

Research Article

CONTRACTS IMPLIED-IN-FACT LIKE A FORM OF WILL EXPRESSION

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ABSTRACT

Background: *Implied-in-fact contracts have been a part of civil legal relations since ancient times. This study aims to test the hypothesis that implied-in-fact contracts are a way to express will. The author also analyses existing doctrinal approaches to understanding and defining implied-in-fact contracts. This makes it possible to create a unified and established knowledge of implied-in-fact contracts from the standpoint of law. The analysis scrutinises the problems of expression of will in implied-in-fact contracts. In addition, it affirms that the conclusion of implied-in-fact contracts is based on freedom of will, the expression of which is the basis for all civil legal relations.*

Methods: *The study employed the dialectical method to analyse international and national legislation. The comparative legal method determined similar and divergent characteristics based on empirical research of legal norms and common and continental law doctrine. The genesis of the contracts was demonstrated using the historical method. Contradictions were defined and clarified using formal and logical methods. Additionally, the dogmatic method made it possible to formulate new legal positions and concepts. All methods mentioned were used in their interdependence.*

Results and Conclusions: *The study explains the origins and ideas of implied-in-fact contracts, which trace their roots back to Roman law. “Contractus innominate” notably influenced their development, alongside synallagmatic agreement, the principle of “non concedit venire contra factum proprium” and “protestatio facto contraria non-valet”. Implied-in-fact contracts are closely related to estoppel and the concept of stipulation. After all, implied-in-fact contracts have evolved to their modern state and have their counterpart in Continental law.*

At the heart of implied-in-fact contracts are conclusive actions, serving as a way of accepting an offer, determining the form of a contract and expressing will. Conclusive actions are the basis for implied-in-fact contracts. Conclusive actions are characterised by dynamic behaviour in the form of unambiguous actions aimed at the desire to conclude an agreement. However, the absence of a direct normative definition for conclusive actions leads to legal problems in their application.

1 INTRODUCTION

Implied-in-fact contracts have been a part of civil legal relations since ancient times. Evolving from Roman law and continuing to the present day, contracts concluded based on fact have garnered recognition across different legal systems. Such agreements have become integral to everyday life and are concluded every second.

Different countries' legal doctrines interpret implied-in-fact contracts in different ways. The primary debate revolves around whether implied-in-fact contracts are a particular type of contract or if they are simply ordinary contracts wherein the contractors' agreement is expressed in a particular way.

The heterogeneous definition of implied-in-fact contracts by legal doctrine and judicial practice, the problem of distinguishing them from other contracts (for example, contracts from implied-in-law), and the lack of controversy regarding the recognition of these contracts as a separate type of contract or simply a form of their conclusion determines the need to conduct an in-depth study of the implied-in-fact contracts and decide on their legal nature.

This paper aims to prove that implied-in-fact contracts are not distinct types of contracts but ordinary contracts formed in a particular manner: the contractors' agreement to the contract is expressed through action rather than verbal or written means.

To achieve this objective, three tasks were set in this research: 1) analyse the origins and determination of implied-in-fact contracts; 2) examine the problems of expression of will in implied-in-fact contracts ; 3) prove a hypothesis about the definition of implied-in-fact contracts as a way of will expressing. The article concludes by confirming that implied-in-fact contracts are a way of will expression, not a genuine form of contract.

2 ORIGINS AND CONCEPTS OF CONTRACT IMPLIED IN FACT

As a starting point, we will consider implied-in-fact contracts as obligations produced by tacit consent through the act of committing actions. Such a concept is incomplete but sufficient for a preliminary understanding of the research subject.

Implied contracts are related to the concept of conclusive actions. The legal practice uses various definitions that are close in meaning. For example, conclusive evidence, implied conduct, explicit acts, implicative conduct, and appropriate and implied actions. However, an established doctrinal definition is conclusive actions – actions of a person expressing his will to develop legal relations, in particular, to conclude an agreement, expressed not in the form of a verbal or written offer but directly through behaviour from which it is possible to conclude such an intention.¹

1 OM Sitko and NM Shapovalenko, *Dictionary of Legal Terms of Another Language Origin* (Odessa State University of Internal Affairs 2013) 21.

The legal basis of conclusive actions was laid out in Roman law, which used conclusive actions for various contracts. However, the peculiarity of the implied contract is that the performance of actual actions is a condition upon which the contract comes into force but is not an acceptance or an offer, respectively.

