

The Principle of Justice and Its Role in Interpretation of Contracts

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ABSTRACT

Fairness is a set of eternal and timeless principles which can be the essence of human's judgment either in the case of nature or target. Some have understood the fairness as the synonym of justice and some have made the distinct and would say, justice like the law is a typical and universal concept but fairness has a personal meaning namely a diverse concept based on different people. And fairness in each case has a specific statement while the justice is identical for all people. Of course equality doesn't imply the meaning of equity, because the justice means setting anything in its own position and in this sense it sometimes appropriates either equality or inequality.

KEY WORDS: Justice; contracts; fairness; law.

INTRODUCTION

The justice is an Arabic infinitive, means giving justice, legal action, doing righteousness, equation, evenness, and moderation. Bisection in Arabic also means (fairness), (justice) and (equity).

The accomplished author of Legal Terminology book in definition of equity writes:

Justice and Equity are : a) setting forth the basis of adjudication on equity in the law and respect for people's rights, b) are applied before legislation proposed, it means the decision taken of legislation proposed and even though in contrast with it, would yet be considered as the instance of justice and equity in custom. And following justice and equity's rules he added: the cases of fairness and justice are where the good balance of rights in human is stimulated. In such case judgment of wisdom and conscience would construct justice and equity, for instance there is nothing more than observance of equity and justice in river borders in which the depth line is defined as common border.

b) Equality before the law and respect the rights of others.

c) The concept derived from conscience and nature which is not considered in or against imposed law and also others in definition of fairness have stated as the follow: fairness is a set of eternal and timeless principles which can be the essence of human's judgment either in the case of nature or target. Some have understood the fairness as the synonym of justice and some have made the distinct and would say, justice like the law is a typical and universal concept but fairness has a personal meaning namely a diverse concept based on different people. And fairness in each case has a specific statement while the justice is identical for all people. Of course equality doesn't imply the meaning of equity, because the justice means setting anything in its own position and in this sense it sometimes appropriates either equality or inequality. For example, the justice adjudicates on the remittance of owes by debtor on time regardless of being solvent or insolvent. But fairness requires allowing more time to insolvent or his/her debts should be split down. The fairness is a vague sense of justice which is created within the people when implementation of legal rules and has been derived from human conscience and his/her outlook for ideal justice and though fairness may not be defined but can be understood within oneself. Fairness in Aristotle's view was considered as a benefit for moderating the violence due to the abstract implementation of justice, he was pessimistic to administration of rules. He reflected on fairness as a means for releasing from the solidity of law and its adjustment on private cases and modification of legal deficiencies which are derived from their own generality and common sense, believed that even in unpredicted cases by legislator, considering fairness cause the achievement of new compensating law's deficiency principals. Prof. Shavell Rousseau in definition of fairness stated: "fairness is an integrated and complex term which has engaged human's minds from old ancient times, and there has been the notion of fairness in the history of human civilization even prior to the creation of notion about law and its concept." The growth of international law has been initiated and terminated by fairness among ancient Romans. Almost the fairness has been utilized as natural justice against legal one. Fairness in Islamic Encyclopedia book embodies two descriptions, one a general concept which is the synonymous of justice as a common sense. In its general meaning is equity and placing in its

own advantage while demands for equality or inequality. Fairness in its specific meaning which is distinct from justice in its own specific meaning and justice in its particular meaning is equality and equity while fairness in its specific meaning is far beyond equality and equity and in this meaning someone who grasps the fairness considers an intention and there is a kind of discerning in his/her decision. This article follows a library method and a type of fundamental and analytical research approach which due to the necessity of discussion about it as an indispensable need of modern developed society in cases and the lack of written research in this case, has imposed upon us to explain in three parts including; first part as the principle of fairness, second part the differentiation aspects of “fairness” with “justice and equity” about its utilization in interpretation of contracts and the third part about the documentary examples of fairness principle in international law.

