



Correlation of Considerations Principle in Bilateral Contracts

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ABSTRACT: Correlation of considerations principle is an important principle in contracts, and though not directly addressed in the Civil law, has an important effect on the regulations of obligations. This principle explains this fact that not only in the two-obligation or bilateral contracts the obligations or reciprocal considerations become so correlated that one can no longer divide the contract into two independent obligations, but also describes how these two obligations affect each other in such a way that they form a unified body called aqd (the contract). The effects and consequences of this principle on bilateral contracts can be traced in all phases of a contract. As a result of the correlation of considerations principle, the cause of the obligations, which is the promise both parties make to each other, must have requirements for the contracts to be realized without which the contract won't materialize at all. Also, the motive of an obligation should be taken into consideration only if it is stated and has met mutual assent (meeting of the minds). The governance of correlation of considerations principle on the contract continues after the conclusion of the contract and lasts until it is fully executed, and also gives rise to lien and several liability in the latter phases of the contract.

Keywords: Correlations of considerations principle, Cause of obligation, Motive of obligation, Lien, several liability

INTRODUCTION

Correlation of considerations principle means a close, reciprocal relation between the two considerations of a contract in a manner that leads to notions, such as lien and several liabilities, in a contract that even the parties' will cannot ignore them. Since the effects of this principle will be discussed further there is no need to explain its terminology.

The Civil law does not refer to the correlation of considerations principle prevalent between two reciprocal considerations in any legal text but admits its logical outcomes. A contract is a combination of the mutual assent of the two parties involved and this is the assent that creates the reciprocal obligations of the parties of an agreement. This intentional connection of obligations has some effects that even the parties' will cannot ignore. For instance, commutative justice requires that considerations should not be surrendered to one of the parties only. In fact, the necessity of reciprocal considerations is a principle above will and rules over the framework in which the parties reach mutual assent; therefore, a condition contrary to this principle negates the requirements of the substance of the contract and voids the principle of mutual assent [1]. The correlation of consideration principle is not limited to the time of assent; offer and acceptance do not finish a contract and the parties reach the purpose of concluding the contract only when it is properly executed. Absence or refusal to submit one out of the two considerations voids the contract but destruction or inability to deliver the object of sale won't lead to void unless it is the object of lease which is destroyed. In this exceptional case, the long term lease is void in a way that is alike cancellation [1].

In general, the effects of the correlation of considerations principle are as follows:

1-To set, in bilateral or two-obligation contracts, the requirements for the object of deal as the cause of the contract, and at the time of concluding the contract, without which the contract cannot materialize. These requirements for the object of deal, according to articles 345, 361 and 190 of the Civil law are as follows: the object must be evident and determined, available at the time of the contract, possible to deliver, lawful, have monetary value and reasonable adequacy. Without these requirements in the cause of the obligation, and as result of the correlation of considerations principle's dominion, the contract cannot materialize.

2-Establishing the right to lien (the right to withhold one's duty/obligation) for the parties: according to this right each party can postpone the fulfillment of his/her promise till the other party has carried out his/her obligation. Considering the terms of article 377 of the Civil law which recognizes lien only if the contract is an executory one, it can be implied that in bilateral contracts each party can subject the fulfillment of his/her promise contingent on the fulfillment of the other party's promise provided that the considerations are not

executory. This general rule derives from the correlation of considerations principle and the necessity of observing commutative justice. Even some have gone so far to suggest that simultaneous submission is the outcome of assent if the contract is absolute [2]. Due to the cause and effect relationship between the considerations in a bilateral contract, and the fact that the right to lien has its roots in this relationship, it is clear that once a party has fulfilled his/her obligation, the other party loses the right to lien and must perform his/her own obligation (article 378 of the Civil law); thus, fulfillment is a terminating factor of lien.3-Disposition of several liability (danger of damage): if vis majeur impedes a party to fulfill his/her obligation the other party becomes clear of his/her own obligation, or he/she can terminate the contract by an act of cancellation. Here the question is to whom lies the responsibility for several liability? Article 378 of the Civil law states: "... if the object of sale is destroyed by the seller, not by his/her fault or out of neglect, the sale is cancelled and the price must be returned to the buyer...".