Q. M. Scaevola categorised them according to the way they arise: pronouncing specific words (*verbis*), performing acts that do not require words (*re*), or based on the sole agreement (*consensu*).²

These types of contracts became the prototype of modern implied-in-fact contracts. However, Roman law's limited range of contracts could not regulate all contractual relations, which led to the emergence of innominate contracts based on verbal formulas: *Do ut des* (I give so that you provide), *Do ut facias* (I give you to do), *Facio ut des* (I make you provide) and *Facio ut facias* (I do that you will do).³

Consequently, we can assert that conclusive actions used for these contracts arising from actions (*re*) are rooted in these innominate contracts. The utilisation of innominate contracts played a crucial role in the legal recognition of the variability of consensual agreements, particularly when one party's legally significant actions necessitated the fulfilment of obligations by the other party. The emergence of nameless contracts significantly contributed to the development of implied-in-fact contracts.

However, for the modern understanding of implied-in-fact contracts, it is necessary to mention the synallagmatic contract. It is separate from the innominate contracts type of agreement, which is analogue to modern bilateral contracts. Current implied-in-fact contracts can be bilateral. This makes their legal nature close to synallagmatic contracts. This approach was confirmed by Lord Diplock: "Every synallagmatic contract contains in it the seeds of the problem - in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done?"⁴

A one-sided contract does not provide for coordination of the parties' will and their mutual manifestation; the parties do not have counterclaims because one party is given rights, and the other party is given duties. Although every right gives rise to obligations, and obligations give rise to rights, the one-sidedness of relations is determined through the category of interest of the parties, which is not aimed at creating mutual obligations. Separating unilateral contracts and obligations from unilateral actions is necessary.

2 Paul J du Plessis, Clifford Ando and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (OUP 2016) 587.

3 Geoffrey MacCormack, 'Contractual Theory and the Innominate Contracts' (1985) 51 *Studia et documenta historiae et iuris* 131.

4 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1961] EWCA Civ 7 <<https://www.bailii.org/ew/cases/EWCA/Civ/1961/7.html>> accessed 07 January 2024.

For example, when advertising a product, the company claims its properties and rewards anyone who disproves them. Such models can be seen in the activities of pharmaceutical companies (denying the effectiveness of drugs), IT companies (software hacking), etc. If someone fulfils the announced conditions, even without entering into a separate contract, this can be considered a unilateral action, not a unilateral contract.⁵ Such cases differ in British, American, and European courts. British courts throughout the century remained content to reward those who supplied the requisite information in ignorance of the offer. American courts held this inconsistent with the contractual requirement of offer and acceptance. For them, a claim to a reward could only be based on a contract, and for a contract to exist, there had to be mutual consent, which required an intention to accept an offer.⁶ In this matter, American case law is closer to civil law. For example, a public reward promise in Ukraine is classified as a non-contractual commitment.⁷ Such contracts are implied contracts because they arise from the conduct of persons rather than from an oral or written agreement between the parties.

Implied-in-fact contracts are unilateral in the relationship of a gift of movable property. Gift deeds are regulated differently in common and civil law, but their content is reduced to transferring movable and immovable property without a counterclaim. For example, when a husband gives flowers to his wife, and she accepts them, a gift contract arises between them.

Therefore, implied-in-fact contracts can be applied to bilateral and some unilateral agreements, which is a fundamental aspect of understanding their essence. We will see this in more detail when considering the responsibility for the failure of contracts implied in fact and when analysing the mechanism of concluding such agreements.

These ideas are close to the principle of *non-concedit venire contra factum proprium*, which prohibits exercising rights contrary to one's previous behaviour. In modern contract law, *non concedit venire contra factum proprium* is akin to the principle of good faith, which prohibits the repudiation of an intention declared by the conduct of the person who testified to the desire to enter into the contract. Implied-in-fact contracts are rooted in this idea. Today, the principle *non concedit venire contra factum proprium* has adopted the form of inconsistent behaviour. Its application can be seen in Art. III.-1:103 of the Model Rules of European Private Law.⁸

5 *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1 <<https://www.bailii.org/ew/cases/EWCA/Civ/1892/1.html>> accessed 07 January 2024.

6 Oliver Wendell Holmes, *The Common Law* (Dover Pub Inc 1991).

7 Civil Code of Ukraine no 435-IV of 16 January 2003 (as amended of 01 January 2024) <<https://zakon.rada.gov.ua/laws/show/435-15#Text>> accessed 07 January 2024.

8 Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (interim outline edn, Sellier European Law Pub 2008).

The analysis of this norm allows us to say that behaviour contrary to good faith and fair business practice does not correspond to the previous statements or behaviour of the party, provided that the other party, acting to its detriment, reasonably relied on them.

