The Effectiveness of Adhesion Contracts Theory in Restoring Contractual Balance in Some Modern Contracts - The Franchise Contract as a Model

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Abstract: The theory of adhesion contracts plays a significant role in regulating the relationship between contracting parties. However, modern contract systems such as franchise agreements, which are typically concluded according to standardized pre-drafted forms, particularly with the proliferation of electronic contracts, compel the franchisee to adhere without genuine negotiation. This reality has exposed the theory's inability to address abusive clauses and has driven legislators to seek specialized legislative solutions that provide more comprehensive protection through laws specific to franchise contracts that regulate the relationship between franchisor and franchisee and control abusive terms.

Keywords: Adhesion contract; Franchise; Franchisor; Franchisee; technology.

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Introduction

Economic and commercial life plays a vital role in the present time, constituting the essence of nations' development, independence, and sovereignty. This is particularly evident in their economic dealings and international commercial exchanges, which rely on international legal rules translated into bilateral or multilateral agreements, or into contracts of an international nature.

In this context, technology transfer contracts emerge as an important tool in the field of international trade, meeting the economic development needs of developing countries. The importance these contracts acquire transcends mere trade to encompass production, services, and information technology, making them an essential means of commercial exchange between developed and developing countries.

Within the framework of technology transfer, the franchise contract has become the most widely used instrument in technological exchanges between developed and developing countries. This contract is one of the important forms of commercial cooperation that allows the franchisor to transfer technical knowledge and trademarks to the franchisee in exchange for fees or a percentage of profits, raising several issues concerning the protection of the weaker party at various stages of the contract, whether before concluding the contract, during execution, or after the contract's termination.

Since commercial exchanges require speed in completion, international trade contracts have acquired the nature of standard pre-prepared forms, including franchise contracts, due to the savings these standard contracts achieve in both time and negotiation costs. This has placed them under the umbrella of adhesion contracts, which are often received with skepticism in legal academic circles. However, at the same time, they enjoy practical popularity and acceptance due to the cost reduction and time savings they provide—reasons that have made them accepted by legal systems generally as a legal means of contracting, despite their defects and the reservations they raise.

This research paper addresses the theory of adhesion in franchise contracts by shedding light on the concept of adhesion theory and its relationship with franchise contracts.

Let us examine the challenges and solutions that contribute to achieving contractual balance in franchise contracts, by reviewing the manifestations of imbalance and the shortcomings of adhesion theory in these contracts, with a focus on the legal and economic aspects that affect justice and balance between the parties.

The importance of the topic emerges from the proliferation of franchise contracts through adhesion, which may result in the potential emergence of disputes between the parties to these contracts, due to the high technicality that these contracts possess on the one hand, and which come in a standardized form on the other hand, with tight drafting that ordinary methods may fail to adjudicate in a manner that ensures contractual balance.

The importance of the topic also appears in the absence of specific legislative coverage, which will lead us to examine the adequacy of existing legal provisions to achieve protection for the weaker party in the contractual relationship.

Based on the above, the following problem can be posed: To what extent is adhesion theory effective in protecting the franchisee?

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Objective of the study:

Main Objective

To evaluate the effectiveness of the adhesion contract theory as a legal mechanism for achieving contractual balance in franchise agreements, identify its shortcomings, and propose appropriate legislative alternatives to protect the weaker party in these contracts.

Specific Objectives

- To analyze the theoretical and legal foundations of the adhesion contract theory and the extent of its applicability to the specific nature of franchise agreements
- To examine the manifestations of contractual imbalance in franchise agreements and identify the common abusive clauses contained in standard contracts
- To examine the adequacy of the monopoly criterion as a basis for applying the adhesion contract theory in light of contemporary economic and technological developments

Study Methodology :

Descriptive Analytical Approach:

This method is employed to describe and analyze the theoretical and legal foundations of the adhesion contract theory, and to analyze the legislative texts regulating franchise contracts in various legal systems. Through this approach, the elements of franchise contracts and their legal mechanisms are examined and deconstructed, and the abusive clauses contained in standard contracts are analyzed.

Comparative Approach :

This method is adopted to conduct a comparison between national and international legislation in regulating franchise contracts, and to compare the extent of applying the adhesion contract theory in different legal systems. This includes studying the legislative and judicial experiences in developed countries that have developed special legal frameworks for franchise contracts, and extracting lessons learned from them.

I. The Conceptual Framework of Adhesion Theory and its Relationship to Franchise Contracts

Adhesion theory is considered one of the important legal theories, particularly in contracts that involve a significant disparity in economic or legal power between the contracting parties. In this context, franchise contracts emerge as one of the types of contracts that often contain terms set by a party with significant bargaining power, namely the franchisor, against another party, the franchisee, who finds himself compelled to accept these terms as they are without a real ability to negotiate. In this section, we will shed light on the nature of adhesion contracts, and explore the extent of the theory's impact on the lost contractual balance between the parties to the contract.

I.1 Concept and Origin of Adhesion Contracts:

The study of adhesion contracts and understanding their characteristics and emergence in different legal systems is essential to understanding how to protect the rights of parties with less bargaining power.

I.1.1 Definition of Adhesion Contract:

The basic principle in contracts is that the two parties negotiate all the details of the contract to be concluded in the future. However, with the development of society and the necessities of life, contracts of a special nature known as adhesion contracts have emerged.[1]

From a doctrinal perspective, jurists have not agreed on a unified definition of adhesion contracts, nor have legislations defined them precisely. Nevertheless, there are several definitions that reflect approximately the same meaning. The jurist Saleilles[2], who is considered the first to establish the concept of adhesion, believes that an adhesion contract is the result of the predominance of one will that dictates its terms to an unspecified group, imposing them unilaterally, and lacking only the other party's submission to accept the contract terms.[3]

Dr. Abdel Moneim Farag Al-Saddah defines it as: The contract in which one party submits to established terms set by the other party and does not allow them to be discussed, with regard to goods or necessary facilities that are subject to legal or de facto monopoly, or where discussion is limited regarding them. [4]

Based on the aforementioned definitions, adhesion contracts raise questions about justice and balance in contractual relationships, where the strong party is in a position that allows it to impose harsh conditions that may not be in the interest of the weaker party. Acceptance in adhesion contracts is not considered true consent resulting from negotiations, but rather submission to imposed terms as a result of the economic need of the weaker party. Hence the need for legislative or regulatory intervention to protect the rights of the weak party in these contracts.