As mentioned, the rule which puts several liability, before submission, on the seller is the result of the correlation of considerations principle and the terms of the mutual assent of both parties to enjoy the object of sale and the price [1]; and not to merely hold the title of Owner since a true and complete use of property becomes possible only if it is in one's full possession. In other words, this article suggests that if the damage to the goods (object of sale) occurs after it has been delivered to the buyer, it is his/her loss and the sale is not annulled; such is the result of the disposition of several liability due to the act of fulfillment. Apparently, there is no debate between secular/Islamic jurists on validity of this interpretation, and it is regarded as an established fact [2] since it is taken for granted that involuntary damage to the property is its owner's loss and not any other's.

Madani [3] in the fourth volume of his *Nominate Contracts* reviews lien and several liability in the sale contracts.

In a research by the name of "The Fulfillment of Contract Obligations' Effects", Ghasemi [4] claims that several liability and lien are the outcome of the relation between the correlation of considerations, the terms of both parties' mutual intent and the necessity of observing commutative justice; also, on the basis of the correlation of considerations principle in bilateral contracts, once a party has fulfilled his/her obligation, he/she can ask the other party to fulfill his/her obligations since fulfillment removes the right to lien provided that the other party's obligation is not executory. In his research, *The Lien*, Bagheri [5] states that lien has been accepted as a property right in all types of bilateral contracts and is not limited to the sale contracts. Although extending lien to all types of contracts does not seem reasonable, some secular/Islamic jurists have employed this interpretation. In the sixth volume of his *Nominate Contracts*, Yusefzadeh [6] addresses lien and the guarantee to indemnity as the consequences of sale contracts.

Sadly, an expansive research on the correlation of considerations principle has not been carried out yet; and since this principle is a crucial principle of the Civil law, it is of extreme importance to introduce the effects of this principle in the Civil law because it is the source of considerable differences between bilateral and unilateral (or defective bilateral) contracts. In this light, an extensive investigation of this principle seems inevitable. Therefore, in this research paper, we are trying to answer some basic questions raised in this field; questions such as these: 1-What are the effects of the correlation of considerations of principle? And among the existing principles of the Civil law which one is the direct outcome of this principle? 2-Is several liability, an outcome of the correlation of considerations principle, unique to sale contracts or applicable to other types of contracts as well?

1-Definition of aqd and iqaa'

In Arabic, aqd means to tie and connect, to strengthen and fortify [the connection] between two things. According to Almonjad, al-aqd is to weave or plait a rope, to seal a deal or an oath, to tie a rope, and to build a roof [7]. In his *Terminology of Law*, Ja'fari Langrudi mentions that "the standard by which to distinguish an aqd (contract) is that in aqd, without the agreement of both parties, one cannot produce an outcome which is endorsed by law, custom and habit, and reason or good conduct. Accordingly, a will is an iqaa' since transferring possession by a party (testator) by his/her own consent to another is not against reason and good conduct, and also is not prohibited by law; waiver is iqaa' and not aqd [8]. Iqaa' is the infinitive of vaq' from the division of e'faal, literally meaning to get hold of, to put in predicament, and to cause to happen. In Islamic jurisprudence, iqaa' means a unilateral legal act creation of which requires an intent. Iqaa', Katouzian says, is producing a legal incident out of an intent. As one can observe, the individual intent (an intent) is the main defining principle of iqaa' which is its major distinction from aqd [2].