Part one:

The principle of fairness: fairness is the second source of British law. This is not the exact synonym of *equite* in French law. Fairness is not a practice of judgment, but a determined set of legal rules, which are born out of a historical reason. The claimer according to common law rules should attain the consistency coincident with the known argument in British law. This system in spite of the authority of judges in issuing new consistent led to injustice act. Some persons “first the great gestures and then ordinary people” had used to propose the gravamen and the king didn’t investigate the gravamens personally and refer them to chancellor. The claimers would directly resort to the chancellor as “keeper of the King’s conscience”. The cancellier enacted through the Roman’s ancient principle in which the ruler is not bound to the law, by avoiding the legal rules. He provided the possibility of claimer’s litigation by giving and sealing a paper. Thus, the chancellor gave this opportunity to the claimer to litigate a claim that might not be able to propose the lawsuit before the common law court for attaining the preliminary injunction. For instance, in case of the lack of commitment, the sole enforcement known by common law was the conviction of promisee to pay the loss while in some cases there might be a more appropriate enforcement tool as the imposing the promisor who has become obliged to pay for the objective performance of his/her promise. Common law did not allow this enforcement, and people referring to cancellier attained the conviction of promisor to become obliged and this is the same objective performance, an enforcement tool unknown for common law. Thus the fairness was created alongside the common law. The cancellier provided the possibility of litigation in the cases which common law prohibited or was unable to allow it. So, the new rules as “equitable rules” and new performances called as equitable remedies were created parallel to common law. Hereunto, fairness developed in the sideline of common law without any interfering. It completed and even fulfilled Common Law’s operations although through the practices which were distinctive from common law’s ways. But very soon the cancellier enforced the petitioners of common law courts, especially by the threat of detention, to adjust the attained rights from mentioned courts and thus the fairness initiated a struggle against Common Law. During the Stewarts it turned to severe confrontation and in 1616 led to issue a decree in which Jack the first, set the principle which in the cases of conflict “fairness” and Common Law, “fairness” was the dominant ruler. The former principle of reversibility, which has been adopted in Common Law courts, has been uncovered a long time in “fairness” courts. Lord cancellier believed that consciences are always exposed to the reassessment and a person can be more expecting than a few years ago. Hence, we can not claim for the obligation of chancellier in granting fair votes which have been previously issued. Near the end of 19th century, a fairvote exclusively and legally firmed would not be found. Despite this, the fair courts were sensitive to the need of each staff in persuasion of its own logic and coordination in court orders. Hence, the fair courts inherently adopted the settlements similar to former resolutions, but without obligation in this regard. The formation of judicial proceeding acquires the similarity of the contemporary judicial procedure in France or Germany. However, the fair courts earlier faced with a custom similar to Common Law’s tradition: Report, in accordance with it, the experts of procedural rights quoted the issued orders of fair judges in the magazines and since then the fair judges’ orders had not been unknown for public sphere, through the set of judicial reports it has been publicized. The reformations conducted through the legal procedures in years of 1873 and 1875, the different high courts which had been created through the historical, political events and somehow the practical facilities in England, integrated in a single court and the task of simultaneous administration of common law and “fairness” was particularly conceded to high court. The reforms conducted by courts act in 1971 had no changes over our intended structure (France). Here what attracts our attention is that prior to evolve the concretion process of fairness through the fair courts, the reforms of 1873-1875 have resolved very real the problem, since then a single court with the authority of Common Law and fairness, jointly,