In Arab legislations, laws have addressed how to accept adhesion contracts without setting a precise definition for them. The Algerian legislator stipulated in Article 70 of the Civil Code that acceptance in an adhesion contract occurs merely by submitting to established terms set by the offeror and does not accept discussion of them. The Lebanese legislator stipulated in Article 172 of the Code of Obligations and Contracts that acceptance in adhesion contracts is merely by submitting to terms set in advance without discussion. In Jordan, Article 104 of the Civil Code stipulated that acceptance in adhesion contracts is limited to submitting to the terms established by the strong party without discussion.

This submission is not considered a defect in the will, since the submitting party has the freedom to contract or not. The compulsion and submission here are due to the necessary need

[1] - Al-Sarhan Khatir, Commentary on Civil Law: Sources of Personal Rights, 1st Edition, Al-Dar Al-Ilmiyya for Publishing and Distribution, Amman, 2000, p. 107.
[2] - La'shab, Mahfoudh (1998). Adhesion Contract in Algerian and Comparative Civil Law. Master's Thesis, University of Algiers, Institute of Law, p. 19.
[3] - Al-Haisa Ali Musbah Saleh,The Judge's Authority in Modifying the Content of Adhesion Contracts. Master's thesis submitted in partial fulfillment of the requirements for the Master's degree in Private Law, Faculty of Law, Middle East University, 2011, p. 22.
[4] - Ben Azzouz Rabia, The Legal System of the Franchise Contract, Dar Al-Fikr Al-Jami'i, Alexandria, 2021, p.77.

for this service or product, and are not related to psychological factors that generate a defect in the will.[5]

From the foregoing, adhesion contracts can be defined as contracts in which the weak party is bound by the terms and conditions dictated by the strong party without discussion, exploiting the urgent need for the monopolized service or commodity. This situation highlights the need for legal regulation and protection for the weaker party to ensure justice and balance in contractual relationships.

I.1.2 The Emergence of Adhesion Contracts:

It has become clear that contracts in civil law remained consistent with the idea of bargaining or negotiation. However, given that modern economic development has moved toward mass production methods, it has become natural for the method of wide distribution to replace bargaining. Thus, the contract itself has transformed into something industrial and standardized, where the same repetitive texts containing the same conditions are used in selling hundreds of thousands of similar goods. This led to the emergence of standard contracts or mass contracts (Contrat type ou contrat de masse).[6]

Due to the great economic power enjoyed by one of the contracting parties, as a result of its monopolistic authority over a particular product or service, this has allowed it to make the contracts it concludes non-negotiable. The contract has become standardized and uniform, prepared in advance and unilaterally by the professional, whether a producer or distributor, who imposes his pre-prepared conditions on anyone who wishes to contract with him, without having the ability to discuss these conditions or negotiate about them. He has only two options: either refuse to contract or submit to the contract, and he will most likely submit, due to the professional's monopoly on the commodity or service.[7]

It appears that economic freedom has led to limiting contractual freedom, and among its consequences was the adhesion contract. The spread of adhesion contracts has become widespread in contemporary society in line with economic development and the emergence of institutions, companies, and individuals who control the consuming public through their monopoly of goods and services that are indispensable to the consuming public.[8]

Naturally, this leads the professional, who is the stronger party, to include in this contract terms that serve his interest, which are rarely in the interest of consumers.

Since the era of the jurist Saleilles, jurists have not hesitated to expose the arbitrariness resulting from adhesion contracts[9]. For example, the jurist Starck pointed out that the principle of the autonomy of will has its origin in the abuse of contractual freedom that prevailed in a social and economic context that allowed the strong to exploit the weak. For his part, the jurist Berlioz expressed his dissatisfaction, saying: Instead of the contract being a tool for reconciling the conflicting interests of the parties, it has become a means for one of the contracting parties to impose its conditions, adding that adhesion contracts contribute to establishing a new feudal

[5] - Ramadan Walid Salah, The Binding Force of the Contract and Exceptions to It between Islamic Jurisprudence and Civil Law: A Comparative Study, Dar Al-Jami'a Al-Jadida, Alexandria, 2009, p. 688.
[6] - Boudali Muhammad, Abusive Conditions in Contracts in Algerian Law: A Comparative Study with the Laws of France, Germany and Egypt, Dar Houma for Printing, Publishing and Distribution, Algeria, 2007, p. 10.
[7] - Boudali, op. cit., p. 11.
[8] - Ibid., p. 12.
[9] - Al-Haisa, op. cit., p. 15.

system, noting that the entry of information technology into legal relationships exacerbates this phenomenon.

It should be noted that this phenomenon is not limited only to the relationship between professionals and consumers, but appears every time one of the contracting parties is able to impose its conditions on the other party, as is the case between employers and workers, or suppliers and distributors. This phenomenon has spread in international contracts, which particularly need rules that restore the lost international economic balance. [10]

I.1.3 Characteristics of Adhesion Contracts:

Adhesion contracts are distinguished by several characteristics, most notably that the monopolist or strong party is in a dominant economic position that allows it to impose its conditions without accepting discussion of them. This applies to contracts such as employment contracts in large industries, insurance contracts, railway transport contracts, and subscription contracts for water and electricity services, where the weaker party has no choice but to accept the terms or reject the contract entirely, due to monopoly or the urgent need for these services or goods.

