms. This makes the commands in the form of software codes based on the principle of (if-permission) whereby digital platforms implement contractual terms without human intervention in their operation. Therefore, the nature of these contracts has led the opponents to consider the program here as nothing but a digital program that determines a predetermined outcome in the contract, and this consensual method cannot be considered as a convergence of two wills to create a legal effect (Irfan, 2020).

The proponents of this trend limited the work of digital programs to the implementation of the terms prepared by the parties to the contract. Thus, the smart contract is just a mechanism used for implementing the contract without dispensing with the original contract that was created traditionally or electronically. This links the validity of the smart contract to a previous contract that was concluded through a legal mechanism recognized in concluding legal actions. These contracts are digital supports whose purpose is to make the traditional contract keep pace with developments in artificial intelligence technology. Therefore, smart contracts are smart terms that have been agreed upon by the parties to the contract and are considered part of the contract written legally (Bouchkosht, 2022). In other words, it is a method that can be used in the completion of many civil, commercial and other transactions, as it enjoys flexibility in the implementation of many contractual terms in order to facilitate the procedures in the formation and implementation phase. The definitions that dealt with the smart contract and its description as protocols and contractual agreements are not enough to give a more complex character to the smart contract because it is devoid of the legal and technical description of the contract. Therefore, the real description that suits this software process is a means or method that is adopted and encrypted to be classified within the contractual terms to be implemented automatically through the programs in the digital platforms. Naming them smart is an inaccurate description as they follow a path predetermined by the contracting parties. The description of smart here refers to the ability of programs to interact independently with digital programs to exchange information and data without the interference of any person (Massoud, 2019).

2.3.2. Smart Contracts are Legal Contracts

The supporters consider smart contracts as legal contracts after being subjected to the general provisions of the contract. This has led to their subject to the terms and conditions of the contract and the law of proof. Also, the nature of smart contracts and their connection to smart platforms through serial data make them control the obligations of both parties to the contract through the control enjoyed by smart programs within these digital platforms (Khudair & Hussein, 2024). Also, smart models are considered contracts in the legal sense that have been agreed upon by the parties to the smart contract, but the nature of these platforms requires the encryption of these terms to be compatible with the smart programs. The reason for using this method by the contracting parties is to fulfil contractual obligations and gain rights, achieving the interests of both parties. Granting the characteristic of smart contracts to these models requires the availability of the conditions and elements required by the law from the parties to the smart contract through digital platforms. The conditions include the presence of the parties to the smart contract, the availability of the necessary capacity for contracting, the legitimacy of the object of the smart contract as in traditional contracts (Ahmed, 2021). This requires the smart programs that create smart contracts to provide the conditions and elements of the contract to grant the legal legitimacy to these smart models. This clarification refers to an integrated legal contract; therefore, it is not possible to describe smart contracts as illegal in light of the availability of all the requirements of other legal contracts. This leads to refuting all statements that limit the legal contracts to digital programs, but they are smart models that depend mainly on the will agreement between the parties to the contract. This type of contract is distinguished from others in terms of the enforcement mechanism that works without interference from the parties to the contract or the court (Sabah, 2024). Among the arguments used by the proponents of this trend to prove the legal characteristic of smart contracts is the application of rules that govern contract theory when there is any dispute between the two parties related to the object of the smart contract. Also, removing the automatic execution from smart contracts makes them the same as traditional contracts and does not grant them the smart characteristic.

While others believe that the nature of smart contracts is unclear due to the different trends on it, as some of them consider smart contract as the appropriate alternative to the traditional contract and cannot be subject to any jurisdiction, which is incorrect. Others consider smart contracts as a suitable alternative for lawyers and the law due to the so-called "new private obligation" (Khudair & Hussein, 2024). However, it is more likely to state that smart contracts are legal contracts of an auto-implementation nature through pre-programmed protocols agreed upon by the parties to the contract. This opinion is accepted by many companies by launching platforms that consider smart contracts as a digital representation of joint agreements introduced to the real estate market instead of traditional contracts in many developed countries.