was obliged to the previous orders, whether the applied rules of Common Law or fairness (or the implemented as it is stated). Today, fairness alongside with Common Law would constitute the case law. Fairness is only the interpreter and representative of newer level in ethical beliefs. Fairness is proportionate with 17th and 18th century's ethics, while the Common Law is the reflection of 12th and 13th centuries' morality. However, even if the traditional source of law- namely Common Law - has been drawn to rigidity due to the lack of judges' ability in issuing a distinct order than their own former, again the fact is that, there has been the fresh source of law –fairness- in the same era. At least the Common Law could act retrogressively during two centuries- the late of 17th to 19th- necessarily without losing the dynamic flow of England laws, for the fairness was capable of creating new regulations, as the common law was being gradually threatened in its predominant legal spheres and sometimes English lawyers nominated it as “territorial rights”. But “fairness”, this fresh legal source, in turn, has been ossified. “Fairness” was no more a type of legal practice and claims handling, namely it wasn't a practice which could renew the legal rules due to the contrast between situations and morality and the ethics which could be refined. From now on, the fairness would constitute a set of legal rules. A set of rules different from the Common Law but thrived to consolidation. As the consequence of courts integration in 1873, the old Common Law, which during the centuries has theoretically remained unchanged, inevitably changed. The change was due to the performance of high court which could adjust the common law through the rules of “fairness” which had achieved the competency of its actions since 1873. Moreover, what is more significant is that the exertion of fairness regulations in this court, particularly the implementation of the enforcements of fairness, transformed English court procedure. However, after the mutation in 1873, fairness was no more the renewal source of English law. The International Court of Justice is one of the six main pillars of United Nation and the major pillar of its jurisdiction. International Court of Law is the successor of Permanent Court of International Justice which officially ceased to exist in 1946. This which commonly referred to as the World Court serves under the Article 14 of the UN Charter and Court Statute which construct a significant part of Charter. The fundamental principle of Court is that its competency is dependent to the consent of the parties and can be announced in three types:

- 1- the special reference of a specific dispute
- 2- beforehand grant eligibility and based on agreement
- 3- The optional announcement of court competency in some legal disputes by virtue of “stated an optional” part 3, paragraph 2, Article36 of International Court of Justice Statute.

The Court is a legal entity and should resolve the disputes by virtue of international law and exert the treaties, customary law, the recognized general principles by civilized nations (as a subsidiary means of legal rules determination) judicial orders and the opinions of legal authors. Decision making “compiled with justice and equity” is possible just through the consent of two parties (based on the principle of fairness or other considerations of ultra legal) but as it was mentioned beforehand, the court never yet has settled down any disputes based on the principle of “justice and fairness”

The peaceful settlement of international disputes by elected judges of parties, according to predetermined rules, would be based on the voluntary disclosure and respect to law. Arbitration is one of the international judicial settlement trends (or judicial settlement), though in absolute concept is different from judicial settlement in which each dispute parties are usually free in selecting the arbitrators and would determine the procedure and the possibility of rendering the rules by themselves, but like the judicial settlement, the arbitration includes a constructive element of an obligation decision called “decree”. In the international agreement called as “arbitration agreement” the consent to the order of a specific dispute or a set of disputes to the arbitration would be ratified. This agreement also contains provisions in which the court would whereby enact (similar to the acting legal rules, it might likely have the right of decision making about the regulations which should be followed,” with the respect of equity and fairness” and any other desirable provision by each parties). The issues which would not be propounded in arbitration settlement, such as the authority of court in its qualification must be settled down by the court itself. In some cases, each party would authorize the arbitrators to comment their own decision making based on “fairness” and or “the general principles of law” and or “the customary international law”. The same referred principle “the authority from the will of both parties” would necessitate that the arbitrator makes a free decision to settle the dispute. Thus the votes for arbitration would become a container, for accommodation of general principle of common law between the different structures of countries. In some oil producing countries, Islamic legal structure is the sole existing legal system. Western companies believe that this legal structure is being configured for a particular region restricted to Muslim area and for settling the disputes among them. Moreover, in their opinion, certain rules for oil exploitation and deals between

Muslim countries and foreign companies have not been anticipated. As the result of this idea, in addition to provision of “the rights of producer” as the ruling law on the contract in most of oil contracts between oil producing countries and foreign companies the necessity of “the general principles of law” as the complementary rules have been addressed to. This would satisfy either the oil-producing country that in case of arising any dispute, its own domestic rules would play the role of contract monitor, or the foreign company would be relief from the outburst of any problem in its relations with the next party, the recognized legal principles in more law structures of world today, would guarantee its rights. An oil contract between the Libyan government and a foreign company has prescribed that:

The available convention and its interpretation is the subordinate of that part of Libyan legal principles which would be enacted and interpreted through the international law, the contract according to general legal principles and particularly those principles of law which would be exerted and interpreted in international courts. Many of the international arbitration provisions are issued on the basis of such conditions. In these verdicts, the arbitrators would attempt more to settle the disputes by referring to the common principles between the Islam and the world outside, and in this case, it would take the shape of a complete universal aspect.

