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CONCEPT OF CONTRACT AND CONTRACT TERMS IN THE ROMANO-GERMANIC LEGAL SYSTEM

Abstract

There are two main legal systems which were adopted by majority of countries as their legal system: the Romano-Germanic and Anglo-Saxon legal systems. In both of these legal systems, regulation of variety of matters regarding contract is considered to be essential. Because of the fundamental differences of the legal systems in question, main institutions of concept of contract such as conclusion of contract, form, content and expression of will thereof are regulated, applied and interpreted differently respective of each legal system. Therefore, the comparative analysis of concept of contract and contract terms under Romano-Germanic and Anglo-Saxon legal systems and identification of their similar and distinctive features have always been a topical issue. In order to conduct such a comparative analysis, firstly it is important to understand the characteristics of those institutions in question in the respective legal systems. Considering this, it is essential to analyze and to understand the concept of contract and contract terms under Romano-Germanic legal system which is a legal system also adopted in Republic of Azerbaijan. For this, it is appropriate to review the theoretical works explaining the concept of the contract in the Romano-Germanic legal system, including the legislation of the Republic of Azerbaijan which belongs to the Romano-Germanic legal system.

Keywords: *contract, contract terms, legal systems, romano-germanic legal system, institutions of concept of contract*

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Roman german hüquq sistemində müqavilə və müqavilə şərtləri anlayışları

Xülasə

Ölkələrin əksəriyyəti tərəfindən hüquq sistemi kimi qəbul edilmiş iki əsas hüquq sistemi mövcuddur: Roman-German və Anqlo-Sakson hüquq sistemləri. Bu hüquq sistemlərinin hər ikisində müqavilə ilə bağlı məsələlərin tənzimlənməsi əhəmiyyət kəsb edir. Qeyd edilən hüquq sistemlərinin əsas fərqlərinə görə müqavilənin bağlanması, forması, məzmunu və iradə ifadəsi kimi müqavilənin əsas institutları bu hüquq sistemlərində fərqli şəkildə tənzimlənir, tətbiq edilir və şərh olunur. Buna görə də Roman-German və Anqlo-Sakson hüquq sistemlərində müqavilə və müqavilə şərtləri anlayışının, yəni müqavilənin bağlanması, forması, məzmunu və iradə ifadəsi kimi institutlarının müqayisəli təhlili və onlar arasındakı oxşar və fərqli xüsusiyyətlərin müəyyən edilməsi həmişə aktual məsələ olmuşdur. Bu cür müqayisəli təhlilin aparılması üçün ilk növbədə sözü gedən müqavilə institutlarının müvafiq hüquqi sistemlerindəki xüsusiyyətlərini dərk etmək vacibdir. Bunu nəzərə alaraq, müqavilə və müqavilə şərtləri anlayışını Azərbaycan Respublikasının da qəbul etdiyi Roman-German hüquq sistemində təhlil və dərk edilməsi böyük əhəmiyyət daşıyır. Bunun üçün, Roman-German hüquq sistemində müqavilənin anlayışını izah edən nəzəri əsərlərin, o cümlədən Roman-German hüquq sisteminə aid olan Azərbaycan Respublikasının qanunvericiliyinin nəzərdən keçirilməsi məqsədəmüvafiqdir.

Açar sözlər: *müqavilə, müqavilə şərtləri, hüquq sistemləri, roman-german hüquq sistemi, müqavilə institutları*

Introduction

When analysing the concept of contract in Romano-Germanic law, its terms, basic principles and features, we consider it useful to provide examples of the ways this institution is regulated in the Civil Code of Azerbaijan.

In the legislation of the countries applying this legal system, the concept of contract is considered as a type of civil legal relationship, and due to the fact that all parties to the contract have equal rights, it is stated to be the concept of private (civil) law. As we know, a contract is a type of transaction. And a transaction is deemed to be an expression of will aiming to obtain specific legal consequences (Ayan, 2002: 257; Oğuzman, Öz, 2014: 23; Tekinay, Akman, Burcuoğlu, Altop, 1993: 34).

Article 324 of the Civil Code of Azerbaijan states that a transaction, which is considered a unilateral, bilateral or multilateral expression of will aimed at the establishment, change or termination of relations of a civil legal nature, can be one-way and in the form of a contract (bilateral or multilateral) (4).

According to Article 389 of the Civil Code, titled "Concept of contract", a contract is an agreement of two or more persons on the formation, change or termination of rights and obligations of a civil nature (4).

However, according to the generally accepted opinion in theory, a contract is a transaction concluded by free, reciprocal and interrelated expressions of will of two or more persons in the form required by law, on the establishment, modification or termination of civil rights and obligations (Ayan, 2002: 157; Oğuzman, Öz, 2014: 106; Tekinay; Akman; Burcuoğlu; Altop, 1993: 407).

For example, in a contract of sale, the seller offers to sell a certain thing at a certain price, that is, submits an offer, and the buyer accepts to buy such a thing at such a price offered by the seller, that is accepts it. So, the contract is concluded.

