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Attaining Implied Will of the Parties in Concluding a Contract and its related Challenges

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Abstract

In concluding a contract, the parties try to agree on the issues that are essential to them and settle on the subjects that form the main basis of the contract. However, contract-related issues are always implicitly understood from the contract when it is signed, taking into account the entirety of the contract and the circumstances surrounding it. Thus, the parties' wills and authorities are not necessarily constrained to explicit will and what is stated in the contract's wording. Instead, sometimes this will can be understood implicitly and indirectly, and in terms of validity, it binds and commits the parties to the agreement just as the explicit will. How ascertaining the parties' implicit wills and authorities while concluding the contract is crucial in the meantime. In this context, the use of custom or supplementary law, pre-contractual negotiations, and other approaches to attain the implied will can be suggested, although each has some challenges. The present study made reviews the applied strategies and solutions and evaluates them. It also introduced the paradigm of 'reasonable and conventional trader' as an effective criterion to attain the implicit will of the contract parties.

Keywords: reasonable and conventional trader, implied will, explicit will, the conclusion of the contract, the authority of will.

INTRODUCTION

A contract is the result of cooperation and joint will between the parties, and imposing obligations on others beyond the parameters of the parties' shared will is against the principle of freedom of will and many other legal precepts.

However, sometimes the contract's conditions and circumstances oblige us to acknowledge a matter within the bounds of the parties' shared wills, even though the parties have not specified it in the contract's wording. These kinds of obligations, also known as implicit obligations, resulting from the parties' implicit will to the contract. Although it is assumed by law, logic, and justice that the parties have implicitly consented to the implied will, which is not expressly mentioned in the contract, the implied will is nonetheless seen as having been made by the parties.

In Black's law dictionary, 'implied terms' are divided into two categories: (1) The terms which are applied by formula to all contracts of a certain class because of general rules of law, unless inconsistent with the express terms, and (2) The terms which are merely the product of the interpretation of the express terms of the individual contract read in the light of its subject matter and circumstances under which same was made. Whether or not the parties' will has been imputed to them, the first category consists of laws and rules that are imposed upon the parties and based on some general considerations. This type of term typically pertains to things like seller quality or health requirements and labor contract requirements. The second category of implied conditions, however, are the ones that can be deduced from the contract following logic and justice or that must exist because of the contract's terms and circumstances. It is even necessary to accept such an understanding and commitment between the parties (Garner, 2004).

The origin of this category of implicit terms is also the parties' implicit intention and will, and without a doubt, determining and verifying this

will is an interpretive process. For this reason, it is never certain how to verify an implied contractual obligation, except for situations where there is clear evidence of the contractual obligations. As a result, care should be taken when applying contract interpretations that result in the imposition of additional obligations on the parties. The following criteria and procedures will be briefly introduced and assessed to standardize such interpretations and ensure the implicit will of the contract's parties more precisely:

A) Attaining Implicit will through 'Usage and Custom' and its Evaluation

In this manner, the contract's gaps are attempted to be filled by reference to custom, and it is analyzed that whenever there is unquestionable usage or custom relevant to the subject of the contract, and the parties do not make any statement contrary to this current custom, it shows their implicit will to accept this custom. Hence, any compromise and agreement in the form of not challenging the custom are acceptable. As a result, by placing the contract in the usage framework, the implicit will of the parties can be understood. (Holmes, 1951).

Despite disagreements about the validity of custom in Islamic law, this approach is not novel among Islamic jurists. According to Hanafi jurisprudence, it is stated in Article 44[1] of ' Al-Majalla Al-Ahkam Al-Adliyyah'[2] that a matter recognized by merchants is regarded as being a contractual obligation between them. Even some contemporary Imamiyeh jurisprudence scholars have gone further to interpret the customary implied terms as an indication of contractual responsibilities drawn from the implication of the contract's wording. (Mohagheq Damad, 1406 AH).

knowing which customs should be used to interpret the wills of the parties or to control the contract is the most crucial concern that arises when using this method to determine an implicit will? It is known that the custom of the place of the conclusion of a contract is the governing custom in the contract. Now, suppose that an Iranian and an American decide to sign a contract in Turkey due to distance and visa issues, and neither of them is aware of the country's contract customs and does not agree to violate them. In this situation, one custom cannot be used as a standard for attaining the will out of all the possible customs, and it is also useless to use the principles of private international law to identify the applicable law.