There would have been more attempts for adjustment of single rules pertinent to the international trade law. Undoubtedly, international trade law is one of the major fields of international law which would make the appointment of international trade relations possible, the most significant international relations and the most major tool in creating link in international relationships and has been and would be one of the oldest fields of international law and even the law. Today, many extensive efforts have been conducted for creating of rules and regulations pertinent to this field of international law and we have witnessed the formulation of more invariable and substantially uniformed and forms of rules and regulations in this field which perhaps it can be claimed that the most uniformed international regulation in comparison with other fields of international law we have faced with, Bern convention of 1980 about railway transport, the Brussels Convention for assistance and salvage at sea, the transportation agreement evidenced by bill of lading in 1924, the state’s ship mortgage and priority act of 1926, Warsaw Convention 1929 on air transport, Hague Agreement on 1964 concerning the international Sales of Goods, Hamburg agreement on maritime transport, Hague convention relating to international sale of goods, ...

It is clear that in these efforts, done for the unity of international trade law and a dozens of agreements and conventions have been the result of these efforts, the general principles of law, particularly “fairness” has played a major role. According to one of the practices of peaceful settlement of international disputes (including the international trade disputes), the third party by the consent of the conflict affected countries, as an intermediate and in a friendly manner try to draw their attention for negotiation necessarily without representing them the essential suggestions for the settlement. In this practice, the fortitude or the assistance and desirable efforts are the humblest type of third party’s participation in disputes settlement. Someone who puts forth the desirable efforts might have been the deputy of a third party country, sub-structure of an international organization, a non-state international organization or even a person. The direct and independent implementation of essential rules specified to international sales rules which may be in favor of fairness and better fulfillment of the international businessman community’s demands, but bear in mind that while the aim of law and consequently the international trade law is the execution of justice and fairness, it is also to entail people relations and specially protect the weak people’s rights. In order to avoid any difference in the amount of losses and to speed up the compensation claims, in some trade agreements a condition would be included. In accordance with it, if any dealer refuses to perform what has been undertaken or to attempt any action which has been specified should pay as the compensation to the other party. Common Law courts in past days avoided making any changes to its composition; based on the principle of “freedom of contracts” any condition for obligation payment has been respected. This trend was on the contrary to the manner of fair trials in 15th century afterward which have been usual in some of contracts subject to the cash. These trials announced as no-work order a condition in which the debtor was obliged to, in case of non payment of the principal amount and interest at stake should pay more as the compensation. In fact, the equity courts did not act based on the condition of “payment obligation” inserted in the contract, but itself would determine the amount of actual damages and denounced the debtor to pay it wherever these contracts would face with the fraud of the creditor, and or the debtor’s delay resulted from the circumstances for which the debtor was not responsible,. This procedure of the fair trials has been long time exclusively about the commitments which were subject to cash payment. But has been gradually observed in the obligations which their issue was doing and undoing another type. Later in 18th century, any condition based on payment obligation- punitive aspect and or being respected irrational, would be

cancelled. In jurisprudence also many rules and regulations have been determined based on fairness. For example, if several people partake in a property and unequal amount of shares and compromise that the expert would divide the common property among them, each of the partners should pay the expert fee of their own share.