Determining whether a contract is an adhesion contract requires identifying the characteristics that distinguish it from other contracts, which are as follows:

a) Economic Superiority of the Offeror:

The offeror enjoys a superior economic position as a result of legal or de facto monopoly, or as a result of limited competition, which gives it the ability to impose its conditions.[11] This superiority is manifested in two points:

- **Legal Monopoly:**

As is the case in contracts for the supply of electricity, water, and telephone services, where companies providing these services enjoy a legal privilege that enables them to provide these services under conditions they set without discussion from the receiving party.[12]

- **De Facto Monopoly:**

De facto monopoly enables the strong party, with a dominant presence in a particular area, to impose contract terms on the public wishing to contract, who have no other alternative. This scope also includes the monopoly of technical knowledge in technology transfer contracts, which have become an urgent necessity required by the need to attract development and the desire to replicate success.[13]

[10] - Boudali, op. cit., p. 13.
[11] - Abd Al-Mun'im, Faraj Al-Saddah, "Adhesion Contract in Modern Arab Civil Codes", Security and Law Journal, Dubai Police College, Issue 1, p. 244.
[12] - Sultan Anwar, The Brief in the General Theory of Obligation: A Comparative Study, Dar Al-Nahda for Printing and Publishing, Beirut, 1983, p. 64.
[13] - Ibid,, p. 64.

b) Continuous General Offer:

The offer in adhesion contracts is characterized by being directed to the entire public or a specific category thereof, and not to a specific person. This offer is issued continuously and is binding for a longer period compared to free bargaining contracts.[14]

c) Standard Form of Contract:

The offer in adhesion contracts is issued in a standard form that presents the conditions in their entirety, so that the other party is faced with the choice of total acceptance or total rejection. Often these contracts are printed and complex so that the ordinary person does not understand them, and they include many conditions, some of which are harsh on the submitting party and others limit the offeror's liability or completely exempt them from it.[15]

It should be noted that the element of continuous general offer is not limited to adhesion contracts alone, but can appear in other standard contracts such as sale at fixed prices in large stores or sale by auction. Therefore, all distinctive elements of adhesion contracts must be present to classify a contract within this category.

I.2 Adhesion Theory in Rebalancing Franchise Contracts:

The role of adhesion theory is embodied in rebalancing contracts and protecting the interests of the weaker party, who finds himself forced to accept pre-prepared conditions. Through the application of this theory, contract fairness can be ensured. The urgent need for adhesion theory emerges in franchise contracts in particular, since the two parties are unequal in knowledge and economically, making this type of contract a fertile field for applying the theory.

I.2.1 Definition of Franchise Contract:

The franchise contract is considered a commercial agreement that originated and developed significantly in the United States of America, where the franchisor grants the franchisee the right to use its trademark and operating system in exchange for fees or a percentage of profits. This contract was invented by American businessmen in the nineteenth century, and the Singer Sewing Company was among the first companies to use it to solve marketing problems in 1860. The use of franchise contracts later expanded in the automotive industry at the beginning of the twentieth century, following companies like Ford and General Motors, as well as in soft drink projects in 1935.[16]

The franchise contract also spread in the field of fast-food restaurants, the most famous of which was the Howard Johnson restaurant chain after World War II. With economic and legislative growth, the spread of this system increased significantly, resulting in the establishment of laws governing this contract, such as the Lanham Act of 1946 and the Full Disclosure Act issued on October 21, 1979, to protect the franchisee from abuse and ensure transparency.[17]

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[14] - Hassanein Muhammad, The Brief in the Theory of Obligation: Sources of Obligations and Their Provisions in Algerian Civil Law, National Book Foundation, 1983, p. 33.
[15] - Sawar Wahid Al-Din, Commentary on Civil Law: The General Theory of Obligation, Volume 1: Sources of Obligation, Faculty of Law Library, University of Jordan, 1977, p. 81.
[16] - Ben Azzouz Rabia , op. cit., p. 23.
[17] - Ibid., p. 24.

From the above, the franchise contract can be defined as an agreement between the franchisor and the franchisee to exploit the intellectual property rights and operational systems of the franchisor for a financial amount, with the aim of achieving the mutual interest of both parties.

I.2.2 Characteristics of Franchise Contract:

The franchise contract is characterized by several features, perhaps the most important of which is the independence of its two parties, which does not prevent their common interest. It is also characterized by the element of technical knowledge through which the franchisee aims to recreate and replicate the success achieved by the franchisor, so that the franchisee becomes economically dependent on the franchisor, all according to a contract of a standard nature.

- **Independence of the Parties:**

Despite the franchisee's commitment to the standards and guidelines set by the franchisor, the franchisee remains responsible for managing and operating his own commercial unit independently, with each party retaining its own legal and financial personality, which enhances the independence of the parties.[18]

- **Contract Whose Essence is Technical Knowledge and Replicating Success:**

The franchise contract relies heavily on the transfer of technical knowledge and expertise from the franchisor to the franchisee, where training and continuous support are provided to the franchisee to ensure the replication of the successful business model proven by the franchisor, which increases the chances of success for the franchisee.[19]

- **Contract of Economic Dependence:**

The situation of economic dependence is defined as: the commercial relationship in which an enterprise has no comparable alternative solution if it wants to refuse to contract under the conditions imposed on it by another enterprise, whether a customer or supplier.[20]

Despite operational independence, the franchisee remains economically dependent on the franchisor. This is manifested in paying initial and periodic fees, adhering to quality and service standards, and relying on continuous support and guidance from the franchisor. This makes the franchisee economically dependent on the franchisor to replicate success and maintain continuity.