The continuation *non concedit venire contra factum proprium* can also be found in Art. 1.8. UNIDROIT Principles 2016: "A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment."⁹

The application of the principle of good faith is reflected in Ukrainian court practice regarding fraudulent transactions. According to this practice, the legal consequences of invalid transactions that contradict the previous conduct of a party to the detriment of the other party are not recognised.

In the case № 390/34/17 in 2019, the Ukrainian Supreme Court applied the doctrine of *venire contra factum*, which is based on the principle of good faith in resolving the dispute. Contradictory behaviour is inconsistent with a party's previous statements or behaviour if the other party acts and relies on it to its detriment.¹⁰

This norm is also relevant to understanding implied-in-fact contracts. The content of this norm confirms that a person is responsible when performing actions that another person perceives as consent to enter into a contract. Here is an actual example of concluding a contract at an auction. If the visitor raises his hand, the auctioneer takes it as an agreement to enter into a contract. We will consider this example in more detail below.

In common law, *non concedit venire contra factum proprium* appeared in the estoppel form. Estoppel explains the legal relationship between previous and subsequent actions if the plaintiff's previous actions confirm no pretension.

S. Bower defines estoppel as follows: where one person has made a representation of fact to another person in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention – actual or presumptive – and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making or attempting to establish by evidence, any averment substantially at variance with his former representation, provided the representee timely and properly objects to it.¹¹

Estoppel prohibits referring to some facts when justifying one's claims. For contracts, implied-in-fact estoppel became the basis for which a party cannot withdraw from the

9 UNIDROIT Principles of International Commercial Contracts (UNIDROIT 2016) art 1.8.

10 Case of no 390/34/17 (Cassation Civil Court of the Supreme Court, 10 April 2019) <<https://reyestr.court.gov.ua/Review/81263995>> accessed 07 January 2024.

11 Piers Feltham, Tom Leech and Daniel Hochberg, *Spencer Bower the Law Relating to Estoppel by Representation* (4th edn, Bloomsbury Professional 2004) ch 1.

contract, citing a false perception of the circumstances. For example, after paying for coffee through a vending machine, a person cannot deny that they understood the meaning of their actions. This example confirms that the estoppel mechanism embodies the idea of justice.

The most plausible definition of the principle of justice is to render each his due. It is precisely due to this principle of justice that we insist on the prohibition of retracting one's words or referring to a false understanding of the circumstances. The principle of justice would be violated if we recognised that the person who ordered coffee through the vending machine did not understand that he was entering a contractual relationship. In this case, the presumption of proper understanding is applied.

When a person independently orders a coffee through a vending machine, completes the payment, chooses a drink and receives it, he is aware of the cause-and-effect relationship. As per St. Leonards, it is immaterial whether there is a misrepresentation of a fact as it existed or a misrepresentation of an intention to do or abstain from doing an act which would lead to the damage of the party whom you thereby induced to deal in marriage, or the purchase, or in anything of that sort, on the faith of that representation.¹²

The fact of performing an action that expresses a willingness to conclude a deal is sufficient. For example, if you see an image of a cup of coffee with cream and vanilla flowers on the coffee machine, accompanied by a disclaimer in small font stating that the illustration is for informational purposes only, and you proceed to choose a drink and deposit money into the machine, you will receive a drink that is visually different from the picture. While the fact that the drink did not meet your expectations is unclear, the contractual terms are nonetheless fulfilled still fulfilled, as you have taken conclusive actions.

Here is another example to illustrate this concept: the inscription “delicious coffee” does not confirm that you will like this coffee, and the description “good price” does not guarantee the price is the lowest on the market.

Legal relations are established through action – whether making a payment, pressing a button, or getting on a bus. For instance, when you buy a computer, you enter into a sale contract. After payment and receipt of the goods, you become the computer owner. But upon opening the box, you may see an inscription, “By opening the box and removing the protective seals, you agree to the user agreement.” At this point, you can return the product and withdraw from the contract. But if you open the box (perform conclusive actions), you lose the right to prove that you did not want to use the computer and disagree with the contract terms.

This confirms that it does not matter how we perceive unequivocal actions when performing them – such as pressing the buttons to order coffee and paying and collecting

12 See *Jorden v Money* [1854] UKHL J50 <<https://www.bailii.org/uk/cases/UKHL/1854/J50.html>> accessed 07 January 2024.

it. Violation of this concept could lead to legal anarchy. Imagine visiting a restaurant, placing an order and then claiming ignorance when the waiter brings you the bill, saying you did not know you had to pay for the food.