Apparently, two important constituent elements take part in the concept of contract in the Romano-Germanic law. These are the parties to a contract and their mutually corresponding expressions of will. That is, in the absence of these two constituent elements, the contract is considered not been concluded and the transaction (contract) existed at all (Ayan, 2002: 157; Kramer, 1990: 164; Kut, 2012: 32; Müller; Jörg, 1964: 255; Oğuzman; Öz, 2014: 106; Schönenberger; Jäggi, 1973: 74; Tekinay; Akman; Burcuoğlu; Altop, 1993: 70).

Article 324.6 of the Civil Code states that if it is impossible to clearly specify the content of the expression of will based on its external nature or other circumstances, it is accepted that the expression of will does not exist, and in other words a transaction (contract) does not exist (4).

In this regard, it is mandatory that two constituent elements exist at the same time so that the contract could be concluded and thus the existence of concept of contract accepted. These are the parties to the contract and their expressions of will.

In the Romano-Germanic legal system, the parties to a contract can be individuals or legal entities. It should be noted that since it is a matter of civil legal capacity that allows the individuals to be a party to a contract, the formation of legal capacity can be regulated by the legislation of each country in different forms.

For example, according to the civil legislation of the Republic of Azerbaijan, the legal capacity of an individual arises from the moment of his birth and ends with his death. (4).

The right to conclude a contract as being related to the basic human rights is also recognized as one of the civil rights. In this regard, all individuals can become parties to a contract provided that they have legal capacity.

But, of course, incapacitated individuals (for example, young children and persons with mental illness) cannot conclude a contract themselves, their legal representatives can do so on their behalf.

According to Article 342.1 of the Civil Code of the Republic of Azerbaijan adopted on the basis of this theory, a contract (transaction) concluded by an individual who is considered incapacitated as a result of a mental disturbance, is invalid (4).

As for legal entities, article 44.1 of the same Code states that legal capacity of a legal entity arises from the moment of state registration and ends at the end of liquidation, that is, from the moment of removal from state registry (4).

As previously stated, the expression of will is accepted to be the other constituent element of the concept of contract in the Romano-Germanic law.

The concept of expression of will, which is considered as a constituent element in the conclusion of a contract, is the manifestation in the outer world of a person's ideas formed in his inner world, which can cause a legal consequence.

For example, any person may wish (think) to buy a store, lease his non-residential area. These ideas of an individual, in other words his inner intentions (decisions), aimed at obtaining legal consequence are called his will (Akyol, 2006: 11).

As we can see, the will cannot cause a legal consequence when kept in the person's inner world. For this reason, it will be of no importance in terms of legal system.

Only the manifestation of this will in the outer world is of importance in terms of legal system. To put it differently, it is necessary for a person to reveal his thoughts (intentions) and express (declare) them in a form that can be understood in the outer world (Kocayusufpaşaoğlu; Hatemi; Serozan; Arpacı, 2017: 51; Saymen; Elbir, 1966: 68-69).

Therefore, it is simply stated that the expression of will can be considered as the expression of person's inner thoughts (intentions). It is apparent that this thought (intention) should be focused on a legal consequence in the way to create, change or terminate any legal relationship. From this point of view, the expression of will can be assumed to be such an expression that creates, modifies or terminates any legal relationship (Enneccerus; Nipperday, 1960: 899; Flume, 1992: 51; Von, 1983: 399).

Apparently, the expression of will required for the conclusion of contract is an expression of person’s will manifested in the outer world. This expression can be both in writing and oral. It is only important to bring it to the other party in the form required by laws.

Thus, according to the concept of contract, it is not enough just to express a will, it should also be mutual, consistent with each other and put in a form required by laws.

Contract is concluded by mutual (and interrelated) expressions of the parties’ will. The reciprocal expressions of will is basically the focusing of such expression directed to the conclusion of a contract, on the person or persons intending to be a party thereto (Tandoğan, 2008: 51; Tekinay; Akman; Burcuoğlu; Altop, 1993: 70).

Therefore, in order to conclude a contract, it is necessary that the person who submitted a proposal (offer) for concluding a contract, has sent the expression of his will to the interested person (counterparty), and that person who accepted the proposal (acceptance) has sent his own expression of will to the sender of the proposal.

The fact that these expressions of will have been sent to another person and not to the person who wants to be a party to the contract, is not sufficient for conclusion of the contract. As a result, the "reciprocity" of the expressions of will is one of the creative elements of the contract (Tandoğan, 2008: 51; Tekinay, Akman, Burcuoğlu, Altop; 1993: 70).

In the reciprocal expressions of will, the first expression in terms of time is called an offer, and the second - acceptance (Akyol, 2006: 66).

Thus, the response of the person to whom the offer is sent, regarding the acceptance of the same, to the sender of the same is considered as an acceptance. This confirms that in order to conclude a contract, it is necessary to send an offer first.