- Standard Contract:

The franchise contract is characterized as a standard contract, where a unified contract is prepared containing specific terms and guidelines that all franchisees must adhere to. This model helps maintain brand uniformity and the quality of services or products offered, and

[18] - Amandine Bouvier, : Regards sur le cotrat de franchise, thése pour obtenir le grade de docteur, l'Unuversité de Montpellier, Soutenue le lundi 07/12/2015, p.441.
[19] - Ben Azzouz Rabia , op. cit., p. 72.
[20] - Article 3 of Ordinance No. 03/03 dated July 19, 2003, relating to Competition, Official Gazette dated July 20, 2003, Issue No. 43.

ensures the application of unified standards in all branches affiliated with the franchise system.[21]

I.2.3 The Extent of Applicability of Adhesion Theory to Franchise Contracts:

The world witnessed in the second half of the twentieth century scientific and technological development that had an impact on the pattern of contracting, directing the compass of contracting toward the path of adhesion, thereby becoming the normal method of contracting.[22]

Under current circumstances, we know that some franchise contracts are concluded based on standard contracts prepared by institutions supplying technology.[23]

Jurists' opinions varied regarding the consideration of standard contracts as adhesion contracts. Some believe that adhesion contracts apply only to contracts related to necessary goods and services, where the offering party monopolizes this commodity legally and actually, and presents the offer in a single form to all parties.

Given this opinion, the franchise contract can be described as an adhesion contract if the following conditions are met:

- The stronger party, which is the franchisor in the franchise contract, enjoys a legal or de facto monopoly that grants it permanent control over the other party, and consequently, can impose the conditions it wants based on its monopoly. As for the franchisee, as a beneficiary party, he is compelled to accept these conditions if he wants to obtain the privileges associated with the franchise, such as using the well-known trademark, accessing knowledge and commercial expertise, and obtaining technical and marketing support.

- As for the criterion of the contract relating to essential and necessary goods, the technical knowledge possessed by the franchisor becomes necessary for the grantee, so that he cannot do without it to achieve economic success.

Franchise contracts are built on the idea of the franchisor's economic dominance, who owns the trademark and has the ability to provide the necessary support to operate the business successfully. This dominance increases the chances of the franchisor imposing its conditions on the weak party, whose position does not allow him to resist them or attempt to negotiate to improve them.

- Regarding the general and standard offer, so that the acceptor cannot modify its terms, this is exactly what the franchisee is unable to do, due to the weakness of his economic position in the face of the franchisor's monopoly.

On the other hand, some see the necessity of transcending the traditional idea of adhesion contracts. According to this opinion, an adhesion contract is one in which one party alone sets the terms of contracting, while the role of the other party is limited to accepting the terms

[21] - Ben Azzouz Rabia , op. cit., p. 81.
[22] - Abd Al-Baqi, Omar Muhammad, Contractual Protection of the Consumer: A Comparative Study between Sharia and Law, 2nd Edition, Munsha'at Al-Ma'arif, Alexandria, 2008, p. 333.
[23] - Al-Kayabi, Hussein Abd Al-Ridha Abdullah, "Imbalance of Contractual Equilibrium Resulting from Abusive Conditions", Al-Huquq Journal (Law Journal), University of Baghdad, 2011, p. 252.

without the possibility of negotiation. These scholars argue that adhesion theory may not be sufficient to protect parties from abusive clauses, especially when there is an imbalance in performance without monopoly, making it difficult for the submitting party to assess the effects of the conditions on his financial and legal position due to lack of competence and technical expertise.

In light of rapid scientific and technical developments, the concept of adhesion, which focuses on the monopoly of goods, may be insufficient to provide the necessary protection, as the imbalance may be not only in the balance of economic power, but in the balance of knowledge power between the parties.

Therefore, the interpretation of the contract must extend to include protection of the submitting party, whether economically or cognitively submissive, and this is consistent with the fundamental rule in contract theory: executing the contract in good faith.[24]

However, another opinion of jurisprudence believes that the adhesion contract is in favor of the franchisee, as the latter benefits from an integrated system based on extensive experience in the markets, which is difficult to achieve alone, and therefore he must sacrifice some of his freedom in exchange for benefiting from the franchise contract.[25]

From this standpoint, franchise contracts raise questions about the extent of fairness and contractual balance. Can these contracts be considered fair to both parties, or do they tip the scales in favor of the franchisor? These questions highlight the urgent need for intervention to ensure the rights of the weaker party in these contractual relationships.

This situation requires the necessity of reviewing these contracts and ensuring the achievement of balance and justice in them, in a way that protects the rights of the franchisee, and develops commercial relationships in a way that makes them more equitable and fair to achieve the desired goals.

II. Challenges and Solutions for Achieving Contractual Balance in Franchise Contracts

Recent decades have witnessed a remarkable development in the use of franchise contracts as a successful business model that contributes to supporting the local and international economy. However, achieving contractual balance between the franchisor and the franchisee faces several challenges, including accurately defining rights and obligations, complying with changing local legislation, and adapting to the knowledge and economic differences between the two parties to the contract.

To overcome these challenges, effective solutions must be adopted that ensure clarity and flexibility of legal frameworks.

II.1 Manifestations of Imbalance and Aspects of Deficiency in Adhesion Theory in Franchise Contracts:

Although adhesion theory aims to achieve justice between contracting parties, its application in franchise contracts reveals challenges and deficiencies in some aspects. Franchise

[24] - Al-Kayabi, Hussein Abd Al-Ridha Abdullah, op. cit., p. 252.
[25] - Marty, Gabriel and Raynaud, Pierre, Traité de droit civil: Les obligations, Vol. 1, 2nd Edition, Éditions Sirey, Paris, 1988, p. 123.

contracts are often characterized by an imbalance in bargaining power, allowing the imposition of conditions that may be unfair to the weaker party.