3. THE ROLE OF THE WILL IN DETERMINING THE LAW APPLICABLE TO SMART CONTRACTS

Most international contracts, in general, and technological contracts, in particular, make the will of the parties to the contracts clear and explicit. This is achieved through a term called the legislative jurisdiction condition, which determines the law applicable to smart contracts (Mohammed, 2019). This term may be within or outside the contract, relying on a term attached to the original contract. The will of both parties to smart contracts is shown through the explicit choice of national legal systems or by the explicit choice of international law by explicitly stipulating it within the contract or in the form of a separate clause or a document attached to the contract (Mohammed, 1997). However, the parties sometimes fail to define the contract law for reasons that may be beyond their control. Therefore, it is necessary to examine this problem in two subsections, as follows:

3.1. Direct Selection of the Law Applicable to Smart Contract

Based on the freedom of the parties to choose the law governing their contract, whether it is national or international law, by including it within the terms of the smart contract, this subject makes the will closely related to the contract, which contributes to the selection of the most appropriate law for the contract and its application to disputes that arise as a result of its implementation. This reveals that the rules of private international law subject the international relationship to the will criterion, which makes it imperative to subject the smart contract to the law of the parties' will and the object of their choice (Sadiq & Abdul-Al, 2010). But the novelty of the subject raises many questions, represented by the possibility of the law of the will to regulate the legal relations resulting from smart contracts, the extent to which the will is subject to the traditional path, or whether there is another trend employed with smart contracts. The answer requires explaining the legislator's position on the application of the law of will and its effectiveness in resolving smart contract disputes, as follows:

3.1.1. The Position of the National and International Legislator on the Law of the Will

The national position is reinforced by referring to the law of will in Iraqi law and comparative legislation. The Iraqi legislator dealt with the law of will and the principle of the authority of the will, like all other comparative legislations, by referring to this principle in Article (25) of the Iraqi Civil Code in force No. (40) of 1951 (Iraqi Civil Code, Article 25). While Article (19) of the Civil Transactions Law of the United Arab Emirates stipulated Federal Law No. (5) of 1985 (The UAE Civil Transactions Law, Article 19). The Egyptian legislator also referred to the principle of the subordination of the international contract to the law chosen in Article (19 f1) of the Egyptian Civil Code of 1948 (The Egyptian Civil Code, Article 19).

In terms of foreign legislation, the American legislator in the Uniform Commercial Law of the United States of America stipulated the right of contracting parties to choose the law applicable to the international contract, whether or not it is related to the chosen law (UCC, 1952). He also referred to it in Article (109) of the Unified Federal Law on Electronic Transactions in 1999 (UETA, 1999). The Austrian legislator referred to this principle in Austrian private international law in 1979 and referred to the validity of the law chosen by the parties to the contract explicitly or implicitly. In addition, the German law adopted this principle in the civil law in 1986, where it stipulated that the contract is subject to the law chosen by the parties (Aya & Kharfalawi, 2016).

At the level of international conventions and to develop solutions and reduce disputes that arise regarding the application of the law chosen by the parties to the conventional, electronic or other contracts, the European Commission has confirmed this principle by stipulating it in the Rome Convention of 1980 (Rome I Convention, 1980). The United Nations experts, when drafting the Electronic Commerce Law (UNCITRAL) in 1996, confirmed the reference to the principle of will in choosing the applicable law because of the trust it provides between the contracting parties. Many conventions, including the Amman Convention in 1980 and the session of the Private International Law Academy in Athens in 1979, whose outcomes included the application of the chosen

law to international contracts. This leads to the conclusion that international contracts, whether traditional, electronic or smart, are subject to the chosen law for its ability to deal with international disputes. Yet, in the international framework, the scope of application of this principle is binding in international disputes between persons of the States Parties only (Ibrahim, 2016).

3.1.2. Application of the Law of the Will to Disputes Arising from Smart Contracts

The choice of the law that applies to smart contracts is available to the parties to be resorted to in resolving disputes that arise from the implementation of the contract, whether current or future. The basic notion in private international law is that contractual obligations are accompanied by a legal system to which the contract is subject through its formation, effects and expiration. The will has taken its prominent role by subjecting international contractual obligations in the context of conflict of laws to the will of contracting parties (Al-Waili, 2011). The nature of the smart contract from the virtual environment creating it to its development, has made the will criterion one of the most important and best criteria in resolving smart contract disputes through the agreement of the parties to determine the applicable law. The attribution of the contract to the law of independent will is considered one of the requirements of justice (Svantison, 2016).

The issue of applying the law of will to smart contracts grants the parties to the transaction the freedom to choose the law to which the contract is subject. This makes this principle the only solution in resolving disputes that arise from the application of the smart contract. This is attributed to its flexibility in resolving such disputes in light of the virtual nature of these contracts concluded via international networks (the Internet), whereby the parties to the contract can choose the applicable law. The law of the will is one of the effective solutions in resolving disputes arising from international contracts concluded via the Internet, but the freedom of contracting parties to choose the applicable law may be restricted in light of the public order that sets some criteria. The Iraqi legislator in Article (25/1) of the Iraqi Civil Code No. (40) of 1951 stipulated that (... This is unless the contracting parties disagree or it is clear from the circumstances that there is another law to be applied). The Emirati legislator in Article (19) of the UAE Civil Transactions Law No. (5) of 1985 stipulated the same text. In the same direction, the First Rome Convention of 2008 determined the law applicable to contractual obligations, as it stipulated in Article (3/1) that (.... The law chosen by the parties shall apply to the contract). By reviewing the aforementioned texts, none of the laws restrict the parties from choosing the law applicable to the contract. This liberates them from national and domestic laws and supports the proponents' position on the personal theory in establishing the principle of the authority of the will[1] (Salah, 2012).