Because this is possible that in case of equal payment, the share of one party would be lower in value than the amount which has been paid as own expert fee and the most jurists have commented this as being against the safe rule. The advocates of the literal interpretation doctrine, who are the pros of text, have the same opinion about the fairness which has been expressed about the customs and habit. Some believe that the fairness derived from the general principles which have been existed before and is superior to the law, could not improve the law and here may confront with this problem that the aroused claims have been predicted by the legislator. In this assumption what task the judge is associated with? Whether in case of being silent, the law would be able to flinch at the article of hostility? If the judge fails to be assisted by the customs, habit and fairness wouldn't help him, so how to settle the hostility? The well known pioneers of this doctrine have firmly responded that the judge should disclaim the prosecutor, namely should avoid constituting the verdict in case of his lawsuit. But it should be confirmed that the extreme solution is in contradiction with the sense of justice and righteousness. For the legislator has stressed that the judge shouldn't and could not refrain from adjudication and issuing the verdict. It must be acknowledged that many of commentators, who have disagreed with the customs and habit, are in accordance with the fairness, because they consider the inevitable application of fairness but respect more restricted usage. The followers of free scientific research school have not represented a vivid definition about fairness and apparently there had not been considered any difference between the concept of justice and fairness in this doctrine and fairness is the offshoot of the justice which is considered in two quality: first, that is a kind of instinct which selects the best solution more desirable to the judiciary without the correlation of intellect and reasoning. Second, it considers the requirements of individual life and for matching it with the notion of justice would reduce its general aspect and or formulate it to sub-factors. If we consider the fairness as a sense of instinct without being the adherent to intellect, which naturally has no more differences with the reflections of ethical conscience and sense of fairness is nothing more than the reflection of ethical conscience and is a kind of inner moral consciousness and the identifying factors of legislated rights are conscience or intellect and the fairness must be also the identifying factors of legislated rights, nevertheless, what the fairness dictates and certainly is subjective and should be limited to the investigation of public and general factors.

It means that when the judge is exposed to the case of private and personal legal matter, could not to interfere his/her sense of fairness to solve that problem, unless it has been stipulated in the law. Considering what has been mentioned in this doctrine the impact of fairness has a special position in judicial interpretation and would consider specific requirements in solving the problems such as individual traits, public opinion and circumstances and fairness has a significant application in the position of exerting rights and judicial interpretation. Fairness in Islamic law has not been identified and stipulated as an independent source for the rights but the rules and regulations can be observed that display the indirect role of fairness in creating the law, including the rules such as "safe rule" and also the rules of act or beneficence are all based on fairness. The basis of many legal rules is fairness regulations. For example in international law, the depth line is the determinant factor for boundaries of river between two countries. In our law there are many rules and regulations which have been formulated based on fairness. While some lawyers would unify the concept of goodwill and fairness, in fact, though both concepts would provide the possibility of court intervention in developing the contractual obligations, but each would play this role in different perspective, while goodwill, typically moving inside, is the process of honestly exerting from any party and the justice would implement this act outside of contract and in a higher position, which is the place of justice and fairness. Also in French Civil Code these two concepts have been stated in two different articles, each one has a particular implication. In fact, though both concepts have the ability of making the contracts ethical and perhaps in this occasion the goodwill has been named as "the sister of justice" but this common feature, would not allow ignoring the independence feature of each concept. The goodwill in the range of stated obligations in the contract would monitor its proper and honest implementation, while the justice would be the entry permit for new commitments in a direct way which had not been sometimes unpredictable for the contractors. Moreover, the entry of commitments based on the justice in the contracts, is for the reason of preserving the overall interests of society and its violation is the cause of objective responsibility and liability without fault. While the expectation of goodwill performance of contracts would be the emergence of behavior or manner which its refusal would cause the responsibility based on fault. In

fact, as a group of lawyers has stated: the fault is a non-coincident act with some behavioral patterns. In other words, the fault is nothing except the wrong behavior, and therefore it is assessed based on man's correct response abstraction model.

It is necessary to judge the behavior of each contractor for the responsibility to be based on the fault and what each party has done must be compared with what should be done. Due to what has been mentioned about the goodwill, and since goodwill implies to the accordance of contract performance with standard intellectual and qualified individual prior to being pertinent to the internal state of people, we would understand the close relationship between the fault and non-compliance of goodwill. This is such a relationship that Stark the French lawyer has stated that the fault is nothing but the non-compliance of discreet and goodwill rules. It is noted that one of the reasons of goodwill is the lack of fault and it is typically evaluated based on the inaction based on the goodwill. By stating these contents, it is obvious that though some aspects in common between two concepts of fairness and goodwill, they are different and better to allow a specific place for each in interpretation of the agreements.