Regarding the subject of knowledge of accepted customs, there is still another query. If the parties to the contract are not aware of the custom, does the absence of an agreement to do otherwise imply the consent of the custom? To address this issue, some authors (Katouzian, 2008) have claimed that the rule of custom over the contract is a type of legal assumption (= Fiction) and does not originate from the will of the parties to the contract. It appears that this case is one of the fundamental challenges of using the custom to discover the implied will.

b) Attaining Implicit Will through 'Pre-Contract Negotiations' and its Evaluation

In today's transactions involving persons, the quality, quantity, and price of the contract's subject are typically negotiated rather than the actual execution of the contract, which does not occur concurrently. People must have preliminary discussions about a contract's terms and implications before signing it with another party since social and economic relationships are growing more complex. Only after gathering enough information and making a firm decision should they proceed to sign the contract. The connection between the parties is unaffected if these first discussions do not result in a final agreement, and no one can be held accountable for scuttling them. Because the parties merely aim to inform each other about certain terms and information and arouse interest in the transaction

[1] - «المعروف بين التّجار كالمشروط بينهم» means: “The well-known statement among the merchants is like the conditional between them,” Article 44, Al-Majalla Al-Ahkam Al-Adliyyah'.

See more information about this at: Tohari,chamim, (2017), “MAJALLAH AL-AHKÂM AL-ADLIYYAH (ANALISIS HISTORIS DAN KEDUDUKANNYA DALAM SISTEM TATA HUKUM TURKI MODERN)” Istinbath Jurnal Hukum, Vol 14, No 1.

[2] - a code of law that was prepared between 1868-1876 in the Ottoman State.

among their audience through advertisements about the transaction's potential financial benefits, the main goal of these negotiations is not to forge a commitment. Only after this step does the parties make a firm choice and write out the details of their agreement in the form of an express request and acceptance.

However, it should not be assumed that these preliminary discussions and pre-contractual negotiations do not affect the subsequently formed contract; rather, referring to these documents and pre-contractual negotiations is one of the most important ways to discover the parties' implicit will and remove ambiguity from cases of summary or silence in the contracts. This strategy has been so well received that, to ascertain the legislators' intentions, the description of the parliament's deliberations before the approval of the law is sometimes resorted to.

This method is more analytically accurate than employing references to custom, which stands for a typical and universal will. It also has a personal face that is pertinent to the characteristics of the parties to the contract. However, it can be considered in two different ways: First, pre-contractual negotiations can eventually reveal the goals that each party had in mind before reaching an agreement, rather than the points on which they ultimately agreed during an agreement. Second, it is important to consider the pre-contractual negotiations' inherent constraints. Even though the absence of definitive answers to these questions indicates a lack of agreement, it is important to remember that the need to attain the implicit will primarily arise when the parties have not previously given it much thought and when it is outside the scope of the direct agreement. As a result, we are currently searching for the implicit and indirect will to fill the resulting gap. Hence, this method seems not a way to achieve the goal in all cases.

c) Attaining Implicit Will through 'Good Faith' and its Evaluation

The analysis of legal systems reveals that over time and as a result of various influences, particularly industrial advancements, the emergence of monopoly powers in business dealings, and the wide range of consumers, there has been an increase in the importance of the legal concept of good faith in contract law. It is no longer essential for the parties to a contract to make the necessary projections for any event that may occur in the future at the moment the contract is reached if the standard for governing contractual interactions is the rule of good faith. As a result, according to some researchers, in nations where good faith is accepted as a general legal norm, the size of the contract is substantially lower than in countries where good faith is not recognized. Whether or not this assertion is true, it may be said from the standpoint of the current discussion that if the principle of good faith guides all of the actions and statements made by the parties to a contract, the will has an implicit impact on what is inferred from the contract. In this sense, good faith reminds us that we live in a community and that the construction and survival of that community necessitate collaboration and solidarity. As a result, when we form relationships with others, we should consider not only our interests but also the interests of others; however, we are not obligated to preserve their interests.

