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A Brief Discussion of Contract Formation Judgment

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Abstract

This article agrees that the parties and the unanimity of intent together constitute the elements of contract formation. In general, it is more appropriate to adopt the doctrine of representation to judge and grasp the unanimity of intent. Whether silence constitutes an expression of intent should be considered in the specific circumstances, whether silence is sufficient to infer the meaning of the parties, such as the existence of prior statements or trade practices. In this paper, we try to sort out the elements of the main rule of contract formation - the rule of offer and promise, in order to clarify the path of judging contract formation.

Keywords

contract formation, agreement, object

1. Introduction

Contract, as one of the most important legal relationships, is an expression of autonomy of meaning. Whether a contract is formed, when and where it is formed, is related to the security and protection of the parties' transactions, and affects the interests of the parties to the maximum extent. Contract formation is the unity of dynamic behavior and static agreement, which solves the premise of the existence of the contract, is the premise of the discussion of the validity of the contract, and is also the basis for judging the parties should bear the responsibility of welcome breach of contract or contractual negligence, and is therefore of great significance. For this reason, the Civil Code has established a special chapter on "Formation of Contracts", which provides detailed provisions on the formation of contracts. Nevertheless, due to the complexity of contract formation, it is not uncommon for parties to dispute the formation of a contract, the confirmation and remedy of a contract, the time and place of formation of a contract, etc. This has led to controversies in the theoretical and practical circles, so it is necessary to explore the formation of a contract in more depth.

In this article, we express our personal views and thoughts on the elements of contract formation, i.e. how to determine whether a contract is formed.

2. Formation of Contract and Entry into Force of Contract

2.1 Contract Formation and Contract Entry into Force

According to Article 502 of the Civil Code, the concepts of formation of a contract and validity of a contract are both related and distinct. On the one hand, the formation of a contract is a prerequisite for the validity of a contract. Once the contract is not formed, there is no need to talk about the validity of the contract. On the other hand, the formation of a contract does not necessarily lead to its validity. In order for a contract to be valid, it needs not only to comply with the law, but also to be ratified. Therefore, for the establishment "according to law" as stipulated in Article 502 of the Civil Law, it means that the contract has the conditions for its validity as stipulated in Article 143 of the Civil Law, i.e., there exist three cases of additional conditions for the validity of the contract as stipulated by law, or additional conditions for the validity of the contract as agreed by the parties, or the contract as stipulated by law or administrative regulations can only be valid after approval. However, "according to law" is a prerequisite for all contracts to take effect. The conditions that must be present for legal acts stipulated in Article 143 of the Civil Law are referred to as general conditions for entry into force, while the conditions for entry into force that are otherwise provided by law or agreed by the parties may be referred to as special conditions for entry into force, as they exist only in special circumstances. The difference between the two is that the lack of the general conditions of validity will lead to one of three situations: nullity, revocation or non-validity of the contract. The lack of a special validity condition will lead to the nullity of the contract. In this regard, invalid, revocable or ineffective contract refers to the concept corresponding to the validity of a contract, while invalid contract refers to the state in which the contract is valid but not effective. In the case of a contract subject to ratification, for example, it may have been "legally" established and "legally binding" on the parties concerned before the contract was ratified. The parties may not change or terminate the contract without permission and must fulfill their obligation to file for approval. It just cannot have the legal effect sought by the parties, i.e., neither party can require the other party to perform the main obligations agreed in the contract. As can be seen, China's civil law not only distinguishes between the elements of formation of a contract and the elements of entry into force of a contract, but also further distinguishes the elements of entry into force of a contract into valid elements (general elements of entry into force) and special elements of entry into force, thus providing a legal basis for accurately determining the validity of contracts subject to approval and the validity of contracts with conditions and periods of entry into force, etc.

2.2 The Meaning of Legal Written Form

Generally speaking, the conclusion of consent as a general part of the conclusion of the contract is more appropriate, and the formal contract in the performance of legal acts as a specific part of the conclusion of the contract, to the contract in kind, the delivery of the object is also a specific part of the conclusion of the contract. However, some experts proposed that the contract form only relates to the interests of both parties, and has nothing to do with the public interest and national interest, and nothing to do with the rights and legitimate interests of others, and the parties should determine whether to take