Second chapter: the distinguishing aspects of the principle “fairness” with “justice and equity”

The observance of justice and equity is the base of issuing the verdict by an international referee based on the justice and equity. Article 38 of International Court of Justice Statute has posed “the observance of justice and equity” as a tool for substituting legal rules, but a file might be settled down by the consent of the parties in the judicial court through the observance of the justice and equity. Somewhat this observance has a similar concept to the Anglo-American legal meaning of equity principle. The observance of justice and equity has a broader concept than the fairness and has given more authority and full allowance to the court. In case of justice inferences, it should settle the issue regarding some consideration other than legal rules and even inconsistent with these rules. Though the principle of fairness in some cases has been exerted, but neither the Permanent Court of International Justice and nor its successor, the International Court of Justice has not yet resolved any file considering the observance of justice and equity.

For example, in the dispute between Netherlands and Belgium concerning the diversion of water from the Meuse (1937) which has been resolved by the International Court of Justice and also in the North Sea Continental Shelf Case which has been investigated in 1969 by the International Court of Justice, the principle of fairness has been carried out. The courts of arbitration in the cases such as the Cayuga's quarrel of red jackets in 1926, the border issue of Guatemala and Honduras in 1933, and in the bloodiest war of Chaco between Bolivia and Paraguay in 1938, they have observed the principle of justice and equity. The relative lack of use to this principle represents the abomination of countries to grant such a vast authority to an international reference. It would be clearly inferable by stating this contents that though there is a similar concept between the principle of fairness, justice and equity, but the range of fairness definition (as stated before) has a smaller circle than justice and equity, and in justice and equity the reference entity would be false accusation and practically is unable to modify and settle the dispute without the suspicion of each party.

Chapter 3: the examples of votes and decision of universal jurisdiction pertaining to the principle of fairness:

a- an example from the role of fairness according to the law unification

If an aircraft which is flying over France, Luxembourg, Germany, Poland and Russia, it would have been desirable to be the function of a single legal system during its flight. This allows an easy insurance for the aircraft against the damages to the third party, and the insurance producer would know that this damage is the function of which legal system and a uniform contract about the damages have been concluded: (Rome contract 1923)

b- An example of the role of fairness due to the practical unity of law.

The issue of sales can represent a numerous examples of this type of unity. Unity in this realm, spontaneously due to its being imitative would necessarily be accomplished sluggishly. Sometimes the contracts of a group would be known in a domestic position, because the exporters and importers have heard about the fame of that place. Therefore they would apply for it. Its neighbors and rivals, in turn, would follow those agreements and very soon the all importers and exporters of that place would apply for use of the example which is working. So for instance, if this sample contract would be applied by all exporters of grain in Algeria, Tunisia and or Morocco, and be admitted by the importers of grain in North of Africa, a sample contract would gradually be created and the practical unity would supersede the legal

unity. The uniformity of the rules in the subject of selling grain by sea would be vain because the facts themselves would realize this unity.

c- the cases of implementing the principle of “fairness”

In the dispute between Netherlands and Belgium concerning the diversion of water from the Meuse (1937) which has been resolved by the International Court of Justice and also in the North Sea Continental Shelf Case which has been investigated in 1969 by the International Court of Justice, the principle of fairness has been carried out.

d- the implementation of fairness about the entity of Trust

Assume that a person has received a property as trustee, and by doing a business, has gained a tremendous profit, though the beneficiary of “trust” has no loss, but the justice demands for that the trusted refund the earned profit to him. According to the rules of Common Law, the beneficiary has no right to demand from the trustee, for the latter has not benefited from his action. In this reason, the chancellor gave the possibility to the beneficiary of trust to litigate against him for refunding the earned benefit from the successful deal which the trustee has run, for (this is the same phrase that the chancellor use it) the trustee really shall not be relieved, otherwise to purify his conscience by paying back the profit which has earned inadmissibly. The chancellor under the authority of this ethical rule would oblige the trustee to pay the earned profit from the deal to the beneficiary.

