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TÍTULO: Estudio jurídico legal de ejemplos de contratos emergentes celebrados en forma de contratos de compromiso.

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RESUMEN: Los contratos de compromiso representan un concepto amplio en la jurisprudencia de Imamiyyah y en el Código Civil iraní. El compromiso literalmente significa concesión y conciliación, y el compromiso en este sentido diferencia los contratos de compromiso de todas las acciones legales que sirven de base para el compromiso. Hay tipos de contratos que se encuentran entre los contratos emergentes que no están clasificados como contratos nominales. Algunos juristas creen que estos contratos se clasificarán como contratos de compromiso y algunos expertos en derecho han declarado que, dadas las disposiciones del Artículo 10 de la Ley Civil, no es necesario utilizar las características de los contratos de compromiso para dar crédito a los contratos emergentes. Lo anterior se aborda en el presente trabajo.

PALABRAS CLAVES: contratos de compromiso, análisis legal judicial, Código civil.

TITLE: A juridical and legal study of examples of emergent contracts concluded in the form of compromise contracts.

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ABSTRACT: Compromise contracts represent a broad concept in the Imamiyyah jurisprudence and in the Iranian Civil Code. The compromise literally means concession and conciliation, and the compromise in this sense differentiates the compromise contracts from all the legal actions that serve as the basis for the compromise. There are types of contracts that are among the emerging contracts that are not classified as nominal contracts. Some lawyers believe that these contracts will be classified as compromise contracts and some legal experts have stated that, given the provisions of Article 10 of the Civil Law, it is not necessary to use the characteristics of the compromise contracts to give credit to emerging contracts. The above is addressed in the present work.

KEY WORDS: compromise contracts, juridical and legal analysis, Civil Code.

INTRODUCTION.

1. Juridical and legal analysis of time-sharing as a category of compromise contracts.

Imamiyyah jurists have not provided an independent and detailed analysis of ownership and its components and Jurisprudential texts have mainly focused on the fact that real ownership belongs to God and have discussed the legitimization of private ownership and related issues.

Like the Roman legal system, the Islamic legal system insists on the permanency of ownership. Accordingly, most Islamic scholars believe that the nature and essence of ownership are inconsistent with temporality (Katouzian, 2011, p. 534). However, some jurists have tried to give credit to time sharing.

Given the doubts and uncertainties associated with time sharing sale contracts and their dubious validity, an issue of interest is whether the parties to such contracts can raise claims on time sharing of the transacted property in the form of a compromise contract by disregarding restrictions of nominate contracts and issues such as the requirement for permanency of sale contracts.

1.1 Legal legitimacy of time-sharing Nominate Compromise Contracts.

Given the provisions of articles 754 and 757 of the Civil Act, the conclusion of time-sharing compromise contracts for properties is permissible as the ownership of the property for a given price is effectual as a sale contract that is realized through a compromise contract and also according to Article 757 of the Civil Act, the specific conditions and terms of sale contracts including the requirement for permanency are not required to be observed and there is no doubt and uncertainty in this regard as compromise contracts do not require permanency.

Legal and juridical scholars have inferred the requirement for permanency of sale contracts from a common-sense perspective and this requirement is not applied to compromise contracts. On the other hand, if the compromise on a property is bound to time and the time-sharing of its benefits it will not invalidate the conditions stipulated in the contract as an agreement in innominate contracts is considered as agreement on the conditions and terms therein (Jafari Langroudi, 2009, p. 135). In other words, in order a nominate contract to be valid its conditions and terms shall be fully observed. However, mutual agreement through a compromise contract is valid when it is not bound to special conditions and terms of nominate contracts (Article 758 of the Civil Act).

1.2 Juridical legitimacy of time-sharing Compromise Contracts

It was stated that compromise contracts have been widely adopted and used. However, the scope of such contracts is limited to the cases where they are not involved in “allowing unlawful actions or prohibiting lawful actions”. In other words, compromise contracts are entered into for legitimate affairs and they are not permitted for illegitimate cases. It should also be noted that if the time-sharing contract of a property and its benefits is considered a special case allowing unlawful actions such a contract will be invalid not religiously prohibited. There is no need for further evidence to prove something that is invalid, but if a special case is religiously prohibited and since the requirement for such prohibition is not the existence of defects in transactions, external pieces of evidence will be needed to prove the defects and the invalidity of the time-sharing contract of a property and its benefits. Nevertheless, the question is: Is time-sharing religiously prohibited? Has time-sharing been prohibited by the Islamic legislator? The answer to the above questions is definitely no, as time-sharing has not been prohibited in Islamic teachings. On the other hand, the emphasis on the Islamic doctrine states that “People have power and dominance over their properties”, points to the owner’s authority over his/her own assets and properties.