Private international law also uses the concept of estoppel, which serves as a mechanism for applying estoppel in the norms of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations is used by the International Court of Justice.¹³

Estoppel mandates compliance with obligations stemming from specific actions and limits the possibility of renouncing one's actions and intentions. Unlike civil law, reliance-based estoppels are recognised in case law, encompassing various forms such as (1) by the representation of fact, where one person asserts the truth of a set of facts to another; promissory estoppel, where one person makes a promise to another, but there is no enforceable contract; (2) and proprietary estoppel, where the parties are litigating the title to land.¹⁴

Estoppel and contracts implied in fact are different legal institutions. Estoppel operates as a bar or impediment raised by the law which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial conduct or admission, or consequence of final adjudication of the matter in a court of law.¹⁵ While implied-in-fact contracts are a way to express one's will when seeking to conclude an agreement.

However, both estoppel and implied-in-fact contracts equally recognise the occurrence of obligations arising from specific actions.

Thus, estoppel and de facto contracts give rise to obligations arising from the performance of specific actions but differ in the legal basis for such obligations – a contract or other legal fact established by law.

The prototype of implied-in-fact contracts can be traced back to verbal agreements in Roman law, where contracts were concluded by pronouncing certain words. Several verbal contracts were enshrined in the Institutes of Gaius, including the stipulation, the

13 The court relied on estoppel during the conflict over the Preah Vihear temple. It rejected Thailand's claim, which referred to the incorrect map establishing the border between states in the temple area. The reason for refusing the allegations was that for 15 years, Thailand had not made a claim and enjoyed the benefits that this gave it. Thailand took advantage of the situation and made no demands. Thus, Thailand's actions confirmed the absence of pretensions. See: 'UN Court Rules for Cambodia in Preah Vihear Temple Dispute With Thailand' (*UN News*, 11 November 2013) <<https://news.un.org/en/story/2013/11/455062>> accessed 07 January 2024.

14 Lord Mackay, *Halsbury's Laws of England: Easements, Equity, Estoppel*, vol 16(2) (4th ed, LexisNexis 2003).

15 'ESTOPPEL Definition & Meaning' in *Black's Law Dictionary* (2nd edn, Lawbook Exchange Ltd 1995) <<https://thelawdictionary.org/estoppel>> accessed 03 January 2024.

freedman's promise to the patron, and the dowry obligation. Verbal contracts had a question-answer form and involved specific phrases.¹⁶

By drawing an analogy between verbal and implied-in-fact contracts, we see that the basis for recognising the concluded agreement is a realisation of specific actions. This similarity features in the stipulation favouring the third person, where the basis for recognising the concluded agreement lies in the realisation of specific actions.

As SE. Abdel-Wahab and J. Brinsley said that the concept of transaction in which the contracting parties contemplate that their agreement should benefit a third person whom they have designated assumes that neither party has the mandate to stipulate in the name of a third person; it is a contract made in favour of a third person.¹⁷

Today, we can see the manifestation of this construction when a customer buys goods in a store and then leaves them in a special charity box. Any person can take a product from the charity box free of charge. This practice can qualify as a contract of donation, charity, or third-party beneficiary contract. We can consider such a situation as an implied-in-fact contract. For example, when a third-party beneficiary takes products from a charity box, he or she enters a legal relationship. The following legal relationship can be qualified as a gift or as exercising a third-party beneficiary's right to a product paid for in advance. Otherwise, we would have to qualify such actions as theft or godsend. Qualifying this situation as an ordinary bilateral sales contract is onerous. In particular, this is due to the condition that the store stores the wares and the obligation to hand over the goods at the request of a third party. Here, we can see an interesting legal structure.

Let us consider another example within the restaurant industry, showcasing a concept known as "Pay-it-Forward". Here is how it works: patrons can visit a coffee shop and pay for the coffee, which a third party can then claim. Some hospitality establishments have a signboard with a "pending meals" list. When a customer points to the selected position on the signboard to receive it, they are taking conclusive action. In this scenario, the visitor effectively concludes a contract without using the verbal or written form.

We agree with A. Zysow that the evolution of common law is distinctly different and reflects the stages or layers that constitute the history of the common law of contract. Two old forms of action, debt and assumpsit, are directly relevant to our inquiry as they are the origin of modern contract law.¹⁸

While common law contains many peculiarities, as seen above, implied-in-fact contracts have fundamental features derived from Roman law. At the core of all the described

16 Gaius, *The Institutes of Gaius* (Bloomsbury 3PL 1997).

17 Salah-Eldin Abdel-Wahab and John H Brinsley, 'The Stipulation for a Third Person in Egyptian Law' (1961) 10(1/2) *The American Journal of Comparative Law* 76, doi:10.1093/ajcl/10.1-2.76.

18 Aron Zysow, 'The Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law' (1985) 34(1) *Cleveland State Law Review* 69.

institutions lies human behaviour, from which the desire of the person to agree emerges. The analysis conducted paves the way for a doctrinal understanding of implied contracts.