e- the international arbitration in the cases of Abu Dhabi and Libya

The significant trend in the international arbitration in recent decades has been the international arbitration of trade disputes between the countries and the private enterprises which the examples can be referred to as the follows:

The Abu Dhabi arbitration (the disputes between Abu Dhabi and Petroleum Development Co. in 1951), the arbitration of Texaco against Libya in 1977, the verdict issued in the frame of International center of disputes settling due to the investment which has been established based on the Convention in 1965 and the International Chamber of Commerce Arbitration Court has been resolved.

f- The dispute between the states of Qatar and an English co.

The clear paradigm of this thought en route would be found in a decree issued between the state of Qatar and a British petroleum co.

The agreement had assigned that in case of any dispute regarding in the implementation of the contract, it would be settled down based on Islamic legal principles. But the selected judge, Mr. L. Milliot, a Muslim Sociologist, while expressing this opinion pertaining to the subject of dispute that there is no solution has referenced to the Islamic accepted general rules and terminated the subject by the implementation of “fairness”, the common principle among all universal legal system of civilized nations.

g. the dispute between Saudi Arabia and Aramco.

Another example is the decree issued by a Swiss lawyer as Sauser Hall in the dispute between Saudi Arabia and Aramco. In addition to the dominant legal principles in Saudi Arabia the issued decree has settled down based on the general legal rules recognized by civilized nations inserted in Article 38 of International Court of Justice Statute.

Chapter four: the application of fairness in interpretation of contracts:

The usage of fairness in interpretation of contracts in various legal structures is different. The sole purpose here is that firstly, in cases that the judge falls short in some other factors of interpretation, the fairness is his solution in interpreting the contract and assessment of right and justice. Secondly, some believe that fairness has been into consideration of judge as an inspirational ideal and where to deal with a blatant injustice, by resorting to the fairness and various interpretations even may disregard the apparent expressions in the position of exerting the contract and so interpret them in fair manner and can determine and settle the dispute to the required justice and equity. For the judge is obliged to investigate the claim and issue the appropriate decree and in case of issuing refusal of decree, would be someone who refuses the adjudication. Therefore, if a dispute arouse about the details which the parties of a contract have confronted to when exerting the contract and in one hand to the contract took the role of being silent or ambiguous to the issues of dispute and the common purpose of the parties would not be obtainable, and could not clarify the imposition of the disputed issue through the law and custom and other tools of presumption, here the judge by resorting to the standards of justice and equity and according to his personal conscience as the conscience of the community representative, would clarify the task and issue the decree. The advocates of ruling would apprehend that the judge diverge the contracts from its basis which is the common purpose of the parties by documentation to the fairness, particularly in the trade and business transactions and the nature and speedy

sense of these deals often the contract may be ambiguous or incomplete due to the necessity of mutual trust, resorting to the fairness may branch the contracts from its own base. Because the judge like any other normal person, has a personal idea about the fairness and may be in contradiction with the common purpose of the parties. While basically the interpretation of the contract primarily is for the exploration of the common purpose of the parties, and the judge has no right to determine or change both parties range of obligations, as the interpretation of the contract where that the common purpose can meet. But the judge must interpret within the range of common purpose of contract. In law of France, the French legislator has referred the judgment theorem to the fairness in rare cases such as in rendering the contract. For example, the Articles of 565, 1135.1854, in French Civil Code, are the regulations which monitor and consider the fairness. In Article 1135 of French Civil Code it has been stipulated that the contracts are binding and obligatory to all that fairness would recognize them as promising, according to the alleged Article:

“The contracts are not only obligatory to their declarer but to all those obliged by fairness, custom or law due to the nature of contract.”