2-Types of contracts and the correlation of considerations principle

Correlation principle can be present in bilateral contracts only [9]. The reason behind this goes back to the principal differences of these contracts with other types of contracts. In fact, the distinctive aspect of bilateral contracts from unilateral contracts lies in this highly crucial and influential issue that in bilateral contracts, the considerations are the sole matters of importance, and not the personality of the parties involved. What matters is that two properties or considerations meet each other, and not the parties' character, while in unilateral contracts character is the only subject of importance. Contrary to unilateral contracts, the considerations are the focal point of assent and are linked to each other. So far, it should be noted that the correlation of considerations principle only occurs in bilateral contracts which necessarily contain two considerations. Therefore, the absence of a consideration is a void and meaningless condition that nullifies the contract.

3-The correlation of considerations principle in the concluding phase of a contract

Should one divide a contract in two phases of the creation and post-conclusion phase, the correlation of considerations principle is present and influential during all these phases. In conventional theories, two theories of cause and motive are differentiated from each other. These two terms relate to the motivation of both parties and the cause of their intent; while "motive" is a personal and individual entity which varies in each contract and for each party, "cause" is an invariable notion and has a general inclination [10]. To explain further, one can say that a motive is the more hidden and indirect motivation of an obligation while a cause is attributed to the direct and immediate motivation within the contract. Legality of a contract's motive, which can be taken as the personal motivation of the individual, and validity of the cause are the effects of the correlation of considerations principle in bilateral contracts which must be met during the creation of the contract; otherwise, due to the correlation of considerations, the contract would be null and void. The Civil law authors recognize, in clause 4 of article 190 and article 217, the legitimacy of a "contract's motive" as one of the principal conditions of validity. Motive in these cases is meant as a determined motivation and perpetrator. As mentioned in the section explaining the difference of cause and motive, cause is virtually one of the technical elements of a contract while motive is not a part of them. Therefore, clause 4 of article 190 should be restricted to the expressed motivations for it to be in the dominion of assent, and not to include personal and hidden motivations [10]. Thus, "lawful motive" is not a technical and internal element of assent.

4-The correlation of considerations principle in the post-conclusion phase of contracts

In the previous discussions, and in addition to some general facts brought about the correlation of considerations principle, we explained the effects and consequences of this principle in the creation and conclusion of a contract. In this section, we will state the effects of the correlation of considerations principle after concluding a contract. In this light, we will investigate those rules and principles of the Civil law which, apparently, are the outcome of the correlation of considerations principle, and will discuss their foundation and origins. Some legal authors [1]. Consider the compulsory enforcement of bilateral contracts as a result of this principle, and believe that the two principles of lien and several liabilities are the outcome of this correlation between considerations, or to put it differently, contractual correlation. Here, we are going to discuss these two issues as two different entities, and identify their limitation and purview.

5-Lien

The correlation between two considerations is not limited to the time of concluding the contract and remains [influential] until the contract is completely executed. Lien is an outcome of correlation of considerations which is in fact a practical implement to force a party into carrying out the contract. In other words, this principle, as the immediate outcome of correlation of considerations, becomes meaningful only at the time of fulfilling the contract; in a manner that, as a result of the correlation of considerations, one of the parties can deprive the other party of the contract's outcome in order to force him/her to fulfill the contract. Lien appears to be a natural and reasonable right as well, since the seller and buyer must deliver the object of sale and the price respectively, provided that the condition precedent is not delayed. Also, article 362 of the Civil law recognizes the necessity, and obligation of the seller, to deliver the object of sale and the buyer to submit the price as the results of a valid sale. Since this is a reciprocal commitment originated from the contract, preference of one over the other is an undue preference. Consequently, should a party abstain from submitting his/her promise, the other party has the right to withhold his/her own. As a matter of fact, this is an implement to force the other party to submit in order for the act of surrender and taking possession to take place. This act of surrender and taking possession is called taqaboz (taking possession) by Islamic jurisprudents [8] and haqq-e-habs (lien) in legal documentation.