1.3 Juridical legitimacy of time-sharing compromise on benefits of the property.

The compromise on the benefits of a property has the same effect as that of lease contracts and the parties to a compromise contract; like the lessee, are not the owners of the property and only can own its benefits periodically in a given period during the year. Such contracts are legally and religiously valid and the conditions and terms of compromise contracts are also applicable to time-sharing compromise contracts for the benefits of the property.

1.4 Legal Legitimacy of time-sharing compromise on benefits of the property.

In the section on the legal legitimacy of time-sharing compromise contracts for properties, it was stated that according to articles 754 and 757 of the Civil Act, the conclusion of time sharing compromise contracts for properties is permissible and the specific conditions and terms of sale contracts are not required to be observed in time-sharing compromise contracts as such contracts are based on concession between the parties and the mutual agreement through a compromise contract is not bound to special conditions and terms of nominate contracts. Therefore, any mutual agreement will be binding and effective as far as the subject of the contract is valid. Furthermore, it is worth mentioning that time-sharing contracts are subject to religious prohibitions (Ashrafi, 2013, p. 160).

2. Legal and juridical analysis of Istisna Contracts as a category of Compromise Contracts.

Istisna contracts (contracts to manufacture, build, or construct assets), although having a long legislative history, are new to Iranian laws. But in terms of their applications in the past, they can be considered as a type of contract that was prevalent in the past and people used it in their economic relations. In such contracts, a person with specific skills in a given field was asked to make a product commensurate with the features designated by the counterparty. After Islam, this type of contract was widely used by Muslims, and according to some of the reports; the Prophet (PBUH) had ordered the construction of a pulpit to a carpenter and a ring to a goldsmith.

2.1 Istisna Contracts from the perspective of the Islamic Jurisprudence.

One of the issues that is a source of controversy among jurists is whether nominate contracts, that have been explicitly referred to in the Islamic jurisprudence, are merely legitimate, or other contracts that are entered into by individuals are also religiously legitimate. In other words, we are interested to know if the general principle that “Believers adhere to their conditions” applies only to nominate contracts or it can be considered a legitimacy principle governing other contracts conventionally and

rationally concluded between individuals unless they are prohibited religiously. This is a controversial issue among juridical scholars, but from a legal point of view, Article 10 of the Civil Code has stipulated non-monopoly of the legitimacy principle for nominate contracts, and accordingly, civil rights scholars have interpreted this article as the basis for the principle of contractual freedom (Katouzian, 2013, p. 144).

Istisna contracts with its own normative and rational root have been prevalent before Islam, and after Islam, jurists have referred to it at various times, as has been discussed by al-Shafi‘i in *Kitab al-Umm*. In the Imamiyah jurisprudence, several of the early jurists have also referred to istisna contracts, including Ibn Hamza al-Tusi, who says: “If a person makes a request for the construction of a commodity and a constructor accepts and makes it, he has the power to deliver or not deliver it to the ordering person who himself is allowed to accept or not accept it. According to Ibn Hamza al-Tusi, it implies three things:

1. Istisna is a type of contract.
2. Istisna is a valid contract.
3. Istisna is a permissible contract.

Istisna contracts as one of the contracts that are widely used today in the community and are often discussed by jurists, but their nature has always been controversial. Among the various opinions in this regard, a group of scholars believes that istisna contracts are categorized as futures contracts with the same special conditions and terms. However, the requirement for the settlement of the price in futures contracts is not compatible with the essence of istisna contracts and categorizing all types of istisna contracts under futures contracts will not be acceptable.