the written form. Even if the parties do not act as proposed or adopt the written form, as long as there is other evidence that the parties have reached an agreement or the parties acknowledge that they have entered into a contract, the parties have to be recognized as having established a contractual relationship. The author points out that although our civil law adopts the principle of freedom to conclude contracts, this freedom does not mean that it is unrestricted, it exists for the greater value of the contract and for the benefit of both parties, most laws and administrative regulations require that the contract should be in writing and that the only remedy for failure to conclude in writing is an act of enforcement. If the parties have not agreed in writing, but one party performs the main obligation and the other party accepts this, it is considered a contractual relationship between the parties. A contract can be concluded only if one party performs the main obligation and the other party accepts this. Under this interpretation, if the parties do not take the statutory form or do not make up for the lack of form by an act of performance, the contract is considered not concluded. In the author's opinion, the significance of the statutory written form is to ensure that the agreement between the parties is legally binding, thus distinguishing it from an intent to deal or a "playful representation", which is not legally binding even if there is other evidence of an "agreement" between the parties. Thus, even if there is any other evidence of the existence of a "contract" between the parties, the contract is not deemed to have been entered into. Even if there is evidence or indication that the persons concerned knew of the "contract" without legal action, the contractual relationship between the persons concerned cannot be deemed to have been established by other evidence, unless the persons concerned have remedied it by performance. Otherwise, a "contract" that cannot be performed may be confused with a civil law contract. Thus, the act should not be understood as a mere defensive clause that produces legal effects.

3. Elements of Contract Formation

For a contract to exist, two elements must be present. First, there must be two or more contracting parties. Second, the parties must agree on the main terms. The first element stems from the fact that a contract is a legal act between two or more parties that creates, modifies or terminates a debt relationship, while a unilateral legal act, such as a will, is not a contract. The second element, the criterion for reaching a consensual agreement, will be analyzed below. There is disagreement as to whether the subject matter of the contract is one of the elements. We will first discuss two elements: the parties and the subject matter.

The parties may enter into a contract in their own name or through an agent, in consideration of assuming the rights and obligations, and possibly the liabilities, arising from the contract. There is a slight difference between a party and a contracting party. A party to a contract is a person who actually enters into a contract as a party to a future contractual relationship or as an agent of a party to the contract, but not as an assignee of performance, realization or possession, because they do not have separate personality in the contractual relationship. In practice, for example, the project engineering department of a construction company may enter into a contract in its own name, a branch of a bank

may enter into a contract in its own name, or a branch may enter into a contract in its own name. Neither court decisions nor legislation refer anymore to the contract being void for this reason, but only to the fact that the rights and obligations arising from the contract must be assumed by the construction company, the head office of the bank or the company as a legal entity, at least in a final sense.

In this case, there are different opinions on whether the branch of legal person is the agent of legal person or the representative of legal person. This is because, according to the existing laws and theories in China, the legal person and its legal representative have the same identity in conducting the business of the legal person, and only the legal representative has the right to represent the legal person and perform legal acts, while other organizations and other individuals do not have the right to represent the legal person. Only legal persons have the right to perform legal acts. This is one of the general principles of Chinese civil law. The civil law applies different legal rules to the relationship between legal persons and their legal representatives and between legal persons and their agents, and branches of legal persons are not considered as bodies of legal persons. Secondly, the written authorization required for a branch of a legal person to have the right of agency can be in various forms, such as laws or regulations, provisions in the articles of association of the legal person, decisions of the board of directors or the general meeting of shareholders, and authorization letters issued by the legal person or its legal representative.

The law requires the parties to have capacity, whether they have it or not. The capacity of the contracting party is one of the elements of the validity of the contract. The parties to a contract are usually the same as the contracting party, but in indirect agency relationships, the contracting party is often not the contracting party, nor is it necessarily the contracting party if the contract is succeeded by another person after the death of the contracting party.

The signing of the contract is an important part of the creation of the contract. The signature itself indicates that the signatory is willing to be bound by the text of the contract and that the text is accurate. Generally, if a contract is signed, the parties are bound by the contract even if the signer has not read the text, unless the contract is declared void or terminated. As for the method of signing, the contract can be stamped or faxed to the other party, or a written signature is acceptable. Part 7 of the UK Electronic Communications Act 2000 provides that an electronic signature in an electronic communication is admissible in legal proceedings, but the weight of the relevant evidence is determined by the court. In addition, even if a party does not sign a further, even if the parties do not sign the text of the contract, as long as the parties acknowledge the existence of a contractual relationship, it is protected by law, but only increases the burden of proof. The signature can be any kind of signature, as long as the existence of proof of the true meaning of the written form can be. The signature may be a signed name or a printed name, and may be a written, printer-printed, stamped or photocopied signature. Title II of the UCC recognizes any type of document - such as a shipping order, letterhead, or even a notepad with a pre-printed name - as a signature, so long as there is a maker’s impression that the document is genuine. All of these are reasonable and practical, and Chinese law

should be taken into account.