The United States Supreme Court has defined an agreement implied as based on a deal and reconciliation of views and interests. This may not be embodied in a classic contract but is understood through the parties' conduct, confirming their unequivocal understanding.¹⁹ Under the traditional conception, a contract implied in fact is drawn out by the trier of fact when circumstances warrant the conclusion, primarily from the parties' conduct, that the legal equivalent of mutual consent exists.²⁰ So, implied-in-fact contracts are based on behaviour that can be interpreted as an unambiguous expression of will within the limits of proper authority.

W. Boyd III and R. Huffman delineated several characteristics that typify implied-in-fact contracts: 1) the absence of necessity to express an oral or written manifestation of consent; 2) the absence of express offer or acceptance; 3) the necessary elements of the agreement are inferred from the parties' conduct in light of the surrounding circumstances; 4) no requirement to demonstrate mutuality of intent or mutual consent.²¹

A similar position can be found in philosophy. T. Dougherty argues that a private intention is insufficient for morally valid consent, which always requires public behaviour in the form of communication through nonverbal behaviour in the case of high-stakes consent.²²

Combining the ideas and doctrines of philosophy and law, we conclude that for the conclusion of an agreement, only committed actions matter, and not the private intention, motive or desire. If somebody wants to agree but does not take appropriate actions, the expression of will cannot be considered an acceptance or an offer. The contract is considered completed only after the will expression of all parties. The contract is considered completed only after the will expression of all parties, but the implied-in-fact contract does not need written or verbal consent. A contract implied in fact demonstrates the parties' will by performing specific actions (raising a hand, pressing a button, etc.). Conclusive actions are an active manifestation of the will and express the intentions and consent of the parties.

A conclusive contract is an analogue of an implied-in-fact contract in Continental law. Some academics define a conclusive contract as embodying a person's will to agree.²³ But, this definition does not convey the specifics of this contract. It is correct to say that a conclusive

19 See *Baltimore & Ohio R Co v United States* [1923] 261 US 592 <<https://supreme.justia.com/cases/federal/us/261/592/>> accessed 07 January 2024.

20 See *JC Pitman & Sons, Inc v United States* [1963] 161 Ct Cl 701, 317 F.2d 366 <<https://case-law.vlex.com/vid/891591044>> accessed 07 January 2024.

21 Willard L Boyd III and Robert K Huffman, 'Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court' (1991) 40(3) *The Catholic University Law Review* 605.

22 Tom Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43(3) *Philosophy & Public Affairs* 224, doi:10.1111/papa.12059.

23 OV Dzera and HS Kuznjecova (eds), *Civil Law of Ukraine: Textbook*, vol 1 (Yurinkom Inter 2005) 633.

contract involves agreeing to the parties by taking conclusive actions in which matters to us is not the motive itself and the party's intentions but whether we can infer a specific intention. We can conclude that the will to enter the contract depends on the party's actions. When a passenger boards a bus, it does not matter to us whether he wants to conclude a contract of carriage. From his actions, we conclude that he intends to enter the contract. This action is enough to create a legal relationship. This shows that conclusive actions are the main feature of conclusive contracts.

The law does not directly define the conclusive actions and conclusive contracts. However, the possibility of concluding a contract using conclusive actions is provided for in the legislation of many countries. Article 205 of the Civil Code of Ukraine establishes the form of transaction and ways of intention expressing: 1) A transaction can be effected in either verbal or written form; 2) A transaction for which the law does not prescribe a mandatory written form shall be considered concluded, provided the behaviour of the parties witnesses their intention before occurrence of the appropriate legal consequences; 3) In cases established by an agreement or the law, the intention of the party to conclude a transaction may be expressed by its silence.²⁴

The above allows us to assert that the contract can be concluded in different forms due to the various ways of expressing an intention. We can conclude the contract using conclusive actions because they reflect the behaviour of the parties, which proves their will before the onset of the relevant legal consequences.

Silence and conclusive actions are not identical concepts. While silence is not an active action, it must be seen in specific contexts. For example, if A says, 'Speak up now if you have any objection to this marriage,' and B remains silent, this seems to imply the absence of an intent to object. At the same time, in economic activity, 'silence may be equivalent to a declaration of consent to an action, request or proposal that the silent person has noticed or is addressed to him or her'.²⁵

Conclusive action is an active expression of will; silence is passive and does not mean automatic acceptance.