A view that appears to be more reliable than other views and which can illustrate the nature of istisna contracts is to consider an specific nature for such contracts as a legal relationship that is independent

of that of other contracts and is based on Islamic principle recommending people to “fulfill [all their] contracts” (Surah al-Ma'idah, Verse 1) and Article 10 of the Civil Code which stipulates the principle of contractual freedom in the event that they are not contrary to the law and Islamic teachings. Accordingly, the conditions and terms of istisna contracts are determined by taking into account their specific characteristics. This view is also consistent with the commonly held beliefs about istisna contracts, and thus, it is not necessary for the parties to enter into an independent contract for the transfer of ownership of the manufactured goods or service provided by the constructor.

2.2 Contracts similar to Istisna Contracts.

As we know, there is no contract under the title of istisna contracts in the Iranian law, and legal scholars and scientists have not paid much attention to it, but in contractual relationships, we sometimes face cases that are very similar to istisna contracts and they are discussed by legal scholars. Apartment pre-sale contract and contractor agreements fall under categories that are very similar to istisna contracts, as will be discussed in the following section.

2.2.1 Building Pre-Sale Contracts.

The Iranian legislator under the influence of issues such as considering the public interest and the principle of fairness has categorized building pre-sale contracts as a type of sale contract to protect the vulnerable consumer's rights against large construction companies. Therefore, in the pursuit of justice, the legislator has formulated the law in a way that building pre-sale contracts fall under sale contracts, and this is also consistent with the view that sees istisna contracts as a type of sale contract.

2.2.2 Contractor agreements.

Contractor agreements in which the provision of materials is with the contractor himself are very similar to istisna contracts. According to Katouzian (2013): "The relative independence of contractor

agreements in terms of fulfilling the obligation brings some types of lease contracts close to sale contracts in a manner that it is not possible to understand if the contract governing the relationship between the two parties falls under either lease or sale contracts. Such ambiguity, in particular, arises in cases where a craftsman or artist himself provides the work materials. In these cases, the thing that should be considered is the intention of the parties, or in other words, the things the two parties intend to do and thus it should be acted accordingly (If the main purpose of these contracts is to transfer the result of the work, they should be treated as lease contracts and the parties shall act accordingly. However, if the value of the work done on the objects is greater than the used material to the extent that the subject of the contract can be considered the utilization of the work and art of the contracting party, the resulting legal relationship shall fall under lease contracts” (Katouzian, 2013, p. 569).

2.2.3 Legal and juridical analysis of the Transfer of Partnership Shares Based on Compromise Contracts.

The answer to the question whether partnership shares of non-stock companies can be the subject of compromise contracts is definitely clear because the Civil Act is explicit in this regard and considers any kind of property or right can be compromised. Therefore, compromise contracts are applicable to shares of business companies. Besides, the applicability of the transfer of shares, the silence of the business law on the nature of such transfer, the principle of contractual validity, and the lack of legal prohibition on such transfer all point to the validity of compromise contracts entered into for this kind of intangible assets. Nevertheless, compromise contracts for any kind of transaction that results in a transfer of shares are effective upon the partner's consent to this transfer in non-stock companies, in addition to meeting its specific requirements.

2.2.4 Legal and juridical analysis of Endowment Certificates in the form of Compromise Contracts.

Endowment certificates are one of a variety of Islamic securities that are designed by Muslims in different ways and now offered in capital markets. Although these securities are traded in Iran in over-the-counter (OTC) markets, given the importance of these certificates, the feasibility of their endowment will also be discussed here, given the fact that endowment bonds are categorized and fall under sukuk (Islamic securities), we will define sukuk in the first section followed by a discussion of endowment certificate in the second section. Finally, the third section provides a comparison of endowment certificates with stock bonds as a means for financing endowment activities.

Compromise literally means agreement and conciliation over something, whether it is the ownership of a property or its benefits and rights, or the settlement of debts. Compromise is divided into two categories in Iran's law: Compromise on claims and initial compromise (compromise on transactions) as will be discussed in the following subsections.

Compromise on claims.

Compromise may occur for resolving conflicts and disputes; for instance, a person may make a compromise with another person after making a claim for the ownership of a land and receive an amount as the object of settlement and it does not matter whether the source of the conflict hose resolution or prevention has resulted in making a compromise is a transaction or other issues, such as a dispute over participation in an estate or inheritance shares disputed by one of the heirs who make a compromise in return for receiving a given amount (Emami, 1968, p. 315). Accordingly, Article 752 of the Civil Act stipulates: “A compromise contract may be entered into to resolve an existing dispute or prevent a probable dispute over a transaction or other matters”.