To avoid the previous criticism, the researcher believes that it is necessary to reconcile the freedom of contracting parties to choose the applicable law with its restriction in domestic legislation. The freedom of contracting parties to choose the law should not be restricted. But it should not be absolute freedom to choose the law applicable to smart contracts, as they are carried out in an open electronic space, which may lead to fraud towards the law or deviation from the text of the mandatory laws[2] (Ezz El-Din, 1969).

3.2. Indirect Selection of Smart Contracts Law

The failure of the contracting parties to determine the contract law is not a justification for the judge to apply the national law or refuse to rule on the dispute. Rather, the judge can search the contract and extract the implicit will through the contract's circumstances. There are signs guiding the judge to the contract law, such as if the contract is subsequent to a contract in which the contract law has been determined. The judge may resort to other means to determine the contract law, such as the language in which the contract was drafted or the currency the contracting parties agreed to fulfil, or through the nationality of the parties, their place of residence, or the place of conclusion or execution of the contract. However, the nature of this type of contract may prevent recognizing the implicit will intended by the contracting parties in the contract, due to its virtual nature and that it operates through a decentralized environment. This raises a question about the position of the national and international legislators on the implicit will and its effectiveness in determining the law applicable to smart contracts. This question is answered in the following subsections, as follows:

3.2.1. The Position of the National and International Legislator on the Implicit Choice of Contract Law

Most of the national legislations referred to the implicit will by stipulating it within the laws, while others remained silent about it. The Iraqi legislator adopted the implicit will by referring to it in Article (25/1) of the Iraqi Civil Code No. (40) of 1951, stating (.... or it is clear from the circumstances that there is another law to be applied). However, the Iraqi legislator prioritized the explicit will over the implicit one, as indicated in Article (155/1), which stipulates that the intent and meanings are what count in contracts, not the words and structures (Iraqi Civil Code, 1951). The Emirati legislator also stipulated the same text in Article (19) of the UAE Civil Transactions Law No. (5) of 1985 (The UAE Civil Transactions Law, Article 19, 1985). The Egyptian legislator referred to the implicit will in Article (90), which stipulates that "the implicit will shall be derived from the circumstances and conditions surrounding the contract" (Egyptian Civil Code, 1948).

As for foreign national legislation, the French legislator adopted the implicit will by stipulating it in Article (1156) of the French Civil Code, which states that "The common intention of the contracting parties must be sought in agreements rather than the literal meaning of the words". The French legislator subjected the interpretation of the contract to the absolute authority of the judge, provided that this authority does not extend to amending the contract's provisions and terms (French Civil Code, Articles 1156, 2016).

Concerning international conventions, the Hague Convention of 1986, Article 7/1, stipulates that "the agreement of the parties upon the choice of the law applicable to their contract must be explicit or can be inferred from the terms of the contract or the parties' behavior or by reference to both". In the same vein, the 1986 Rome Convention states that "the law chosen by the parties shall apply to the contract, and it shall be explicit or specified in the terms of the contract or the contracting conditions" (Elias,

[1] The proponents of the personal theory argued that the principle of the authority of the will has a philosophical justification, through which this term can be given a moral concept, represented in the freedom of the parties in a way that is subject to natural law, and a legal justification represented in considering the will the source of positive law, which creates the rights whereby the individual is considered a source of the right through which the will of the parties is formed. Concerning the disputes, it is the basic law without the need for law, so that the source from which the contract derives its binding power is the will, and the law protects this will.

[2] Fraud towards the law in its broad sense means the deliberate use of legitimate means in themselves to achieve goals that contravene the orders and prohibitions of the laws. Whereas in its narrow sense, it means the escape from the provisions of the competent law according to the national attribution rule, and this law may be the law of the national judge or foreign law.

2009).