Article 405.2 of the Civil Code states that a contract is concluded by sending an offer (offer to conclude a contract) by one of the parties and accepting it (acceptance of the offer) by the other party (4).

According to the requirements of Article 408 of the Civil Code, to put it differently, the offer to conclude an agreement must comply with certain conditions required by law (4).

Thus, the offer must be addressed (sent) to one or more persons, and the contract must be considered concluded if the other party agrees with this offer, that is, accepts it (Tekinay, Akman, Burcuoğlu, Altop, 1993: 70).

From this point of view, just as the key terms of a contract must be specified in the offer, it is also necessary that it should be sent to the other party in the form required by law (Süleymanlı, 2019: 47).

So, if the price of an apartment is posted on the internet, this is not enough to be considered an offer. Although an apartment and its price are indicated here and addressed to several persons, it is impossible to accept it as an offer, since the contract for the sale of an apartment must be notarized. Because, even if the other party agrees with the offer, the contract is not considered concluded. It is necessary to notarize the offer and the acceptance so that the contract should be concluded (Chen-Wishart, 2015: 257).

However, it is considered a public offer from the seller to the buyer if in the market a product is placed on the shelf with its price written on it. Thus, the contract is considered concluded if the buyer wants to buy the product at the same price. That is accepts the offer (acceptance).

Article 408.7 of the Civil Code states that if a proposal containing all sufficient contract terms clearly reflects the will of the person making the same to enter into the contract with anyone who will respond to the proposal under the terms mentioned in it, such proposal shall be deemed a public offer.

As we can see, for any proposal to be considered an offer, it is necessary that it should reflect all the special terms of the contract in the same way as comply with the requirements to its form. Thus, for the contract to be considered concluded, the parties to the contract must agree upon its special terms. This agreement is only possible if the parties on a reciprocal basis send to each other the expressions of will that conforms to them. That is, the contract can be concluded by disclosure (agreement) of mutual expressions of will of its parties under special terms thereof.

It should be noted that the special terms of the contract vary according to the type of a contract (Tekinay, Akman, Burcuoğlu, Altop, 1993: 76).

For example, the important conditions in the purchase and sale contract are considered the price of the sold item and its price, in the construction contract - the order and price, in the lease agreement - the leased premises and rental fee.

According to Article 405.1 of the CC, the contract is considered concluded if the parties agree on all special terms of the contract executed in the required form. The terms relating to the subject of a contract, the terms referred to in the Civil Code as important or necessary for these types of contracts, as well as all the conditions in respect of which an agreement must be reached upon at the request of either party, are considered important (4).

Now therefore, just as it is necessary that the expressions of will required for the conclusion of a contract should be reciprocal, it must also correspond to each other (Oğuzman, Öz, 2014: 23).

Therefore, it is necessary that the expressions of will required to conclude a contract should be free and independent in exactly the same way as reciprocal and in conformance with each other.

Apparently, the content of a contract, in other words, the terms of a contract are specified by free will of parties based upon the principle of freedom of contract. The concept of contract terms are classified in the Romano-Germanic law as the “special terms” and the “other provisions”.

The “special terms” of a contract along with terms related to the subject thereof are the terms explicitly regulated and referred to in the law as essential or necessary for the same types of contracts. Moreover, the terms under which an agreement must be reached at the request of either party, are also considered special (4).

If the “special terms” of the contract are not specified in the contract, the contract is considered invalid in the Romano-German laws.

For example, if the subject of the sale is indicated but not specified in the purchase and sale contract, and it is impossible to identify it in any other way, the contract is deemed invalid even if it is signed.

Meanwhile, a contract is considered valid even if the terms expressed as the "other terms" of a contract are not specified herein. However, it shouldn't be forgotten that with a view to prevent problems that may arise in future, it is useful that all other terms suggested by the parties should also be stipulated in the contract in compliance with the requirements of the principle of freedom of contract.

For example, it is recommended that the "other terms" of a contract, such as the place of execution hereof, the moment of execution, liability for non-execution, the way of settlement of disputes under the contract, the term of a contract, etc. should be stipulated in the contract.

Conclusion

For understanding the concept of contract and contract terms in the Romano-Germanic legal system, it is essential to analyze the variety of rules which describe the requirements for conclusion of a valid contract. Many of these rules are codified in the respective legal documents of the countries which adopted this legal system. In this legal system, two initial requirements are recognized for conclusion of a valid contract - parties with legal capacity and their clear, independent and confirmative expression of will. In the Romano-Germanic legal system, notions such as offer and acceptance is defined and the whole process of making an offer and accepting the said offer is regulated, including i) how the offer must be made, ii) how the acceptance must be communicated to the offeror, iii) what should be indicated in the offer, iv) which situations conclude public offer and so on.

Additionally, Romano-Germanic system makes distinction between contract terms as 'special terms' and 'other terms'. The reason for this distinction is because of how these two categories of terms of the contract affect the validity of the contract. In Romano-Germanic laws, a contract which doesn't specify the special terms is considered invalid, meanwhile other terms do not constitute such result.

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