Building upon these features of compromise contracts, some have suggested the design of endowment certificate based on compromise contracts in such a way that the holder of the bonds (the transferor) transfers a part of his property under the compromise contract to the transferee, so that the latter constructs or implements a public interest project using the transferred properties and endows it on the behalf of the owner(s) on the bonds in accordance with religious regulations (Mousavian, et. al., 2009). This proposed model can be taken into consideration as it is free from restrictions of other contracts. However, as one the compromise is made, the transferor is not the owner of the property, the transferee shall take actions to do the endowment project as he has undertaken to do so through the compromise contract. This analysis is counterproductive as the purchasers of bonds endow the received property with the intention of being rewarded in the hereafter.

2.2.5 Legal and juridical analysis of Lease Sukuk in the form of Compromise Contracts.

Assuming that the incompatibility of lease bonds with lease contracts a new type of contract, they can be considered in the framework of compromise contracts.

From a juridical perspective, a compromise is a legitimate contract for the cessation of conflict (Shahid al-Thani, 1414, p. 295), and it is permissible to conclude it unless in cases, it allows unlawful actions or prohibits lawful actions.

Compromise contracts can also be entered into as valid and binding contracts with or without the parties' knowledge of the subject of conflict. Compromise also means peaceful settlement for the ownership of a property or its benefits or the waiver of debts or rights with or without consideration. Accordingly, Article 752 of the Civil Act provides: "Compromise contracts can be entered into to resolve the existing disputes or to prevent a possible dispute over a transaction, etc." From the point of view of legal scholars, compromise is a contract to create or benefit from one or more legal effects

without relying upon the specific conditions and terms of nominate contracts (Jafari Langroudi, 1974, p. 352).

Some legal scholars have divided compromise contracts into a compromise on claims and initial compromise, the latter being an independent transaction which is based on peaceful settlement and also a nominate contract that can be entered into the form of sale, donation, and lease contracts (Bahrani, 1405, p. 85).

There is some controversy among Imamiyyah jurists over whether compromise contracts are independent of or subsidiary to other contracts in cases where compromise contracts bring about results that are similar to those of other contracts. In his book *al-Mabsut*, Shaykh Tusi stated that depending on their results, compromise contracts are subsidiary to sale, lease, donation, and borrowing contracts, as well as the voluntary waiver of one's own claims. However, many scholars believe that bringing about similar results does not make a contract subsidiary to other contracts and the evidence in support for compromise contracts implies their independence.

According to Article 758 of the Civil Code, compromise contracts can play the role of bilateral and bare contracts and also contract for the transfer of a property and its benefits, but they will not have special conditions and terms of these contracts (Shahidi, 1998, p. 131). Therefore, compromise contracts are considered an independent type of contract with its own terms and effects.

A large number of jurists have taken the view that contracts are valid if they are legitimized based on the Islamic rules and regulations and that only nominate contracts are valid (Shahid al-Thani, 1414, p. 71). They did not recognize the contractual freedom independently without the permission of the Islamic legislator. However, the opponents of this view argue that it should not be supposed that the juxtaposition of Article 10 and compromise contracts is not beneficial in the current situation, and these two legal entities repeat the same rule because compromise contracts represent an agreement

that should be explicitly or implicitly chosen by parties to the contract. Besides, compromise itself is a contractual model established by the legislature for the manifestation of the contractual freedom; while the provisions of Article 10 imply the need for private contracts, regardless of any special format with a wider scope (Katouzian, 1997, p. 304).

Article 10 of the Civil Code also stipulates the principle of permission under nominate contracts, and accordingly, all conditions and agreements that are not explicitly contrary to imperative rules are binding and effective. However, the application of the principle of permission resulting from compromise contracts is limited to cases that provide for the conditions and terms of compromise contracts and play a role in the jurisprudence like the role implied by the hadith stating that “Believers adhere to their conditions” (Katouzian, 1994, p. 304).

In other words, the provisions of Article 10 of the Civil Code do not invalidate compromise contracts, and such contracts are not valid without making reference to Article 10 (Katouzian, 2008, p. 32).