Courts in different countries confirm this idea. In the resolution of the Supreme Court of Ukraine, it is stated that acceptance can also occur through tacit consent and the form of certain behavioural acts (so-called conclusive actions) of the transactions' party (for example, accepting payment for goods for sales contracts).²⁶

The conclusive actions are the way of accepting the offer, the form of the contract and the method of expressing will. Conclusive actions are characterised by dynamic behaviour in

24 Civil Code of Ukraine (n 7) art 205.

25 Commercial Code of Germany 'Handelsgesetzbuch-HGB' (as amended of 21 December 2023) <<https://www.gesetze-im-internet.de/hgb/index.html>> accessed 30 November 2023.

26 *Case of no 3-59rc14* (Supreme Court of Ukraine, 19 August 2014) <<https://reyestr.court.gov.ua/Review/40289257>> accessed 07 January 2024.

the form of specific measures aimed at the desire to agree. Conclusive actions are the basis for concluding conclusive contracts and implied-in-fact contracts. However, conclusive actions do not have a direct normative definition, and the practice of their application creates legal problems. What has been said determines the relevance of understanding the specifics of expressing the parties' will in the implied-in-fact contract.

3 ISSUES OF EXPRESSION OF WILL IN IMPLIED-IN-FACT CONTRACT

All contracts are based on the expression of will, which should be characterised by principles of good faith, fairness, clarity and voluntariness. At the core lies the concept of free will, which is indispensable in civil law. As we concluded earlier, freedom of will in civil law is a person's ability to consciously, freely and independently make and implement decisions regarding participation in civil legal relations, whether through taking action or inaction, disposing of subjective civil rights, or performing duties.²⁷

The conclusion of contracts requires free expression of will, which is based on the autonomy of the parties' will. This autonomy can be manifested in the performance of conclusive actions, serving as a form of acceptance of an offer and expression of will. As noted by O. Green, "accepting an offer includes verbal, written, silent and conclusive actions."²⁸ Although several ways exist to accept an offer, contracts are characterised by conclusive actions.

The conscious expression of will is a prerequisite to conclude a contract. Therefore, a person must understand that he is entering a legal relationship. On this issue, there is a particular problem with conclusive actions. In an implied contract, acceptance may be expressly communicated or inferred from the conduct of a party. Still, a quasi-contract refers to situations in which a defendant is bound as if there were a contract.

The study of quasi-contracts is not the focus of this paper. But we want to support the idea that, in some cases, we associate the emergence of legal relations under the contract implied in fact with the fact of taking conclusive actions. Awareness of the meaning of one's actions may not impact concluding a contract. In this situation, it is more relevant to talk about the "*protestatio facto contraria non-valet*", a Roman law norm, according to which an expressed reservation is invalid when contradicting one's own behaviour.²⁹

Two well-known cases confirm this. The first example is the famous case of the Trier wine auction. This fictional legal doctrinal case illustrates in detail the legal consequences of unconscious expression of will. H. Isay offered the case when an auction visitor saw a friend and greeted him with a raised hand. Traditionally, at auctions, raising your hand

27 Viktor Savchenko, 'Issues of the Collective will of Legal Entities' (2022) 8 Entrepreneurship, Economy and Law 22, doi:10.32849/2663-5313/2022.8.03.

28 Oleksandr Green, *Contracts in the Civil Law of Ukraine: Album of Schemes* (Pub Breza AE 2012) 41.

29 Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts* (3 aufl, Springer 1979).

means making a bid. Because of this, the auctioneer fixed a bid per visitor and demanded payment from him. The main argument of the case was that the visitor did not know about the internal rules of the auction, and his actions were not an expression of the will to conclude a contract.³⁰

There are two main points of view regarding this situation among lawyers. C.-W. Canaris emphasised, “that this situation does not express the will because it violates private autonomy.”³¹ However, J. Ellenberger noted “that we should focus on external behaviour, even if it does not coincide with the person's motives.”³²

It is essential to acknowledge that a person can create legal consequences by his actions. The interpretation of such scenarios hinges on a person's ability to familiarise himself with the auction rules. Despite the lack of awareness of the declaration, there is a declaration of choice if the declarant, exercising the necessary care in transactions, could have avoided having his action interpreted as a declaration of intent in ordinary practice and if the recipient understood it as a declaration of intent.³³

This allows us to conclude that the performance of conclusive actions may not directly correlate with the awareness of their significance. This position is not relevant for cases of agreements with defects of will, under the influence of delusion or when a person is not aware of his actions at all (mental illness, intoxication, incapacity, limited legal capacity).