II.1.1 Aspects of Imbalance in the Rights and Obligations of the Parties:

Looking at the essence of the franchise contract, which includes a set of conditions set by the franchisor to achieve his interest, as the stronger party, before the franchisee who is compelled to accept these conditions, which often limit his freedom, especially those related to sources of supply of raw materials or the geographical scope in which he can exploit the technology. They may also exempt the franchisor from liability for warranty of defects that may appear in the technical knowledge transferred to the franchisee. Among these conditions:

a) Conditions Restricting the Economic Exploitation of the Franchisee's Business

The economic dependence of the franchisee is one of the most important characteristics of the franchise contract, where the franchisor exploits its economic power and monopoly over the means of production to keep the franchisee bound by its conditions. To maintain this dependence, the franchisor imposes several conditions, including:

- **Exclusive Supply Condition from the Franchisor**

The franchisor requires the franchisee to obtain the supplies and materials necessary for his business from specific sources chosen by the franchisor, which are often linked to economic interests with him. This condition is considered an essential part of the technology transfer process within the franchise contract, but it may be abusive because it restricts the franchisee from obtaining materials at lower prices from other sources, or from within his country. Even in the absence of an explicit provision on exclusivity of supply, the franchisee may find himself forced to comply with this condition under the pressure of quality control.[26]

- **Quality Control Condition**

If the franchise contract does not include an exclusive supply condition, the franchisor grants the franchisee the freedom to choose suppliers, but with the imposition of respect for quality standards within the franchise network. The franchisor retains full authority to assess whether the products or services provided by the franchisee comply with quality standards, and can even reject any product he deems harmful to his commercial reputation, even if it matches the specified standards. This broad authority reduces the franchisee's freedom to choose suppliers and makes the quality control condition effectively an indirect exclusive supply condition.[27]

b) Restrictive Conditions with Quantitative and Territorial Effects

International franchise contracts generally include conditions that restrict the franchisee with the aim of ensuring the franchisor's rights to achieve specific profits. These conditions can include determining the quantity of production or restricting geographical distribution to maintain the franchisor's market strategy.[28] One of the most prominent of these conditions is

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[26] - Al-Himshiri, Walid Odeh, Technology Transfer Contracts: Mutual Obligations and Restrictive Conditions, A Comparative Study, Dar Al-Thaqafa, Jordan, 2009, pp. 271-272.

[27] - Al-Najjar, Muhammad Mohsen Ibrahim, Commercial Franchise Contract: A Study in the Transfer of Technical Knowledge, Dar Al-Jami'a Al-Jadida for Publishing, Egypt, 2001, p. 55.

[28] - Al-Kilani, Mahmoud, The Commercial and Banking Encyclopedia: International Trade Contracts in the Field of Technology Transfer, Dar Al-Thaqafa, Jordan, 2008, p. 218.

the territorial exclusivity condition, which restricts the scope of the franchisee's exploitation of technology. Although it grants the franchisee a monopoly within a certain area, it limits his competitive ability, especially with the presence of conditions that prevent him from entering into agreements with competing projects or from exporting his products without the franchisor's permission.[29]

c) Conditions Restricting the Technological Exploitation of the Franchisee

These conditions show clear abuse, as they hinder the franchisee from fully benefiting from the technology he acquires under the contract, and prevent him from developing it or using it freely.

- **Restrictions Related to Intellectual Property Elements**

The franchisor imposes on the franchisee not to challenge the intellectual property rights associated with the transferred technology. This condition is considered abusive because it exempts the franchisor from guaranteeing the integrity of these rights.[30] The judiciary has considered that stipulating non-challenge of the validity of a patent is an unlawful condition, because it conflicts with the franchisor's legal obligation to guarantee that the franchisee will not be exposed to any legal problems due to these rights.[31]

- **Conditions Restricting Technological Practices**

The franchisor may impose conditions that limit the scope of technology use or prevent the franchisee from modifying it to suit the local environment, or prevent him from conducting research and development activities and introducing modifications to technical knowledge, thereby depriving him of the possibility of actual acquisition of technological capability. These conditions are considered legitimate in some developed countries that recognize the franchisor's monopoly rights over the technology.[32]

[29] - Al-Himshiri, Walid Odeh, op. cit., pp. 254. And Al-Najjar, Muhammad Mohsen Ibrahim, op. cit.,, p. 53.
[30] - This is what is contained in the first paragraph of Article 377 of Law No. 75-85 dated September 30, 1975, containing the Civil Code, as amended and supplemented by Law No. 07-05 dated May 13, 2007, published in Official Gazette No. 31 dated May 13, 2007, which states: "Any clause that eliminates or reduces the warranty shall be null and void if the seller intentionally concealed a third party's right." Similarly, the first paragraph of Article 378 of the same law states: "The seller remains liable for any eviction resulting from his act, even if an agreement has been made to exclude the warranty, and any agreement to the contrary shall be null and void."
[31] - Al-Himshiri, Walid Odeh, op. cit.,, pp. 276
[32] - Ibid., p. 277.

- **The Condition That Grants the Franchisor the Right to Refuse Contract Renewal[33]**

This led many jurists to classify the franchise contract as a contract that falls within economic dependence contracts, where the franchisee has no alternative if he refuses to contract under the conditions imposed by the franchisor.