The object is what is involved in the contractual rights and obligations. The object of the contract is important because without an agreement on the object, the contract would lose its purpose and meaning. The object of the contract, also known as the object of the claim, the content of the claim, or the purpose of the claim, is what the creditor claims from the debtor. What one person claims from another is an act, an act or omission, so the object of the debt is what the creditor claims from the debtor, which in law is called payment. This term is used separately from the object of a claim, which is a bond for the purpose of payment.

The general theory of Chinese civil law has long held that objects can be divided into tangible objects, acts and intellectual achievements. In a car sale contract, the object is a car. In a technical consulting contract, the object is the provision of technical advice. In a technology transfer contract, the object is a specific technology. In foreign countries, the subject and the object are considered to be the same concept. During the negotiation of the transaction, the parties should understand and determine the object of the contract. Therefore, the registered MOU must take into account the description of the subject matter. According to the structure of this theory, the object is not the subject, but the object of the subject. For example, in a contract for the sale of a car, the subject is the car, while the object is the act of transferring ownership or possession of the car. The range of subjects includes, in order, tangible property, utility rights, security interests, equity, intellectual property, bonds, general obligations and other physical instruments. It is important to note that the subject matter under Article 470 of the Civil Code is mostly material, rather than a thing in the doctrinal sense, and therefore there are statements such as the quality of a substance, the quantity of a substance, etc. Therefore, the matters mentioned in the Civil Code and related judicial interpretations should often be understood in terms of a thing.

4. Consensual Judgment

Two conditions need to be met in order to reach an agreement. First, the main terms of the latter should be specific and clear. According to the original “Supreme People’s Court on the application of the contract law of the People’s Republic of China” interpretation of certain issues (II): the parties, the subject matter, quantity is the general elements of the contract. Therefore, these three necessary provisions are necessary to reach agreement. Second, the formation of consent. Except in the case of contract fraud, coercion and other occasions to adopt the subjective said. The rest of the situation should be used to express the doctrine, that is, through the external performance to infer whether the parties mean the same. In this case, the rule of offer to commit is the key to analyze the formation of the contract.

Offer as a prior expression of intent, need to meet the four elements to take effect. First, it is made by a specific person. Second, it must be made by a specific person. Third, the content of the offer must be specific and definite. Fourthly, the offer must be made with the intention to bind once it is made. The understanding of the second element should be noted that, in principle, it should be issued to a specific

object, but some commercial advertisements, although issued to an unspecified object, but it has specified the object of the contract, and expressed the willingness to assume responsibility, at this time should be regarded as an offer. The understanding of the third element should be consistent with the above-mentioned necessary terms and expresses clear. The understanding of the fourth element involves the distinction between an offer and an invitation to offer, and the distinction can be made through legal provisions, which have been clarified in Article 473 of the Civil Code with regard to the seven typical forms of an invitation to offer. However, the more essential judgment is whether the parties have clearly indicated the intention to be bound, and if not, whether the combination of other factors is sufficient to infer that the parties have the intention to be bound. If it is, then it is an offer.

A promise indicates that the offeree agrees to accept all the conditions of the offer, and is an expression of intent after the offer, which requires three elements to be met in order to be valid. First, the promise must be made by the offeree to the offeror. That is, the subject of the promise is limited to the offeree. Second, the promise must reach the offeror within the promise period. Third, the content of the promise must be consistent with the offer in substance. The understanding of "unanimity" is the key to determine whether the expression of intent is a promise or a counteroffer. Article 479 of the Civil Code clearly states that "a promise is an expression of the offeree's consent to the offer", but also moderates the "mirror image rule" by requiring only that the promise cannot materially change the offer, while non-material changes are It is explicitly stated that "the promise is valid unless the offeror objected to it in time or the offer indicates that the promise cannot make any material change to the content of the offer". Meanwhile, Article 488 of the Civil Code clearly lists the substantive changes to the offer. In addition, the path of judgment as to whether silence constitutes an expression of intent and thus a promise is whether it can be combined with other factors, such as prior statements and trading habits, sufficient to infer the meaning of silence, and if so, it constitutes an expression of intent and a promise.