Another illustrative example of the problem is the case of the parking lot in Hamburg. In 1953, the Hamburg senate converted certain parking areas into paid parking spaces. Near these places, signs were installed with the inscription “Parking is paid and guarded”. Despite this signage, the defendant regularly parked their car and refused to pay for parking. The defendant argued that he did not require the protection of his vehicle. However, the court, notwithstanding, ordered him to pay for parking.³⁴

During the court session, a critical opinion was voiced. The judge said that to conclude a contract, the party must consent. Since the defendant did not consent, the agreement was not established, leading to non-contractual relations between the parties. Such an approach enables us to seek compensation even if the party did not knowingly enter into the contract. We have to use two algorithms for contracts. The first arises when a person understands he has concluded to agree and consents willingly. The second occurs when a

30 Hermann Isay, *Die Willenserklärung im Thatbestande des Rechtsgeschäfts nach dem Bürgerlichen Gesetzbuch für das Deutsche Reich* (G Fischer 1899).

31 Claus-Wilhelm Canaris, ‘BGH, 07-06-1984 - IX ZR 66/83: Ohne Erklärungsbeußtsein erfolgte tatsächliche Mitteilung als Willenserklärung’ (1984) 40 *Neue Juristische Wochenschrift* 2279.

32 Jürgen Ellenberger, ‘Einführung’ in Palandt, *Kommentar zum BGB mit Nebengesetzen: Inkl WEG-Reform und COVID-19-Änderungen, Rechtsstand: 15.10.2020* (80 aufl, CH Beck 2021) 1.

33 *Erfordernis des Erklärungsbeußtseins* (“Sparkassenfall”) [1984] BGHZ 91, 324 <http://lorenz.userweb.mwn.de/urteile/BGHZ_91_324.htm> accessed 06 March 2023.

34 *Hamburger Parkplatzfall* [1956] BGHZ 21, 319 <https://lorenz.userweb.mwn.de/urteile/bghz21_319.htm> accessed 06 March 2023.

person does not intend to enter into a contract but takes conclusive actions that cause damage to the other party.

A contract implied in fact expresses will when the parties enter into a legal relationship by performing actions the other party understands as a desire to enter into a contract. Because of this, the desire for clear consequences is essential. Each contract provides for the emergence of specific rights and obligations. If the parties attach a different meaning to their actions, the question of determining the deed's fictitiousness arises.

This can be illustrated using the example of an auction. Let us imagine that the auctioneer and the visitor have agreed that he will raise his hand to raise the bid. They aim to increase the lot's value, not make the deal. If the visitor raises his hand and no one raises the bid after him, no obligations will arise between him and the auctioneer. This is justified because their purpose was not to conclude a sales contract. And although conclusive actions were formally taken to agree, legal relations will not arise. The main feature of a fictitious deed lies in the inconsistency of the internal and external will of all involved participants in the legal relationship, and the underlying purpose may even be illegal (for example, hiding property from confiscation), yet this does not affect the recognition of the deed as fictitious.

4 ANALYSIS OF SOME PRACTICES OF APPLYING CONTRACT IMPLIED IN FACT

Contracts implied in fact are actively used in everyday life. Here are a few examples: buying or exchanging currency through machines, purchasing goods in self-service stores, paying for public transport through terminals, giving gifts by transferring a symbol (for example, car keys), paying for services without signing the corresponding act of services rendered.

D. Birk offered other examples: 1) a customer who puts goods on the cash register in a store declares that he wants to buy it; 2) a raised glass at the bar means: I will order the same drink again; 3) raising a hand during an auction means placing a bid; 4) passing through a customs gate with a green marking when entering the country is an implicit customs declaration and says: I declare that I have nothing to declare; 5) payment of a tax refund by the tax inspectorate after submitting a tax declaration.³⁵

The given list of examples of implied-in-fact contracts in everyday life is indeed not exhaustive. Implied-in-fact contracts should be understood as a form of will expression, not a particular type of contract. Essentially, any contract can be construed as an implied-in-fact contract, except those mandated to be in written form. For example, a passenger and baggage transportation contract can be concluded in different forms (in writing, by conclusive actions or verbally). In this case, boarding the passenger on the bus or dropping the token into the turnstile will be conclusive actions. The indicated actions will be recognised as a direct expression of the passenger's will, which confirms his desire to

35 Dieter Birk, *Steuerrecht* (11 aufl, Müller CF in Hüthig Jehle Rehm 2008).

conclude a contract of carriage. A similar situation can be cited for the retail sales contract. However, reducing conclusive actions only to use terminals and vending machines is incorrect.