This situation has been prohibited by all competition laws of different countries. For example, Order 03/03 relating to competition and Article 06 of the Competition Protection and Anti-Monopoly Practices Law No. 03 of 2005 in Egypt, as well as in French law under Order 86/01 relating to competition, state that these laws do not punish the mere existence of a situation of economic dependence nor prohibit it in itself, but rather prohibit abuse associated with a situation of dependence if it contributes to hindering and disrupting competition.[34]

According to what French legislation stipulated in Article 1143 of Order No. 2016-131 issued on 10-02-2016 and amended by Law No. 2018-287 dated 20-4-2018, it can be said that this text includes economic coercion as a defect in consent. The article states that coercion also exists when one party, as a result of exploiting the state of dependence in which the contracting party is in relation to him, obtains from the latter a commitment that he would not have consented to in the absence of such pressure, and obtains from this a manifestly excessive benefit. Here, the coercion is based on the situation of dependence between the contracting

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[33] - Abd al-Mahdi, Kazim Nasser, and Nizam, Jabbar Talib. "Technical Knowledge and Its Effect on the Franchise Contract." Journal of the University of Babylon for Humanities, Vol. 17, No. 2, 2009, p. 285. Restrictive clauses in franchise contracts are classified into three types:
(1) Black Clauses: These are clauses that are void in themselves without requiring any justification for their nullification because they are abusive.
(2) White Clauses: These are permissible clauses that are not voided if included in the agreement because they are fair, such as: the franchisee's obligation not to disclose the confidentiality of technical knowledge; the non-compete clause after the termination of the contract as long as the technical knowledge remains confidential or the protection of the trademark or patent is still in effect; the franchisor's right to terminate the contract if the franchisee competes with the franchisor or produces goods or commodities in fields other than those licensed.
(3) Gray Clauses: These are clauses that fall between validity and nullity depending on the circumstances of the contract, such as the exclusive supply clause or the mandatory purchase clause. See the exception introduced by the International Code of Conduct adopted by the European Common Market through the European Commission convened in 1996 to determine permissible and prohibited clauses.
Ben Azzouz, Rabia, op. cit., pp. 14-15. See also: Hamid, Ibrahim Hamad Abd Al-Rahman, Restrictive Clauses in Technology Transfer Contracts and Their Impact on Developing Countries, Master's thesis, Cairo University, 2007, p. 37.
Opinions differed regarding the criteria adopted to determine the existence of restrictive clauses, which led to divergent effects resulting from this difference in viewpoints. This disagreement was clearly manifested in the meetings of the UNCTAD Committee under the United Nations during the drafting of the International Code project. The Code addressed the issue of restrictive clauses in its fourth chapter, which provoked considerable controversy not only regarding the content of these clauses but also regarding how to formulate them. Therefore, we find in this chapter many terms and expressions placed in parentheses, reflecting existing disagreements. These disagreements stem primarily from fundamental differences in determining the necessary criteria for assessing the existence of restrictive clauses and the binding nature of this Code. Developing countries tended to prohibit restrictive clauses completely without considering whether these clauses had justifications or not, and expanded the enumeration of these clauses to exceed forty clauses, emphasizing the necessity of their absolute nullity. In contrast, industrialized countries sought to reduce the scope of these clauses and limit their effects so that they would not exceed fourteen clauses, restricting their impact to the judge's discretion without making their nullity mandatory.
As a result of this difference in determining the criteria for restrictive clauses between developing and developed countries, and due to the conflict of interests between the two parties, the project was unable to obtain binding status.

[34] - Ben Azzouz Rabia, op. cit., p. 75.

parties, which is known in French jurisprudence as economic coercion, although the text did not explicitly refer to this term.[35]

It is clearly evident that the regulation of franchise contracts in several countries does not conflict with their competition laws, because even if exploitation arises from it, this is permissible if it achieves economic progress, provided that the institution committing the abuse does not reach the point of eliminating competition in an important part of the product market,[36] leading to dominance.

Naturally, authorization must be obtained from the Competition Council[37], given that the franchise contract meets the description of a vertical agreement, which is an agreement concluded between two or more institutions, each operating at a different level of production and distribution, and the agreement relates to the conditions under which the parties can purchase, sell, or resell certain goods or services. It is an agreement that brings together institutions not at the same economic level, and vertical restrictions are placed by the producer that limit the franchisee's freedom of disposal.

On the other hand, some jurists believe that the franchise contract meets the conditions of adhesion, where the franchisor enjoys a legal or de facto monopoly that grants him continuous control over the other party, and can dictate whatever conditions he wishes, in the absence of an alternative option for the franchisee.

Since the franchise contract is considered one of the types of technology transfer contracts, which use modern technology as a monopoly tool, making it a means of political pressure on individuals, groups, or countries that need it, this situation gives the franchisor the power to impose his conditions on the franchisee, who is forced to accept them due to his urgent need for technology and technical expertise.

The franchisee often cannot discuss these conditions, which are varied and numerous, and may not realize their abusive nature when concluding the contract, due to his urgent need for technical knowledge, making him in a weak position, making him merely a recipient of the franchisor's instructions, obligated to fulfill a series of strict conditions imposed on him. [38]

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[35] - Al-Khatib, Muhammad Irfan, "The Theory of Contract Validity in French Civil Legislation", Kuwait International Law Journal, Issue 6, Part 1, 2018, pp. 277-288.

[36] - Article 6 of Ordinance No. 03/03 dated July 19, 2003, relating to Competition, Official Gazette dated July 20, 2003, Issue No. 43:

"Practices, concerted actions, agreements, and explicit or implicit arrangements are prohibited when they aim or may aim to obstruct, restrict, or distort freedom of competition in the same market or in a substantial part thereof, particularly when they seek to:

Restrict entry into the market or the exercise of commercial activities therein;

Reduce or control production, marketing outlets, investments, or technical development;

Divide markets or sources of supply;

Obstruct price determination according to market rules by artificially encouraging price increases or decreases;

Apply unequal conditions to the same services toward commercial partners, thereby depriving them of the benefits of competition;

Subject the conclusion of contracts with partners to their acceptance of additional services that have no connection to the subject matter of these contracts, either by their nature or according to commercial customs;

Allow the granting of a public contract in favor of those engaging in these restrictive practices."