Furthermore, whether the agreement required to conclude a contract is a complete agreement on the entire content of the contract or an agreement on the necessary points of the contract depends on the circumstances. If the parties insist on a complete agreement on the content of the contract, they reach an agreement if they negotiate within the scope of the contract. If the parties insist on reaching agreement on certain points, they reach agreement on those points and the contract is concluded. The rule developed in international commercial transactions is that if the parties agree on the main terms of the transaction and any uncertain subsidiary terms can be proved by subsequent facts or law, then an agreement has been formed and a contract has been concluded. The fact that the parties intended to enter into a contract does not prevent the formation of a contract, even if certain terms were deliberately left to further negotiation, agreement or later determination by a third party. If the parties cannot agree on the terms to be determined, or if those terms are not determined by a third party, the existence of the contract is not affected if there is another reasonable way to determine those terms, taking into account the intent of the parties, depending on the circumstances. Indeed, this is the case law in the United States. The parties to a contract agree to avoid the risk of litigation by allowing an

independent third party to make binding decisions. This agreement to give the third party the power to determine certain terms of the contract is generally considered to satisfy the requirement of contractual certainty, and the contract is concluded. A prospective expectation clause that an independent third party, such as an arbitral institution, will decide one or more contractual terms in the future, consistent with the principle of autonomy and effective in preventing manifest injustice, is worthy of reference in Chinese law and its doctrine.

It should be noted that a contract is not concluded only if there are no elements in the offer; if the offer contains customary and incidental elements, then the customary and incidental elements in the offer are also factors in determining whether a contract is concluded, since the promise is inherently immutable. In other words, the "elements" are only used to assess whether the statement of intent is specific and the criteria are clear. If there are no elements of the statement of intent, of course, no contract will be concluded, but this does not mean that as long as the parties agree on the "elements", a contract will necessarily be concluded. However, this does not mean that as long as the parties agree on the "elements", a contract will necessarily be concluded. If the offer contains essential elements other than the "elements", the contract will be concluded only if the parties agree on all the essential elements contained in the offer. In view of this, I believe that if the parties negotiate but do not agree on the other essential elements, the People's Court should still find that no contract has been concluded. The elements of validity of the offer and promise as clarified above should also be combined with the provisions of the Civil Code on the validity, revocation and invalidity of the offer, and the manner, duration and effect of the promise, so that the agreement reached between the parties is legally binding.

5. Silence and Commitment

Generally speaking, there are three ways of expressing meaning: explicit, implicit and silent. Of these, implicit means that although not expressed explicitly in written or oral form, it is expressed through an active act that becomes an expression of meaning. Silence, on the other hand, is considered to be mere inaction without an active act. Both explicit acts and acts of silence are expressions. Silence is not expressive and does not indicate either rejection or acceptance. There are three ways in which silence can be considered an expression of intent: first, by law; second, by agreement of the parties; and third, by custom in the parties' dealings. The above distinction is simple and easy to apply in judicial practice, but as some scholars have argued, "there is a loophole because the article does not provide a rule of faith that reliance on the protection of the silence doctrine can be considered an expression of intent." In general, the silent person does not actively express or subsequently deny the meaning of silence, contrary to the principle of fiduciary duty and business practice. Some experts argue that if the silent person's silence creates the appearance of trustworthiness for the complainant, then that silence may create a duty of trust for the silent person (possibly a duty to perform a positive interest) as an inducement to trust. Courts have also held that the silence of the silent person is not an inducement of trust. While many courts in their jurisprudence strictly adhere to the distinction between implied and

non-implied and do not recognize mere silence by omission as a statement of intent, some courts have held that silence may also be considered a statement of intent in terms of the principle of good faith, the balance of interests, and the protection of the complainant's legitimate expectations. The principle of "silence is a promise" is even more applicable in business transactions. In a commercial transaction, the parties are obliged to respond promptly to the other party's offer based on the principle of good faith in order to maintain a long-term business relationship. If the businessman does not respond within the deadline, his silence is considered a promise. If the businessman does not wish to enter into a contract, he must notify the idea provider immediately; otherwise, the contract will come into force on the basis of the idea provider's offer. In analyzing the case, it is possible to ignore the issue of the trader's return and first analyze the facts of the case to determine whether the trader's failure to send a timely return affects the facts of the case itself. The content of the contract is initially consensual, but it is the content of the principal's unilateral offer, once formed, that constitutes the contract. It must then be determined whether the principal's offer is also consistent with the recipient's intent, which always constitutes "consent", or whether the recipient's intent was to reject the offer. If not, the general principle that the parties intended to conclude a contract by means of an offer and a promise is the criterion.