M. Eisenberg considered an interesting case: “Every day Mary Moore passes a produce store on her way to work and stops to buy an apple for lunch. One day, Moore is in a hurry to catch her bus, so she takes an apple from a bin outside the store, catches the shopkeeper’s eye, and waves the apple at him. The shopkeeper nods back. Even though Moore didn’t say, “I offer to buy this apple for the price posted on the bin”, that is implied from her waving the apple at the shopkeeper and her past practice, and even though the shopkeeper did not say, “I accept your offer,” that is implied from his nodding his head and his past practice. Because an implied-in-fact contract is real, the usual remedy for breach of an implied-in-fact contract is expectation damages. Whether the defendant was unjustly enriched is normally irrelevant.”³⁶

This example demonstrates two principles that are necessary for implied-in-fact contracts. First, conclusive actions can be applied in the frames of customary law. In the proposed example, we saw that an established custom arose between Mary Moore and the seller when the buyer took the apple, waved his hand, and paid for the goods later. If another person did the same, his actions would be classified as theft or unjust enrichment. In this example, a retail sales contract concluded as an implied-in-fact contract. Customary norms created the rules of the agreement. Secondly, if conclusive actions were not agreed on to express will between the parties, there are grounds for compensatory relations. If a third party saw Mary Moore’s actions and took the apple, but there was no nod from the seller, that person would have to reimburse the value of the apple. In this case, we would use a compensatory mechanism.

An implied contract is based on the presumption of intent, which allows us to recognise that the parties to the agreement a priori seek to achieve its purpose and fulfil its obligations. In this example, we see another confirmation of the hypothesis that contracts are based on the parties' intentions. For implied-in-fact contracts, the expression of the parties' will must indicate the desire to covenant. In the opposite case, the contract will not be concluded if no acceptance is received from the other party. In this case, obligations to compensate for damage will arise.

We know cases when implied-in-fact contracts are used in less common circumstances. Take the case *Copyright v. Implied-in-Fact Contract* as an example. Forest Park developed an idea for a series and pitched it to Universal TV, who liked the concept but declined to buy it. Later, Universal TV released a new series bearing striking similarities to Forest Park's ideas, leading to a dispute between the parties in question.

36 Melvin A Eisenberg, *Foundational Principles of Contract Law* (Oxford commentaries on American law, OUP 2018) 493-6, doi:10.1093/oso/9780199731404.003.0035.

To prove a violation of the terms of the contract, it is necessary to provide evidence of the existence of the agreement itself, which must contain a provision on the obligation to make payment in case of the presented ideas used. While Forest Park and Universal TV had agreements requiring payment for idea usage, it was a daily practice to conclude contracts implied in fact without compensating the creator. The court assumed that the parties understood the payment procedure for the proposed idea. Still, Universal insisted that the agreement did not specify the payment amount, so no contract was formed. Forest Park insisted that Universal had agreed to pay for using the idea at an "industry standard". In court, Forest Park had to prove the existence of an industry-standard price and establish similar arrangements.³⁷

In this case, the application of the implied-in-fact contract is unambiguous. The main issue in this dispute should be proving the kinship of the ideas of the series. When Universal used Tove and Hayden's ideas, they took conclusive action. Even if it is recognised that there is no implied-in-fact contract between them, Universal has the obligation to compensate for damage and unreceived remuneration.

5 CONCLUSIONS

Implied-in-fact contracts, like all other contracts, require the parties' will. Guided by their own free will, the parties take actions that involve the conclusion of an agreement. Taking conclusive actions may not be directly related to the awareness of their meaning. However, for contracts implied in fact, even accidental activities can create legal consequences. This is demonstrated in detail in the Trier wine auction case example. However, this concept is not relevant for cases of agreements with defects of will, under the influence of delusion or when a person is not aware of his actions at all (mental illness, intoxication, incapacity, limited legal capacity).

Implied-in-fact contracts should not be understood as different types of contracts because they are a form of agreement and will expression. Any arrangement can be concluded like a implied-in-fact contract. The only exceptions are contracts for which written form is mandatory.

This is confirmed by the fact that the same contract can be concluded orally, in writing, or conclusively. For example, a passenger transportation contract can be concluded by signing a written agreement with the carrier, in verbal form, or as an implied-in-fact contract. The choice of contract form will not affect its content and subject matter.

At the same time, contracts must comply with all general requirements established for contracts. For example, the party should study the terms and conditions of the agreement,

37 Bruce Strauch, Bryan M Carson and Jack Montgomery, 'Cases of Note-Copyright vs Implied-in-Fact Contract' (2013) 25(2) *Against the Grain* 56, doi:10.7771/2380-176X.6490.

particularly when concluding a contract using vending machines and terminals. In such cases, the precise terms of the agreement must either be visibly displayed on the devices' surface or presented in electronic form for review. In any case, an individual must have the opportunity to familiarise himself with the terms of the contract in an accessible and understandable form. Failure to do so would violate the principles of contract law, leading to the deed's invalidity.

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