[37] - See Executive Decree No. 05-175 dated May 12, 2005, determining the procedures for obtaining a declaration of non-intervention regarding agreements and situations of market dominance, published in the Official Gazette of Algeria dated May 18, 2005, Issue No. 35.

[38] - Falhout, Wafa Mazid, Legal Problems in Technology Transfer Contracts to Developing Countries, Al-Halabi Legal Publications, 1st Edition, Lebanon, 2008, p. 28.

II.1.2 **Deficiencies of Adhesion Theory:**

Referring to general rules, we find that most legislations provide judicial protection for the submitting party, granting the judiciary broad discretionary power to modify or exempt from abusive conditions. However, applying this to franchise contracts faces several difficulties, including:

- The imbalance of economic power between the franchisee and the franchisor. In the case of an international franchise contract, this will place the judicial authority in the franchisee's country under economic pressure, in addition to the fact that enforcement of judgments issued in this context will be outside the territorial jurisdiction of the court.[39]

- The franchisor seeks to include an arbitration clause in case of dispute, which has revealed several practical problems in protecting the weak party,[40] thereby excluding the role of the judiciary in restoring the lost balance of the franchise contract.

- Regarding the legal protection provided in Article 110[41] of the Algerian Civil Code, it cannot be relied upon effectively; the imbalance in the financial equilibrium between the parties to the contract makes the judicial authority in the recipient state subject to

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[39] - Al-Najjar, Muhammad Mohsen Ibrahim, Commercial Franchise Contract: A Study in the Transfer of Technical Knowledge, Dar Al-Jami'a Al-Jadida, Alexandria, 2007, p. 38.

[40] - Despite the practical necessities that have imposed the arbitration system in international trade contracts and the conclusion of international agreements encouraging its use and regulating its aspects, there are several concerns and risks that confront the arbitration system from developing countries. These risks include:

Lack of Arbitrator Neutrality

Some developing countries, such as Libya formerly, consider arbitration to be a tool in the hands of developed countries, where they benefit from its presence in contracts to impose rulings that align with their interests, making the award—however unjust or unfair—final and binding and not subject to national judicial review.

Subjection of the Contracting Party to the Investor's Will

Arbitration, like other contracts, depends on the will of the parties, allowing them to direct the proceedings according to their economic interests and in accordance with the arbitration laws adopted by states. The parties may choose a language other than that of the host country, forcing host countries to accommodate investors' wishes to avoid losing investment, which may result in representatives being unable to follow proceedings and protect their rights. Furthermore, the investor may impose the place of arbitration, which is often outside the host country, reducing the host country's opportunities to benefit from arbitration-related profits.

Use of Arbitration to Protect Investors from Environmental Investment Consequences

Countries seek to attract foreign investment, but sometimes this attraction comes at the expense of the environment. Arbitration-related laws may strip the state of its ability to enforce environmental laws, harming the environment and human rights. Countries may find themselves facing two choices: either abandon contracts to protect the environment while paying compensation, or comply with conditions that may lead to environmental destruction. This has led to the development of special arbitration rules for environmental disputes.

Recognition of Void Arbitration Awards

One of the most serious concerns is the recognition by national courts of arbitration awards that have been declared void in the seat country, allowing enforcement of awards despite their nullity in other countries. This serves the interests of large corporations and exposes developing countries to risk, as some judges consider that recognizing non-annulled arbitration awards is a means of constraining modern legal systems.

Because of these concerns, many developing countries avoid resorting to arbitration tribunals and maintain their judicial immunity, causing some arbitration awards to be issued in absentia.

See Al-Bouaishi, Sakina Abd Al-Hakim, Contractual Balance in Technology Transfer Contracts, Master's thesis, University of Tripoli, Faculty of Law, Department of Private Law, pp. 130-134.

[41] - Article 110 of Law No. 75-85 dated September 30, 1975, containing the Civil Code, as amended and supplemented by Law No. 07-05 dated May 13, 2007, published in Official Gazette No. 31 dated May 13, 2007:
"If a contract is concluded by way of adhesion and contains abusive clauses, the judge may modify these clauses or exempt the adhering party from them, in accordance with the requirements of justice. Any agreement to the contrary shall be null and void."

> economic pressures, and even if the article is applied and the contract is cancelled or modified, enforcement of the judgment outside the recipient state's borders will be difficult. This makes the recipient prefer to accept the contract terms as they are rather than lose the contract, causing the judiciary to lose its authority in subsequent monitoring of the contract after having relinquished legislative authority from the outset.[42]

In addition, the effectiveness of the aforementioned article decreases when an arbitration clause is included in the technology transfer contract, transforming the judiciary's role into an interpretive one. In this case, the franchisor attempts to avoid any interpretive role of the national judiciary by drafting the contract with precision and clear terms when drafting the contract, imposing rules and provisions he deems appropriate to control the relationship between him and the franchisee, closing the gap before the judiciary and preventing the interpretation of the contract's terms as they are clear.

II.2 Proposed Solutions for Achieving Contractual Balance in Franchise Contracts:

Balance in franchise contracts represents a major legal challenge given the importance of these contracts, especially in technology transfer, where the franchisor tends to impose his conditions, which are unfair to the technology recipient, necessitating legal guarantees for the weaker party, in addition to increasing the legal awareness of the parties, and to ensure the continuity of the partnership and continuity in a series of successful contracts under the banner of contractual justice.

II.2.1 Possible Legal and Legislative Amendments:

Achieving contractual balance in franchise contracts can only be achieved by enacting laws that clearly define the criteria for balance in the contract, regulate the relationship between the franchisor and the franchisee, and prevent the imposition of abusive or unfair conditions.

Encouraging the franchisor to draft clear and understandable contractual conditions away from intentional ambiguity and vagueness.