For instance, the seller subjects the surrender of the object of sale to the submission of the price and the buyer withholds the price contingent on taking possession of the object of sale. This right of distress which is devised as a guarantee towards fulfilling the contract is called lien [1]. So far, lien can be defined briefly as the right to abstain from one's obligation until the other party's obligation is carried out [11]. For so long a time, this right has enjoyed the consensus of Islamic jurisprudents and has been extremely effective on the fulfillment of obligations. Article 327 of the Civil law refers to this definition: "[T]he seller and the buyer each has the right to forbear from submitting the object of sale or the price until the other party is ready to surrender. . . ". Although this article does not name the lien, it mentions lien's terms and contents [12].

6-Several liability

We said in the previous section that lien is one of the most important effects and outcomes of the correlation of considerations principle in the post-conclusion phase of a contract. This right comes into existence once a party refuses to carry out and fulfill his/her obligations, while, logically, the contract could be carried out. In these cases, one tries to make use of the right to lien and the refusal to submit to the other party as a mechanism to execute the contract, though there are times when one of the two considerations is destroyed before the act of surrender and after concluding the contract. In these cases, the parties can no longer coerce the other party to fulfill the contract by resorting to lien; since, basically, the subject of the contract is destroyed and exists no more. In this case, based on the correlation of considerations principle and as its outcome, the issue of

several liability comes into the fore. Therefore, several liability and its disposition are among the outcomes of the correlation of considerations principle in the post-conclusion phase of contracts.

DISCUSSION

The correlation of considerations principle is one of the most important and effective contractual principles prevalent in all phases of a contract from conclusion through fulfillment and even after the cancellation of the contract, and has important effects on its process. First of all, as it can be inferred from this principle's terminology, it is present in bilateral, or to quote some jurisprudents [9]. Two-obligation contracts only. Thus, there is no correlation of considerations principle in unilateral and one-obligation contracts whatsoever, because in these contracts there is but one obligation and just one party obliges himself/herself. There is another reason for this issue as well; the two reciprocal considerations are the most important elements of bilateral contracts, meaning that they are the base and axis of rules while in unilateral contracts it is the personality of the parties which matters most and not the subject of the deal; for instance, in gift or loan contracts, people donate or lend their property in accordance to the character [of the other party] and the relationship that is shaped between them.

All said, this question may arise that in unilateral contracts in which the condition is altered or, to quote some jurisprudents [1], defective bilateral contracts, the correlation of considerations principle could exist since these contracts contain two obligations, one is the main obligation which is the outcome of the contract and the other is the reciprocal obligation derived from the condition. To explain this issue, an important one as it is, one should pay attention to the major distinction of bilateral contracts with gratuitous contracts with a conditioned consideration; in bilateral contracts the two obligations are not separated at all but totally tied together. In other words, bilateral contracts are not consisted of two autonomous considerations, contrary to that, they are linked together in such a way that the fate of one obligation decides the fate of the other and even the whole body of the contract. Another reason behind this fact is that in two-obligation contracts, the reciprocal obligations are part of the elements of the contract and are intertwined with the agreement, while in defective bilateral contracts this fact does not apply at all; meaning that the two obligations are entirely separable and they do not reciprocate.