Silence may be an indication of intent, but it may also be that the party is silent because of fraud, duress or misunderstanding. In such cases, do the provisions of civil law regarding lack of meaning apply? The prevailing view is that the provisions on fraud, duress and mistake should also apply to silent intent, and that the silent person may withdraw his or her intent on the grounds of fraud, duress or mistake, since there is no reason to put the silent person in a worse position than the person expressing a clear intent. However, it is debatable whether and to what extent the requirement of intentional mistake should be limited to discourses to which silence applies. In essence, the silent person is unaware of his or her own discourse in the so-called inference error. The silent person thinks that his or her silence does not constitute a representation in law, when in fact it does. According to contemporary doctrine, ignorance does not necessarily prevent the formation of a statement; if the actor is attributable, his or her conduct still constitutes a statement, but the content of the statement can be retracted on the ground of error. The uninformed silent person is silent because he does not know the legal requirements or customs of the transaction, or because he does not know the specific consequences of violating the principle of good faith. In both cases, silence is imputable and therefore constitutes an expression of will. If the person who remains silent does not know that his silence constitutes an expression of will under the law, then under the principle that "ignorance of the law is inexcusable", the silent person should not escape this expression of will by claiming a fallacy. In a modern state, ignorance of the law is not tolerated. It would be different if the person who remained silent was simply unfamiliar with business practices or unaware of the specific consequences of violating the principle of good faith. There is no reason why the rule on intentional misconduct should not apply in this case. In cases such as the Trier wine auction, where a person's raising of hands was interpreted as an indication of intent under commercial practice, it was generally accepted that the ideologue had the right to cancel such an

indication. If an ideator relying on a derived positive meaning can revoke it on the basis of ignorance of the custom of the transaction, why shouldn't an ideator relying on a derived negative meaning have the same right? According to the principle of "equal treatment of essentially equal situations," the originator of a negatively inferred expression should also have the right to revoke it. If the silent person claims that he or she did not know about the commercial act in question or did not know the specific consequences of the violation of the principle of good faith, the adjudicating body will conclude that the application is invalid due to insufficient evidence or irregularities, that the representation is not wrong, or that the application is valid and the silent person acquires the right of revocation.

However, many scholars argue that in commerce, the silent person should be excluded from the right of revocation if he or she is responsible for the occurrence of a mistake of fact. Some scholars have also relied on the businessman's theory of organizational risk to argue that the silent person is not entitled to revoke an implied statement if the negligence occurred as a result of a risk typical of the businessman's business. For example, if an employee intercepts a letter and the business owner does not see it and remains silent, this is a typical business risk; conversely, if the letter is lost in a fire, this is not a typical business risk and the silent party can rescind the statement. Opponents argue that there is no empirical basis for excluding the right of revocation due to the silent party's negligence and that under current law, a party can revoke a communication at any time, even if the other party is at fault. On the other hand, the systematic risk theory for dealers is not sufficiently persuasive. If it can be inferred from the systematic risk theory that a dealer's erroneous silence cannot be rescinded if the dealer is at fault, then it can be inferred that other kinds of erroneous communications by dealers cannot be rescinded if the dealer is at fault, but this conclusion is clearly not based on a rule of thumb. This point is worth evaluating. If the right of rescission is vestable in the case of unfair representations and limited to the party at fault, then there needs to be a uniform treatment of all types of representations, not just one type of representation. It would be a clear violation of the principle of "equal treatment of substantially the same circumstances" for a party without the ability to communicate expressly or actively to rescind while a party without the ability to communicate passively to rescind. It would also be unethical to exclude the wrongdoer's right to rescind based solely on general fraud or systemic risk. Given the wrongdoer's obligation to pay the other party for damages caused by the rescission, and considering the other party's interest, it is reasonable to consider excluding the wrongdoer's right to rescind in cases of gross negligence. Of course, such exclusion can only be achieved by legislation and not by interpretation.

6. Conclusion

Although the rules for determining whether a contract has been concluded and, in particular, whether the parties have reached a legally binding agreement seem to have been sorted out, the practice is complex and various problems still exist in court practice. In summary, this article assumes that the existence of an agreement between two or more parties and the agreement of the parties' intention are

the two main factors constituting contract formation, and composes the relevant detailed evaluation criteria into the body of the offer and promise rules.

References

Cui, J. Y. (2022). Exploration of contract formation. *Jiaotong University Law*, *2022*(01), 7-19.

Liu, G. X. (2022). Several issues on contract formation. *Application of law*, *2022*(04), 3-17.

Ran, K. P. (2019). The reengineering of the rule of "my silence is deemed to be consent" in the perspective of the Civil Code. *Contemporary Jurisprudence*, *33*(04), 3-12.

Yang, D. X. (2016). Silence and mimesis in the theory of meaning. *Comparative Law Research*, *2016*(06), 155-171.

Zhang, C. L. (2017). Experimental discussion on the general conditions of contract formation—Thinking based on legislative theory. *Journal of Heilongjiang Academy of Political and Legal Management Cadres*, *2017*(04), 58-61.