Article 10 implies the need for private contracts, regardless of any special contractual model. For example, if the parties to the contract reduce or add to the duration of the performance of obligation after the conclusion of the contract, the compromise contract is not fulfilled, while such an agreement can be justified in accordance with the provisions of Article 10.

Given the arguments raised about the novelty of sukuk contracts and its justification in accordance with Article 10 of the Civil Code, the differences between such contracts and somewhat similar contracts are clear. These contracts, depending on their types, have the same effects of a couple of nominate contracts such as sale, lease, and representation contracts and typically intend to provide financing for the conduct of economic activities or the completion and development of investment projects, and some agreements are made during the issuance and sale of these bonds, and the rights

and obligations arising from them are all directed at the development of the processes of equipping and allocating funds.

2.2.6 Legal and juridical analysis of compromise on Intellectual Property Rights.

It is natural that the legislator in the Civil Code does not refer to the compromise on intellectual property rights, and there is no mention of compromise contracts in special laws; for example, Article 5 of the Law on Patents, Industrial Designs and Trademarks of 2007, which deals with the transfer of the transfer of patents, provides: "The rights deriving from patents shall be transferable and, in the event of the death of the owner, the rights shall be transferred to his/her heirs". The holder of the patent can transfer the rights of the patent in whole or in part in any manner that he wishes another person, but the article does not refer to a compromise contract for patents.

Given that, the intellectual property rights are regarded as financial properties and can be priced, and since one of the important features of the intellectual property rights is the ability to transfer, they can be traded like any other property. However, as it was discussed, any property whether the original property or its benefits and other financial rights, that can be transferred or waived, can also be compromised. Even some of the jurists believe that financial aspects are not applicable to compromise contracts and legal rights such as retaliation which have no financial aspect, but can serve as the object of compromise contracts. Therefore, it turns out that the intellectual property rights can also, like any other property, be the object of compromise contracts. It is also possible to prove the validity of compromise on intellectual property rights by using the analogy of priority.

2.2.6 Legal and juridical analysis of Franchise Contracts in the form of Compromise Contracts.

A compromise contract is a type of contract that can be compared to franchise contracts. As it was mentioned earlier, compromise is divided into two categories: Compromise on claims and initial compromise (compromise on transactions). As the name of compromise contracts suggests,

transactions are done based on reconciliation and peaceful settlements in these contracts, and there are not strict rules typical of other contracts. In addition to their daily transactions and financial pursuits, people have emotional and materials needs that require them to have peaceful negotiations and resolve their disputes in a friendly way. Compromise is used as a means to satisfy such needs (Katouzian, 2007, p. 337).

The most important difference between initial compromise contracts and franchise contracts is to have tacit knowledge of the subject of compromise contracts. In fact, compromise contracts can be valid even if the parties to the contract have tacit knowledge of its subject, provided that it leads to full knowledge as a compromise does not apply to something that is basically unknown.

Basically, the peaceful settlement does not apply to commercial contracts. In business law, any activity is a means to gain profit, and therefore, commercial contracts can be considered as aleatory contracts in which the two parties apparently exercise their full discretion to safeguard their separate interest.

CONCLUSIONS.

Compromise contracts fall under nominate contracts and its subject shall be explicitly or implicitly agreed upon by the parties.

Compromise contracts are a definite model for the manifestation of the contractual will. However, Article 10 of the Civil Code recognizes private contracts as binding and effective contracts irrespective of their particular form. In fact, the provisions of Article 10 of the Civil Code stipulate the binding nature and effectiveness of innominate contracts, while compromise contracts make an agreement binding whose object is compromised. Article 10 of the Civil Code provides for the principle of permission under nominate contracts, including compromise contracts with a scope that is beyond that of compromise contracts.

Although Article 10 of the Civil Code has a wide scope, this does not mean that all contracts can be made in the framework provided by this article. The legislator's intention for passing this article is to validate transactions, that despite the community's needs, do not fall under any of the nominate contracts. In other words, Article 10 of the Civil Code applies only to cases where it is not possible to place the transfer of the object of the transaction into nominate contracts. This means that some of the contracts, such as those discussed in this article, can be categorized as compromise contracts and they are not compatible with the provisions of Article 10 of the Civil Code.

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