Now that the restriction of the correlation of considerations principle to bilateral contracts has been proved by the arguments mentioned so far, it should not escape our notice that the dictation of this principle on bilateral contracts prevails from the outset of a contract's conclusion to the end of its execution; and if need be, it functions as a mechanism to coerce the parties toward fulfilling their obligations. If we divide a contract into three epochs of 1-The time of conclusion, 2-The post-conclusion phase, 3-The post-nullification period, the correlation of considerations principle exercises drastic influence on the first two epochs. The effects of the correlation of considerations principle on the third period, which is after discharging the contract, remains a matter of debate and will be addressed in the following lines. In the conclusion phase, as is mentioned in the "Section of Contracts and Obligations in General" of the Civil law, the crucial issue is the conditions of valid deals. In article 190 of the Constitution, where the validity conditions of deals are addressed, four conditions have been considered for a deal to be valid. The first clause is on the intent and assent of the parties during a contract's conclusion period, and the second clause is about the competency of the parties. The first and second clauses are not exclusively related to bilateral contracts because they do not address the object of deal and considerations in general. On the other hand, the third and fourth clauses are related to the terms and conditions of the object of the deal and obligations at the time of the contract. The third clause talks about the object of deal and its being evident and determined, an issue we discussed earlier while discussing the conditions of the cause of the deal; and the fourth clause reviews the legitimacy of a deal's motive. So far, the distinction between the cause and the motive of an obligation was made clear. We mentioned that each consideration in a two-obligation contract is in fact the cause of obligation for the other party, while the motive of an obligation includes more hidden motivations of an obligation and is not part of the elements of a contract. As matter of fact, the cause of the deal is one of the elements of a contract; therefore, it must embody requirements at the time of conclusion for the contract to materialize. These requirements, most of them emphasized in the Civil law, are as follows: the cause of a deal must be evident, determined, available, possible to be delivered by the promisor, and have legal and rational value and adequacy. As a result of the correlation between the two considerations, it is just reasonable for the cause of the obligations to contain these requirements, otherwise the deal would be void; however in the case of defective bilateral contracts, regarding that this correlation does not exist between the considerations and they are considered two separate obligations, if a conditioned consideration does not meet these requirements, the condition itself becomes void while the deal does not suffer cancellation.

On the issue of the motive of the deal, the majority of secular/Islamic jurisprudents [1] emphasize that since "cause" is a personal and individual notion, it should not become a source of much influence. The legitimacy of the motive of the deal affects the contract, only if it has been stated. The Civil law confirms this fact in article 217: "[I]t is not necessary to specify motive in a deal, however, if it is specified it must be lawful; otherwise the deal is null and void".

Undoubtedly, the purpose of entering an agreement is to perform it; therefore, the correlation of considerations principle governs the contract after it has been concluded until it is fully executed. All in all, some probable problems may occur in the process of performing a contract; for instance, the parties might not, for any

possible reason, be able to carry out their respective obligations. Two causes may hinder the fulfillment of obligations which results in two different outcomes:

1-Intentional refusal to fulfill an obligation and submit the considerations; happens when a party who, by all means, has the competency to surrender the property refuses to do so. In these cases too, because of the correlation of considerations principle and the intention to exchange, the other party can abstain from undertaking his/her obligation. This right, called lien is unique to bilateral contracts; however, in the case of gratuitous contracts, if a party refuses to carry out his/her obligation, one can only ask a court to force him/her to execute the contract. Even if the condition has changed, one cannot enforce the lien since these two obligations have no correlations whatsoever, and there has been no intention to exchange at the outset of the deal.

2-Inability to execute the contract due to the pre-surrender destruction of the object of sale; in this case called several liability, an obliged party cannot execute the contract because the object of deal, before surrender and in his/her own possession, has been destroyed due to vis major. Here, the correlation of considerations principle necessitates the cancellation of the deal since an element of the contract is wasted and the contract can no longer continue to exist. In this case, we face two major questions: 1-who is to take several liability? And 2- Is several liability restricted to the sale contracts?

There are different speculations on the first question; some put the liability on the buyer, referring to the notion that at the time of concluding the contract the ownership is transferred as well. Some others believe that several liability shifts by the act of surrender. This is also the idea which can be induced from the articles of the Civil law. In other words, several liability lies with the debtor. Regarding the second question, some argue that since article 387 is contrary to the principle (because involuntary loss must be the loss of the owner not any other), this issue ought to be an exception and restricted to the sale contracts, and cannot be attributed to the other types of bilateral contracts. Conversely, there are many others, which make the majority, regard it as a general rule and prevalent in all types of bilateral contracts, based on the correlation of considerations, the theory of the cause of an obligation, interpretation of the parties' intent, performing commutative justice, and observing good will and etc. The result of induction from articles 483, 496, 567 and 649 of the Civil law confirms this speculation; admitting of which, one can say that as a matter of fact, performing the obligations in bilateral contracts removes several liability from the promisor, meaning that the act of surrender shifts several liability not the mere notion of the ownership.

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