3.2.2. The Role of the Implicit Will in Determining the Law Applicable to Smart Contracts

The negligence of the parties to the smart contract and the failure to include the legislative jurisdiction clause in their contract does not mean that they have no role in determining the law governing the contract, as there is a will, along with the explicit one, through which a certain legal system can be accessed. This refers to an implicit definition of the law governing the smart contract, indicating that the notion of implicit will refers to the will indirectly, entrusting the judge to extract the will of the contracting parties from within the contract or from the circumstances surrounding it. The judge determines the applicable law through the terms of the contract or the circumstances surrounding it (Abdul Kareem, 2015). Perhaps someone asks about the circumstances or means through which the implicit will can be recognized and whether they are appropriate to determine the law applicable to smart contracts, given their unique characteristics. This requires addressing them in detail as follows:

1. Language: One of the most prominent means for determining the implicit will of the contract is the language in which the contract was drafted. The will of the contracting parties to draft the contract in a specific language indicates their will to rely on the law of the contract's language to govern it. However, this method is criticized based on the fact that some languages, including English, are used for concluding many global contracts on the Internet (Thamer, 2006). This cannot be applied to the language of smart contracts, as they have a unified encrypted language on all contracts that are created and executed on smart platforms (Ali, 2001).
2. The competent court: The contracting parties' choice of the court that hears the smart contract disputes is an implicit recognition of their acceptance of the application of the law of the court's country to their contract disputes. This choice has become one of the accepted principles (whoever chooses a judge chooses his law). However, the contracting parties' ignorance of the legal system of the judge's country may leave them facing the judge's failure to hear the disputes that arise regarding the application of this type of contract due to the lack of legal recognition of it.
3. Currency: Determining the currency to be fulfilled in the contract by the contracting parties is an effective way to determine the legal system of the contract. However, this means has failed to assign international contracts that have made global currencies the means through which the obligations of both parties are fulfilled because of the difficulty of recognizing the contracting parties' implicit will. Within the framework of this study, smart contracts are distinguished by using a unified digital currency across all contracts, a method that makes it impossible to access the implicit will that determines the contract (Kadhim, 2012).

There are many means and ways for inferring the implicit will to determine the law for the international contract, including the place of execution and conclusion, but they are not appropriate for digital disputes to be applied to smart contracts, as they depend on physical factors in determining the legal system, which is inconsistent with the nature of smart contracts, as they are created in a space that lacks the physical factor. To resolve the problem of determining the law applicable to smart contracts through the law of will, the researcher believes that it is more appropriate for the parties to the legal relationship in smart contracts to explicitly determine the applicable law to the smart contract, eliminating any doubt about it. This procedure provides the parties to the smart contract with legal certainty to address the disputes arising from the implementation of the terms of smart contracts.

4.CONCLUSION

After examining the role of the will in smart contracts, it can be said that the law of will is currently an effective and necessary means to determine the law applicable to the smart contract. The law of will can overcome a major problem, which is determining the law applicable to smart contracts created in the virtual space. This law provides confidence to the parties to the smart contract and protects their rights through the law that they deem appropriate for the terms of their contract, understanding the scope of their obligations and the nature of their work. These factors make the will criterion one of the most appropriate rules for the operation of technological contracts in general and smart contracts in particular to resolve the problem of determining the law applicable to smart contracts. This study revealed the following results:

5. RESULTS

1) Jurists differed in defining smart contracts. Some defined them as a legal contract and subjected them to the contract theory based on their effects and formation, while others defined them as a program whose purpose is to serve the basic contract.
2) The jurisprudential difference in the definition of smart contracts has affected the legislative aspect, causing many countries to retreat from regulating smart contracts through legal regulation or making the necessary amendments to some laws to accommodate the development in the law of contracts.
3) The notion of the law of will is based on the recognition of the law of the contract by both parties to the smart contract to determine the effects of smart contracts.
4) Smart contracts do not differ from their counterparts in terms of activating the law of will, but the nature of these contracts makes the law of the will play an effective role in addressing the disputes arising from their application. The judge refers to them to determine the law applicable to smart contracts, leading to their stipulation in national and international law. This is due to their adoption in addressing technological disputes occurring in the virtual environment.
5) In smart contracts, the choice of applicable law can be explicit by referring to it in the terms of the contract or a subsequent clause of the contract. If the law is not determined by the parties to the contract, the judge will implement precautionary controls that lose their feasibility in an environment that does not have a physical presence and operates through a decentralized global virtual network.

6. RECOMMENDATIONS

The study recommends the Iraqi legislator to:

1) Define smart contracts in a way deemed appropriate, or amend the relevant terms in electronic contracts in a way that makes them compatible with smart contracts.
2) Stipulate considering smart contracts as contracts in the legal sense and keep pace with the countries that have dealt with smart contracts by stipulating them in a special law or by amending the existing provisions.

3) Stipulate a provision obliging smart platforms or electronic programs to include a special clause in determining the law applicable to the smart contract.

4) Amend the electronic signatures and electronic transactions law in a way that makes it suitable to work with the developments witnessed in electronic transactions and the emergence of new technologies within the framework of digital contracts.

5) Develop the legal structure through adopting legislation that is more in line with virtual space and artificial intelligence operations.

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