Introducing investor protection mechanisms, such as the right to inquiry and clarification by regulatory bodies, protection from exploitation.

Reconsidering arbitration conditions, by amending laws to ensure fairness and balance of arbitration conditions, and not imposing them in abusive ways.

Granting the franchisee the possibility of reviewing the contract terms by independent legal entities before signing it, to ensure it is free from abusive conditions.

Introducing amendments to competition laws to ensure that the franchisor does not exploit his strong position in a way that harms fair and equitable competition.

Regulating the franchise contract with a special law that accommodates regulating the relationship between its parties, away from resorting to general rules that are somewhat rigid.

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[42] - Muhammad, Bashar Qais, Technology Transfer Contracts in the Framework of Private International Law, Doctoral thesis in Private International Law, Faculty of Law, Ain Shams University, Egypt, 2016, p. 139.

II.2.2 Fair and Transparent Negotiations:

Negotiation plays a crucial role in establishing legal security before concluding the final contract, enhancing trust between the parties and contributing to the success of the contractual process. This stage may be reinforced by obligations arising from a fundamental obligation, which is good faith, either through the will of the parties by including them in preliminary contracts, or through obligations imposed directly by law, which the French legislator responded to through provisions that emphasize and confirm this obligation at this particular stage[43], from two aspects: emphasizing the same obligation in two texts within Articles 1104 and 1112 of the mentioned law, and ensuring this obligation in both texts is linked to public order.[44] On the contrary, Arab legislators, including the Algerian legislator, have not regulated this stage, which is still considered a non-binding material act.

To say fair and transparent negotiations requires providing comprehensive information and ensuring that all parties have the right to access complete and necessary information. This information must include details about the contract terms, its provisions, and its financial performance.

Encouraging parties to use independent legal advisors to help understand the contract terms and risks, and ensure transparency and integrity.

Including conditions that allow both parties to amend the contract if unexpected situations arise after signing the contract, contributing to achieving contractual justice throughout the contract period.

Encouraging open and frank communication between the parties, and providing opportunities to clarify ambiguous matters.

Providing training on how to conduct successful negotiations, including communication skills and negotiation techniques, in addition to defining clear standards for transparency in the negotiation process, such as the commitment to disclose all conditions related to the contract and its details, and taking into consideration providing special protection for the weak party, to inform him of the consequences of the obligations he will bear.

These mechanisms contribute to softening the negotiation atmosphere with more transparency and clarity, which ensures smooth execution of the contract, reducing disputes, and enhancing the success of commercial relationships between the parties and proceeding with a series of other successful contracts, away from all forms of abuse and exploitation and instability in the legal positions of the parties.

II.2.3 Legal Awareness of the Weak Party:

Legal awareness has great importance in protecting the rights of the weak party and ensuring the achievement of balance in the contractual relationship. This importance is evident in the following:

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[43] - French law was preceded in stipulating this obligation during the negotiation phase by Japanese, Turkish, Swiss, German, and Italian law. Othman, Shirzad Aziz, Good Faith in Concluding Contracts, p. 189.

[44] - Article 1104: "Contracts must be negotiated, formed, and performed in good faith. This provision is a matter of public policy."
Article 1112: "The initiation, conduct, and termination of precontractual negotiations are free. They must imperatively satisfy the requirements of good faith."

Legal awareness enables the weak party to understand his rights and obligations, which is positively reflected on the fate of the contractual relationship, as it helps avoid exploitation by the stronger party, such as abusive practices or unfair conditions that may be imposed in the contract. It also helps in making informed decisions about entering into a franchise contract or not, as well as how to manage the contract if negotiations are crowned with contracting, in addition to identifying the best legal methods for dealing with disputes and resolving them effectively, and compliance with local and international laws that may affect the contract.

Conclusion:

Through this study, it has become clear that the franchise contract in its essence does not differ from the adhesion contract, regardless of the different interpretations provided by many jurists, as developing countries find themselves under the weight of local development pressures and achieving social and economic progress, forced to import technology without possessing the ability to discuss or negotiate the terms of the contract. On the other hand, developed countries that own technology, representing the other side of the equation, adopt a commercial approach focused on profit, making them unwilling to easily relinquish the technologies they have developed, aiming to achieve a basic goal of achieving greater economic gains, which can only be reached through control and dominance over wider markets.

In the face of this imbalance, adhesion theory suffers from deficiency in achieving the required balance, as the scales clearly tip in favor of the stronger party at the expense of the weaker party. This imbalance appears through the complete control of the franchisor over the contract terms and imposing obligations that burden the franchisee and restrict his execution of the contract, which is negatively reflected on the fate of the contractual relationship as a whole, and exacerbates the imbalance in rights and obligations between the two parties.

Results:

- The franchisor enjoys a high ability to impose his conditions without regard for flexibility in negotiation, placing the franchisee in a weak position.
- The franchisee lacks independence and the ability to make decisions, which is due to the situation of economic dependence on the franchisor.
- The franchisee bears most of the commercial risks, while the franchisor benefits from financial returns without bearing the risks.
- The failure of current laws to provide adequate protection for the franchisee from the unfair conditions imposed by the franchisor.

From the above, developing countries must overcome these challenges by taking a set of procedures and steps. We mention as **recommendations**:

- Updating legal systems to suit the nature of these contracts, especially in light of the failure of general rules to accommodate the relationship between a strong party and another weak party submitting to the conditions dictated to him.
- Restrictions must be placed to control unfair contractual conditions and enhance transparency in negotiations between the franchisor and the franchisee.

- Establishing mechanisms that ensure fair negotiation with more balanced conditions to ensure safe transfer of technology.

- Encouraging competition in the franchise market by supporting the entry of new companies, by providing a safe contractual environment that provides options for the investing public.