Though French courts has not taken in to account the fairness in spite of British courts which it is considered as one of the major sources of issuing the verdict, however the same few legal materials referred to the fairness is suggesting the limited popularity of fairness in the legal structure of France. There is another material in the French Civil Code that its regulation has been originated from the sense of fairness. Also the Article 1162 of France Civil Code determinates:

“In cases of uncertainty and doubtfulness, the contract would be interpreted against the one who has stipulated, and in favor of one who has contracted the obligation.

And in Article 1602 of the same Code has stipulated about the sales that the abridgement conditions of sales contract would be interpreted against the vendor. French judges would not admit the fair courts and believe that the law in many cases particularly civil claims has provided the room in observance for the fair, but to the people, the judge has no right to apply the fairness against rules of law. Namely disregarding the valid words and deploying against it, unless the valid word of law has devolved the case to the fairness. In British law, the fairness has a significant role in the sentences of the courts. In case of inability of British judge to obtain the solution through the records, judicial procedures and also custom would resort to the fairness and clarify the task and issue the appropriate decree through the equity. As described, the fairness carries a long history in the legal structure of Britain. Today, although the formulation and development of written rules and integration of fair and Common Law courts, has lost its former importance in British law, but has established and consolidated the rules in British law that nowadays, in the frame of these rules the British judges would have resorted to the fairness for issuing the decree. A summary of these rules retrieved from General Comparative Law by Dr. Hassan Afshar is as the follows:

1. Equity acts in personam and not in rem
2. Equity will not suffer a wrong to be without a remedy
3. Equity follows the law
4. Where equities are equal, the law will prevail
5. Between equal equities the first in order of time shall prevail
6. One who seeks equality must do equity
7. One who comes into equity must come with clean hands
8. Equity does not require an idle gesture
9. Equity abhors forfeiture
10. Equity will take jurisdiction to avoid a multiplicity of suits
11. Equity delights to do justice and not by halves
12. Equity will not allow a statute to be used as a cloak for fraud
13. Equity delights in equality.

The applicability of equity in interpreting the agreements is not just for disambiguation of the abstract terms of contract which in this case would not afford a determinant role, but seems that in most cases which the parties have taken the pledge of silence about some dispute cases and incompleteness of the contract due to some dispute cases and in the issues that the balance of parties' mutual obligations shall be deemed to be upset where economic circumstances such as sharp reduction in the value of country's currency and rise of economic inflation that one of the party became unworthy, like the assumpsit's contracts which due to the more expensively of building materials , the execution of the contract based on the price determined to the contractor shape up an outrageous aspect or the value of one party has dramatically been decreased and also in some inevitable situation and unpredictable events the exertion of

the contract shall be unbearable and onerous for one of the party and the equity has more practical usage and the judges of courts in these issues inspired by equity would complete and modify the contract according to the justice and equity and pronounce the verdict.

Conclusion

There are many cases that because the court judges have considered the act based on the apparent expressions of contract as the cruel and unfair outcomes, they somehow interpreted the apparent expression of the contract and have deviated from its outward meaning to avoid and deactivate the unfair impacts of contract. Though in this path, equity is less addressed to. For instance, when both parties have not certified some conditions explicitly in a contract and law, custom and habit have taken the silence about the issue, the magistrate in the position of issuing would use the individual and private equity for resolving such a contract and would assign that what the purpose of each party in taking the silence has been. If they have silenced about the wage or term contract determination the magistrate would replace the equity in the frame of will granted and would issue the decree. The base of many ordinances in international law is the rules of equity. For example in international law, the depth line is the standard determinant for the borders of countries. Some of our lawyers would directly consider the fairness as one of the legal sources which has the authority of formulation and consolidation of rules and task and in this case believe that for example in an emergence deal which the value of the dealers are not balanced, as far as the emergency removed the loser can refer to a competent court for compensation of the injustice imposed on him, equity has a long record in British legal structure. Though today the equity has lost its former significance in British Law by legislation and development of written rules and integration of equity courts and Common Law, but nowadays has created and consolidated the rules in British law that in the frame of these regulations the British judges resort to the equity for issuing the decree and the global procedure is leading these courts more to cite to this principle.

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