The issue of cause and effect is what we run into in this situation. Thus, it is unclear whether the inferred will of the parties to the contract should be defined based on good faith or whether good faith itself is a part of that implied will. In the first situation, the topic is not relevant to our discussion, and the details of the implicit will's provisions have no bearing on how to acquire them. However, in the second assumption, good faith is given as the supreme standard guiding the contract, which must not contradict the implied will.

Criteria such as matching the will with good faith, not implying that the will is against the law, utility and logic of the will, and other things are not necessary among the conditions for the creation of human will; rather, they are aspects of a will that merit legal protection.

Thus, if a clear and direct will is communicated on a meaningless or illegal topic, attaining that will should be done regardless of the legal outcome. However, in circumstances of several choices, the choice of a legally effective interpretation of the revealed will is preferred, based on the rule “ut res magis valeat quam

pereat"[3] that means the thing may rather have effect than be destroyed (Aaron X. Fellmeth and Maurice Horwitz, 2009).

d) Proposed Regulation

The authors presented the rule of the 'reasonable and conventional trader' in pursuing a solution for this goal, considering the difficulties and challenges of the requirements above to find the implicit will. It is vital to explain this notion since it forms the foundation of this regulation based on the civil liability law concept of 'reasonabe man.'

A reasonable person[4] is a fictitious and hypothetical being against whom the harmful activity is evaluated, and in the event of non-compliance, the improperness of the action is acknowledged. Such a person is a typical middle-class citizen who is busy running his own business and possesses traits from two groups of descriptors and norms. According to a description, he possesses the same intelligence, talent, memory, experience, insight, courage, discernment, self-control, selflessness, altruism, and physical capabilities as a regular person. He may also have shortcomings because he is an average member of his society. For instance, he might commit errors, experience fear, be unable to accurately identify problems, and occasionally exhibit selfishness. However, these flaws are to the extent that they do not violate the accepted norms of social behavior (Lee, 2003). In terms of civil responsibility, a person is compelled to make amends for whatever harm they have caused if they have not acted in a way that would be acceptable and expected in society.

However, the application of this model to identify the parties to the contract's implicit will makes this study important. Based on this, the parties to the agreement develop a usual pattern in which a sensible and conventional negotiator' asks the parties to the agreement what they would have desired under the identical conditions, and these demands are recognized as part of the parties' implicit will. It is probable that the word "conventional" in the phrase " reasonabe and conventional trader" or interpretations such as "conventional bayer or seller" may conjure up images of this criterion being synonymous with attaining the implicit will through usage and custom.

To prevent such a mistake, it should be made clear that the ideal of a reasonable and conventional man is a combination of a typical and personal attitude with no typical face. Thus, from the perspective of a buyer or seller, all the physical, gender, situational, time-and-place, contract type, contracting party, economic conditions, and even compatibility with the explicit will of the contracting party are taken into consideration when determining the will of a reasonable and conventional trader. Finally, the implicit will of such a dealer concerning the aforementioned is inferred. It is clear that in comparing and evaluating this study, the use of interdisciplinary studies, notably psychology and economics, is necessary to comprehend the impact of personal factors on the will of this model.

Conclusion

The purpose of the current study was to propose various methods to attain the implicit will of the parties of a contract, which is now a crucial component of all contracts. Common approaches, including following good faith, employing custom, and engaging in pre-contractual negotiations, have all been found to present significant difficulties, and depending on them alone does not appear to be a viable option for getting the implicit will. To address these issues, a new paradigm titled "reasonable and conventional trader" was proposed regarding the model of reasonable and conventional person in civil liability. It was applied to the contract's declaration of will and formation, in which a unified approach is used to attain the implicit will of the contract's parties.

[3] - «إعمال الكلام أولى من إهماله» See more information about this at: (Aboud Harmoush, 1406 AH).

[4]- A standard that, according to civil law, is equivalent to "le bone pere de famille = good father of the family" and " reasonabe man" in common law. See more information about this at: Savatier, René, (1951), "Traité de la responsabilité civile en Droit Français," Tome I, Les sources de la rsponsabilité civile, Deuxième édition, Paris, and Treitel, G.H., (1997), Law of Contract, Sweet and Maxwell, Ninth Edition.

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